

(1963) 12 AHC CK 0018
In the Allahabad High Court
Case No : Second Appeal No. 550 of 1955

Union of India (UOI)	Vs	APPELLANT
Parvati Kuwar and Others		RESPONDENT

Date of Decision : 18-12-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, 100, 101, 80
Income Tax Act, 1922 — Section 46(2)
Limitation Act, 1908 — Article 11
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 278, 279, 280

Citation : AIR 1965 All 154

Hon'ble Judges : S.N. Katju, J

Bench : Single Bench

Advocate : J. Swarup, for the Appellant; S.B.L. Gaur, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Katju, J.—This a defendant's appeal arising out of a suit for declaration that the plaintiffs are the owners of the house in dispute and it was not liable to be sold in discharge of the Income Tax dues against the second defendant, Kesho Deo, as a Karta of the Joint Hindu Family Finn Gopi Krishna Kashi Prasad. It was alleged that the plaintiffs were the owners of the house in dispute and they had nothing to do with the second defendant on whom the Income Tax Officer of Azamgarh had imposed Income Tax amounting to Rupees 16682/14/- for the realisation of which a recovery certificate was issued by the Income Tax Officer, Azamgarh to the Collector Ghazipur u/s 46(2) of the Income Tax Act and the Collector of Ghazipur in pursuance of the aforesaid certificate had wrongly attached the property of the plaintiffs. They had filed an objection for the release of their property before the Collector which was heard by the Sub-divisional Officer, Ghazipur who dismissed it summarily without taking any evidence on 17-9-1961 Thereupon the Collector of Ghazipur ordered the sale of the house of

the plaintiffs. It was further alleged that a notice u/s 80 C. P. C. was sent by post to the first defendant, the Union of India, the present appellant.

2. The suit was contested by the Union of India defendant No. 1 on the ground, inter alia, that the suit was not maintainable for want of a proper notice u/s 80 C. P. C. and that the house in dispute was the property of respondent No. 2, the defendant No. 2 in the case. The trial court found that the disputed property belonged to the plaintiffs. It however, dismissed the suit on the ground that no notice u/s 80 C. P. C. was given to the appellant. On appeal the lower appellate court affirmed the finding of the trial court that no notice u/s 80 C. P. C. was given but further held that no such notice was necessary in the present case and, further, affirmed the finding of the trial court that the plaintiffs were the owners of the house in dispute.

3. The Union of India has now preferred the present second appeal in this Court. The finding that the house in dispute is the property of the plaintiffs which has been arrived at by the courts below is a finding of fact which cannot be assailed in second appeal. The further finding that notice u/s 80 of the C. P. C. was (not?) sent by the plaintiffs is also a finding of fact which cannot be disturbed in second appeal. The question for consideration, however, is whether a notice u/s 80 of the Code was at all necessary in the present case. The court below found that the suit in appeal in substance is a suit under Order 21 Rule 63 of the Code and the objection preferred earlier by the plaintiffs before the sub-divisional officer was an objection under Order 21 Rule 59 which had been dismissed, and the proceedings in the present suit are in continuation of the aforesaid proceedings and consequently no notice u/s 80 of the Code was necessary. The Court below relied on a decision of the Madras High Court in Muhammad Yusuf Sahib Vs. The Province of Madras, . Reliance was placed in the aforesaid case on a decision of the S.A. Rajamier Vs. M.R.M.A. Subramaniam Chettiar and Others, It was observed as follows:-

"This suit has, however, been brought under Order 21, Rule 63, to set aside the order of Court dismissing the plaintiffs claim petition and It must be deemed to be a continuation of those proceedings and therefore no fresh notice to the appellant is necessary. The argument that a suit may be a continuation of the prior proceedings when the claim is allowed but is not such continuation when the claim is dismissed, is based on no recognized principle and appears to be untenable. In fact in Phulkumari v. Ghanshyam Misra ILR 35 Cal 202 for the purpose of court fee, a similar suit was deemed to be a continuation of the prior proceedings when the suit was brought after the claim petition had been dismissed."

4. Reliance was also placed on certain other decisions which are referred to in the aforesaid case of Muhammad Yusuf Sahib Vs. The Province of Madras, In this case it was held that a notice u/s 80 of the Code was not necessary.

