
(1974) 10 OHC CK 0003
In the Orissa High Court
Case No : Civil Revision No. 471 of 1973

Sri Raghunath More

APPELLANT

Vs

E.I.D. Parry and Co. Ltd. and Others

RESPONDENT

Date of Decision : 03-10-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, Order 38 Rule 8

Citation : (1975) 41 CLT 64

Hon'ble Judges : P.K. Mohanti, J

Bench : Single Bench

Advocate : J. Das, for the Appellant; C.V. Murty, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanti, J.—This civil revision is directed against on order dismissing a petition under Order 38, Rule 8, Code of Civil Procedure.

2. The Plaintiff-opposite party No. 1 filed Money Suit No. 339 of 1970 for recovery of Rs. 4, 97,487.08 against opposite parties 2 to 5 and on 4-5-1970 it obtained on order of attachment before judgment of some immovable properties. The Petitioner preferred a claim under Order 38, Rule 8, Civil Procedure to the property attached on the ground that he had purchased the same from opposite parties 3 and 5 by a registered sale deed dated 28.3-1970. The claim petition was registered as Misc. Case No. 290 of 1970, It was dismissed for default by order dated 5-3-197 G. The Petitioner did not file any suit for setting aside the order. On 10-5-1972 he filed another claim petition under Order 38, Rule 8, CPC which was registered as Misc. Case No. 176 of 1972. The learned Additional Subordinate Judge dismissed this miscellaneous case on 13-9-1973 holding that a second petition for investigation of claim under Order 38, Rule 8, CPC was not maintainable.

3. The sole contention raised in this civil revision is that it is only on order passed

after investigation that can operate as final and conclusive subject to the result of the suit and not on order dismissing the claim petition for default.

4. Order 38, Rule 8, CPC provides:

Where any claim is preferred to property attached before judgment such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

It is now well settled that Order 21, Rule 63, CPC is as much applicable to a claim preferred against on attachment before judgment as it is applicable to claims made against attachments in execution of decrees. See *Mt. Babbal Kumari Jayaswalin and Another Vs. Mulchand Marwari and Another*, *Baistub Churn Naun and Ors. v. Woorna Churn Sen* ILR Cal. 436 (P.C.), *Srimanth Rajah Yarlagadda Mallikharjuna Prasada Nayudu Bahadur Zemindar Guru v. Matiapatti Virayya and Ors.* ILR Mad. 849, *Bisheshar Das and Ors. v. Ambika Prasad* ILR All. 575, *Calcutta National Bank Ltd. Vs. Rahmat Ali Fateh Ullah*, and *v. Aluar Okelly and Ors. v. Makda Piichaiah Naidu and Ors.* AIR 1962 A.P. 469. The effect of this rule is that unless the party against whom the order in the claim proceeding is made files a suit to establish his right, he is precluded from setting up a claim against the other party that the property was not liable to attachment and sale. If the adverse order in the claim proceeding is not set aside by filing a suit as contemplated under Order 21. Rule 63, CPC it becomes conclusive and the same claim cannot be agitated again. The legal position seems to be indubitable that the rule applies even if the order was made for default or without full investigation of claim or for on-prosecution. There is abundant authority in support of this view.

5. In the case of *The Cannanore Bank, Limited Vs. Pattarkandy Arayanveettil Madhavi and Others*, it was held by a Full Bench that if a claim petition under Order 21 Rule 58. CPC was not pressed and was dismissed without obtaining the permission of the Court to withdraw it without prejudice to the rights of the Petitioner, the dismissal would amount to on adverse order within the meaning of Order 21, Rule 63, CPC and the Petitioner, if she wished to re-open the matter and assert the same claim, was bound to file a suit within the period of limitation. This view was followed by a Single Judge of this Court in the case of *Mahadev Prasad v. Muralidhar Nandi* 1959 (1) O.J.D. 623. The Patna High Court in the case of *Bhai Lal Tanti Vs. Prabhu Sahu and Others*, held that a second application in respect of the same property, when the first application has been dismissed, even though the dismissal is for default and without investigation, is not maintainable.

In *Mangilal and Others Vs. Kedarnath and Others*, it was held, following the Madras view that on order under Order 21, Rule 58, CPC should be treated as final and conclusive notwithstanding this fact that there was no investigation into the merits of the claim.

In *Mt. Aziz Jahan Begam Vs. Sardar Singh and Others and Sabir Husain*, it was

observed:

There seems to be no reason for excluding on order under Rule 58 summarily dismissing on application from the scope of the words the party against whom on order is made: There can be no doubt that the order was against the party who had preferred the objection. When Legislature amended the language of Order 21, Rule 63 and omitted the words in the previous Acts which confined the conclusiveness to on order after investigation it must be assumed that it was done with the deliberate object of widening its scope.

There are also decisions of the Calcutta, Bombay and Nagpur High Courts in support of the view that on order dismissing a claim petition even if passed without investigation of the claim petition is on order under Order 21, Rule 63, Code of Civil Procedure-Vide *Ambica Prasad Sanyal v. Sooraj Mull Nagaramull* 43 C.W.N. 999, *Jaggivan Dhondiram Kirad Vs. Gopal Vinayak Joshi, and Wamandhan and Anr. v. Kampta Prasad and Ors.* AIR 1926 Nag 423.

6. Keeping in view the principles enunciated in the above decisions, I do not see how any exception could be taken to the order of the learned Additional Subordinate Judge. In the result, the civil revision is dismissed with costs to opposite party No. 1.