
AIR 1979 All 16 : (1978) AWC 596

Allahabad High Court

Case No: Civil Revision No. 1432 of 1977

Smt. Shyama Devi

APPELLANT

Vs

Firm Ramjas Rolling
Mills

RESPONDENT

Date of Decision: July 10, 1978

Acts Referred:

- Civil Procedure Code Amendment Act, 1976 - Section 97
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 59, Order 21 Rule 63, Order 21 Rule 92

Citation: AIR 1979 All 16 : (1978) AWC 596

Hon'ble Judges: A. Banerji, J

Bench: Single Bench

Advocate: C.P. Srivastava, for the Appellant; Bharatju Agarwal, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

A. Banerji, J.

This revision is directed against an order of the District Judge of Jaunpur dated 9th April, 1977 in Execution Case No. 1 of 1975. The learned District Judge dismissed the application 27/C under Order XXI, Rule 59 (b) C.P.C. praying for the stay of the confirmation of sale of the house.

2. Firm Ramjas Rolling Mills, Uchehra, district Satna and Dharam Chand, opposite parties 1 and 2, in this revision, obtained a decree for the recovery of Rs. 15,029-32 against opposite parties 3 to 7 and also against the late Sri Ram Kadam, father of opposite parties 6 to 13, from the Court of the District Judge, Satna, on 18-1-1974. The decree was transferred for execution to the court of the District Judge, Jaunpur. One house and an Ahata situate in Tehsil Shahganj were attached by the order of the District Judge,

Jaunpur. Smt. Shyama Devi, wife of Ram Kadam and mother of opposite parties 6 to 13 and one Smt. Chandrawati Devi filed an objection under Order XXI, Rule 58, C.P.C. in respect of the properties attached in execution of the aforesaid decree. The learned District Judge by his order dated 3-1-1976 allowed the claim of the applicant in part and released the Ahata from the attachment but rejected the objections relating to the disputed house under Order XXI, Rule 58 C.P.C. After the disposal of the aforesaid objection the disputed house was auctioned on 10-1-1977. Thereafter an application 27/C was moved by Smt. Shyama Devi under Order XXI, Rule 59 (b) C.P.C. for staying the confirmation of the auction sale of the disputed house on the allegation that she had filed a civil suit No. 1 of 1977 in the Court of Civil Judge, Jaunpur under Order XXI, Rule 63 C.P.C. The application having been dismissed the present revision was filed.

3. Learned counsel for the applicant contended that the court below was in error in not granting the prayer made in the application 27/C. Reliance was placed on the provisions of Order XXI, Rule 59 (b), C.P.C. which reads as follows:--

"Where before the claim was preferred or the objection was made, the property attached had already been advertised for sale, the Court may--

(a)

(b) if the property is immovable, make an order that, pending the adjudication of the claim or objection, the property shall not be sold, or, that pending such adjudication, the property may be sold but the sale shall not be confirmed, and any such order may be made subject to such term and condition as to security or otherwise the Court thinks fit."

It was contended that where the attached property was immovable one, and an objection or a claim was made and it remained pending, the property could not be sold and even if sold its sale could not be confirmed until the disposal of the claim or the objection. In the present case immovable property had been attached and the claim had not been finally disposed of. Learned counsel for the opposite parties raised a twofold objection to this argument. Firstly, it was stated that Order XXI, Rule 59 (b) of the Code was not applicable in the present case and secondly, the reference therein was to an objection or a claim and not to any suit. In other words, it was contended that the provisions of Rule 59 (b) were not at all attracted to the facts of the present case.