5. In Nawab Syed Mahammad Hashim Ali Khan and Another Vs. Iffat Ara Hamidi

Begum and Others, a Division Bench of the Calcutta High Court observed as follows:

"That that issue, namely, whether the property at the date of attachment was the property of the judgment debtor or of the claimant can be the only issue in a suit under Order 21 Rule 63 (apart from issues in bar, e.g., of limitation), is also indicated by the language of Order 21, Rule 63 itself, for that rule speaks of a suit "to establish the right which he claims to the property in dispute". A suit under that rule is in essence a review of the summary order passed by the executing Court on the claim: ILR 35 Cal 202. It is a mere continuation in a different forum of the claim proceedings: Mt. Bas Kuar Vs. Gaya Municipality and Others,

6. The learned counsel for the appellant referred to a Full Bench Decision of the Lahore High Court in Smt. Shukantla v. People's Bank of Northern India Ltd., AIR 1941 Lah 392. In the aforesaid decision there are observations indicating that a suit under Order 21 Rule 63 C. P. C. is an independent action and does not arise from the execution proceedings in which the attachment had been ordered and the objection disallowed. The question for decision in the aforesaid case was whether a person wishing to bring a suit under Order 21, Rule 63, against a company in liquidation must first obtain leave u/s 171, Companies Act, from the Court by which the winding up order had been made. It was held that such a suit being a suit within the meaning of Section 171 of the Companies Act, could not be commenced without the leave of the Court which had ordered the winding-up. The decision in the aforesaid case depended on the answer to the question whether a suit under Order 21, Rule 63 of the C. P. C. attracted, under the circumstances of that case, the provisions of Section 171 of the Companies Act. The rule laid down in that case would not be directly applicable in the present case.

7. The proposition that proceedings in a suit under Order 21, Rule 63 C. P. C. is a continuation of the claim proceedings was affirmed in AIR 1925 82 (Nagpur); Mt. Bas Kuar Vs. Gaya Municipality and Others, and Ahmad Ali v. Radha Kishan AIR 1937 Pesh 13. In AIR 1925 82 (Nagpur) Mr. Justice Kinkhede, A. J. C. after a review of authorities expressed the view that a suit under Order 21, Rule 63 C. P. C. is one to set aside the order passed upon the claim and is a form of appeal therefrom.

8. Learned counsel for the appellant referred to single Judge decision of the Nagpur High Court in AIR 1939 232 (Nagpur) . In the aforesaid case in execution of an award issued by the Registrar, Co-operative Credit Societies, the liquidator had attached a house and an objection to the attachment brought by a person on the ground that the house belonged to him having been dismissed, a suit under Order 21 Rule 63, C. P. C. was brought by the objector to establish his title. It was held that the suit must fail for want of notice to the liquidator. It appears that no reference was made by Pollock J. to the aforesaid cases where it was held that proceedings under Rule 63 are in continuation of the earlier claim

proceedings. The decision proceeded on the ground that the provisions of Section 80 of the Code had to be observed and no suit can be brought without previous notice against a public officer in respect of any act done in his official capacity even if the relief claimed is merely a declaration or injunction. It was also held that the liquidator was a public officer and, therefore, a notice u/s 80 C. P. C. was necessary. I am not prepared to follow the rule laid down in the aforesaid case. It must, therefore, be held that since the proceedings in the present case were in continuation of the, proceedings under Order 21 Rule 58 of the C. P. C. it would follow that the present proceedings are not independent proceedings and, therefore, no notice u/s 80 C. P. C. was necessary.

9. The learned counsel for the appellant contended that the objection preferred by the plaintiffs before the Sub-divisional Officer could not be said to be an objection under Order 21 Rule 58 C. P. C. because it was not incumbent on the part of the Collector or the Sub-divisional Officer to follow the provisions of the C. P. C. since the tax imposed on the second defendant had to be recovered as land revenue and the Collector had to proceed to recover the same under the law prescribed for the realization of land revenue. It would, therefore, follow that the provisions of the CPC with regard to objections under Rule 58 would not at all apply. He relied on a decision of the Punjab High Court in Union of India (UOI) Vs. Firm Ralia Ram Raj Kumar and Another, It was observed that the powers conferred on the Collector by the proviso to Section 46(2) of the Income Tax Act are to be used by the Collector in proceedings which are permitted under Chaps VI and VII of the Punjab Land Revenue Act for the recovery of arrears of land revenue. The provisions of Section 78 and Section 159(2)(xv) of the Punjab Land Revenue Act apply to that person alone against whom the writ of demand for the arrears of land revenue are issued and Section 158(2)(xiv) of the Act did not refer to claims which may have a connection with the collection of land revenue but are made by persons other than the defaulters.

Relying on a decision of a Full Bench of this Court in Radha Kishan Vs. Ram Nagar Co-operative Society and Others, it was held that a suit by a person who is not a defaulter himself was not barred by the provisions of the Punjab Land Revenue Act. The learned counsel argued that it would follow that such a suit is an independent action and no objection could be preferred by a third person before a revenue authority and thus it could not be said that the present action was in continuation of the earlier objection that had been preferred by the plaintiffs before the sub-divisional officer. Learned counsel contended that the Objection by the plaintiffs before the sub-divisional officer itself was not maintainable. He conceded that there is nothing in the provisions of the U. P. Land Revenue Act or in the provisions of the U. P. Zamindari Abolition and Land Reforms Act Which provide for an objection by a third person whose property might be made the subject-matter of attachment and sale in proceedings for recovery of land revenue.

It was, however, contended that there being no provision for any objection being

raised by the plaintiffs before the Collector or Sub-divisional Officer the objection was rightly dismissed and the present suit was an independent action for which a notice u/s 80 of the Code had to be given and in the absence of such a notice the suit itself was not maintainable. Learned counsel further relied on a single Judge's decision of this Court in *New India Tennerly, Kanpur Vs. M.P. Nigam and Others*, . In the aforesaid case income tax due from an assessee was sought to be recovered from his transferees. It was observed:

"The other preliminary objection was that the petitioner should have filed an objection against the recovery of the tax from the petitioner's property before the Tahsildar, But here again the learned counsel was not able to point out any provision of law under the Income Tax Act or the Land Revenue Act or the U. P. Zamindari Abolition and Land Reforms Act authorising the petitioner to file an objection before the Tahsildar or the Collector. In the complete absence of any provision of law, permitting the filing of objections it cannot be said that the petitioner had any other Suitable remedy which it failed to avail itself of."

10. Relying on the aforesaid observation it was contended that since there was no provision enabling the petitioner to prefer an objection before the Collector or the Sub-divisional Officer the aforesaid proceedings were without jurisdiction and the present suit had nothing to do with those proceedings & was thus a wholly independent action in which a notice u/s 80 was absolutely necessary. There is no discussion in the aforesaid case about the scope of Section 48(2) of the Income Tax Act. It cannot be denied that under the U. P. Land Revenue and Zamindari Abolition and Land Reforms Acts there is no provision which could enable the filing of an objection by a third party in order to show that the Immovable property which was subjected to attachment or which was being put to sale was his own property and not the property of any one who was liable to pay land revenue. If the question was to be determined only in accordance with the provisions of the Land Revenue Act or the U. P. Zamindari Abolition and Land Reforms Act the aforesaid rule laid down by Chaturvedi, J. would be absolutely correct. The question, however, has to be determined in the light of provisions of Section 46(2) which runs as follows:

"The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue.

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908, a Civil Court has for the purpose of the recovery of an amount due under a decree."

11. If there was no proviso to the aforesaid sub-section the Collector could properly proceed to recover the amount due from the assessee in the manner laid down by the U. P. Land Revenue Act or the U. P. Zamindari Abolition and

Land Reforms Act for the realization of land revenue due from the person concerned. In that case the Collector would have to proceed in accordance with the provisions of the aforesaid Acts and clearly there would be no opportunity for a third person to put forward an objection before the Collector that the property which was sought to be sold did not belong to the person from whom the tax was due but in fact belonged to him. His only remedy would have been by a separate suit. The aforesaid provisions in Sub-section (2) have to be read along with the proviso to the sub-section. It says that the Collector shall for the purpose of recovering the said amount have the powers which under the CPC a Civil Court has for the purposes of recovery of the amount due under a decree. It was held by the Supreme Court in *Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others*, that,

"..... on a proper reading that sub-section (i.e. 46(2)) does not prescribe two alternative modes of procedure at all. All that the sub-section directs the Collector to do is to proceed to recover the certified amount as if it were an arrear of land revenue, that is to say, he is to adopt the procedure prescribed by the appropriate law of his State for the recovery of land revenue and that in thus proceeding he is, under the proviso, to have all the powers a Civil Court has under the Code. The sub-section does not prescribe two separate procedures".

12. In *C. Dhanalakshmi Ammal Vs. Income Tax Officer, II Additional City Circle II, Kilpauk, Madras and Others*, it was conceded that there was no provision in the Madras Revenue Recovery Act which enables the Collector to attach and sell land not registered in the defaulter's name for arrears of revenue due from the defaulter. It was observed that in the exercise of the additional power conferred on the Collector under the proviso of Section 46(2) of the Indian Income Tax Act the Collector may attach property ostensibly standing in the name of a person other than the defaulter on the assertion by the Income Tax Department that the property really belongs to the defaulting assessee. But then the ostensible owner will have the right to prefer a claim under Order 21, Rule 58, C. P. C. and such claim must be enquired into and disposed of, though summarily, by the Collector in the same way as a court would be bound to dispose of a claim in the course of execution of a decree. In the present case also learned counsel for the appellant could not show any provision either in the U. P. Land Revenue Act or Zamindari Abolition Act which could enable the Collector to attach and sell property which does not belong to the defaulter or which did not stand in the name of the defaulter. Under these circumstances it could not be said that the Collector had no power to entertain the objection of the plaintiffs against the attachment and sale of his house and such an objection could not be validly entertained by him under Order 21 Rule 58 of the C. P. C. Only where the Collector acts under the powers conferred on him under the U. P. Land Revenue Act or Zamindari Abolition and Land Reforms Act for the recovery of land revenue then and then alone it could be said that an objection under Rule 58 C. P. C. could not be entertained by him. Where, however, he seizes property which does not belong to the defaulter in pursuance of a recovery certificate issued by an Income Tax

Officer he could only act under the proviso to Section 46(2) of the Income Tax Act and objection under Order 21 Rule 58 C. P. C. would be maintainable

13. I am thus of the view that the objection preferred by the plaintiffs was an objection under Order 21 Rule 58 C. P. C. and the present suit was in continuation of the earlier claim proceedings and therefore, the absence of a notice u/s 80 of the Code was not a bar to the maintainability of the suit in appeal.

14. The court below has further found that there was no substance in the objection raised by the appellant that the present suit was barred by limitation. It was brought within a year of the order passed by the Sub-divisional Officer rejecting the objection preferred by the plaintiffs. It was thus clearly within time.

15. An unfortunate feature in this case is the attitude adopted by the Income Tax authorities. Admittedly the second defendant was assessed to Income Tax and the said amount of tax imposed on him was over Rs. 16000/- and the Collector was required to realise the amount from the assessee in those proceedings. The property of the plaintiffs was attached and was sought to be sold. They objected to the attachment and sale on the ground that the house in dispute belonged to them and the defaulter assessee had nothing to do with it. Their objection was dismissed on 17-9-1931. Even if the Income Tax authorities thought at first that the house in dispute belonged not to the plaintiffs but to the assessee that doubt was set at rest by the decision of the lower appellate court which affirmed the finding of the trial court that the house in dispute belonged to the plaintiffs and the defendant No. 1 had nothing to do with it. It is true that the plea of want of notice u/s 80 C P. C. was raised by the appellant. It may be that it was thought that the finding of the court below on the question whether a notice u/s 80 C. P. C. was not necessary was not correct.

The fact, however, remains that the court below had found that the house in dispute belonged to the plaintiffs and that finding of fact could not be challenged in second appeal. It would have been in the fitness of things if the Union of India had bowed to the decision of the court below when it had been found that the department was wrongly pursuing the present plaintiffs in putting to sale the house which undoubtedly belonged to them and not to the assessee. It was certainly open to the appellant to raise the plea of the bar of Section 80 to the maintainability of the suit. The appeal preferred by the appellant could either end in its being allowed or in its being dismissed. In the former case the result would have been the undue harassment of a person whose claim to the property, which was sought to be sold by the department had been established by the courts below. In that case the plaintiffs would have been subjected to hardship and harassment solely on the ground that no notice had been given by them u/s 80 of C. P. C. Admittedly in the case of an ordinary litigant it would not be unusual on his part to pursue any remedy that the law may give him. In case of a Department of the Union Government like the Income Tax Department its aim should not be to realise the amount due from the assessee even from property

which admittedly did not belong to the assessee but belonged to the plaintiff In the present case the Department should have bowed to the decision of the court below and not have preferred an appeal in this Court which has undoubtedly resulted in harassment of the plaintiffs

16. I may add that the appeal was argued with great ability by Sri Gulathi, learned counsel for the appellant and Sri S B. L. Gaur for the respondents.

17. I see no reason to interfere with the decision of the court below. The appeal is dismissed with costs throughout.