4. The provisions of Rule 59 (b) were introduced by the Civil P. C. (Amendment) Act, 1976, hereinafter referred to as the Amendment Act. Section 97 (q) of the Amendment Act has specifically provided amongst other things that the provisions of Rule 59 of Order XXI, as amended, or substituted or inserted by Section 72 of the Amendment Act shall not apply to or affect (i) any attachment subsisting immediately before the commencement of Section 72 of the Amendment Act, or (ii) any suit instituted before such commencement under Rule 63 of Order XXI to establish a right to attach property or (iii) any proceeding to set aside the sale of immovable property, and every such

attachment, suit or proceeding shall be continued as if the said Section 72 had not come into force. It is, therefore, clear that the provisions of Rule 59 (b) will not be attracted in the present case where the attachment took place before the date of the commencement of the Amendment Act viz. 1-12-1977. It was a pending proceeding and, therefore, the provisions of un-amended Civil P. C. would be applicable. In this view of the matter the question of staying of the sale or staying the confirmation of sale under the provisions of Rule 59 (b) does not arise.

5. Consequently, it will be unnecessary to consider the scope of Rule 59 vis-a-vis the claim or the objection.

6. Learned counsel for the applicant then contended that since a suit had been filed under Rule 63 of Order XXI of the Code, the order made under Rule 58 of Order XXI had not become final. That is correct. In the present case the provisions of the un-amended Civil P. C. would be applicable so far as Rules 58 and 63 of Order XXI are concerned. It is true that Rule 63 has been deleted by the 1976 Amendment Act, but, for the purposes of the present case Rule 63 would be deemed to be existing and applicable. This is clear from Section 97 (q) (ii) of the Amendment Act. Rule 63 reads as follows:--

"Where a claim or an objection is preferred, the party against whom an order is made, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

It is clear that any order passed under Rule 58 of Order XXI is not final or conclusive so long as a suit filed under Rule 63 is not finally disposed of. Of course, if no appeal is preferred against the order under Rule 58 within the period of limitation, the order becomes final.

7. A contention was weakly raised in the present case that the suit had not been filed within a period of one year. The District Judge decided the objection under Order XXI Rule 58 by his judgment dated 3rd Jan. 1976. The suit under Order XXI, Rule 63 C.P.C. was filed on the 3rd Jan. 1977. It was urged that it was filed one day beyond time. I cannot agree. Section 12(1) of the Limitation Act makes it clear that in computing the period of limitation for any suit the day from which such period is to be reckoned shall be excluded. Thus, the 3rd Jan. 1976 is to be excluded. The limitation for filing a suit under Rule 63 of Order XXI is one year as provided by Article 98 of the Limitation Act. The limitation runs from the date of the final order. In the present case the order of the District Judge is 3rd Jan. 1976 which day has to be excluded. Consequently, the suit filed on the 3rd Jan. 1977 would be within one year. Since the suit had been filed within the period of limitation, the order passed under Rule 58 would not be final, until the decision in the suit under Rule 63 is made.

8. The next question for consideration is whether the confirmation of sale has to be stayed under any other provision of the Code. The proviso to Sub-rule (1) of Rule 92 of

Order XXI makes the following provision:

"Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection."

This proviso has been added by the Amendment Act. The first question to be considered is whether this proviso would be applicable to a pending proceeding. Section 97 of the Amendment Act makes no mention of Rule 92 in Clause (q) thereof. Sub-section (3) of Section 97 of the Amendment Act reads:--

"Save as otherwise provided in Sub-section (2), the provisions of the principal Act, as amended by this Act shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action in pursuance of such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement."

Section 97 (2) (q) of the Amendment Act is an exception to the law enunciated in Section 97 (3) of the Amendment Act. As seen above, Rule 92 has not been included in Section 97 (2) (q) of the Amendment Act. It means that the provisions of Rule 92 would be applicable even to pending suit or proceedings. Consequently, it would be applicable to the facts of the present case also.

9. In view of the applicability of the proviso to Rule 92, the Court is prohibited from confirming such a sale until the final disposal of the claim. In the proviso to Rule 92, the words used are "pending final disposal of any claim to such property". As seen earlier, a claim is made under Rule 58. That claim does not become final until the disposal of the suit under Rule 63. Although the suit had been filed for a declaration but the purport of the suit is for an adjudication of the claim which had been made under Rule 58. Thus, the suit contemplated under Rule 63 is the continuation of the claim made under Rule 58. It is a claim to the property which is kept pending under Rule 63. The proviso to Rule 92 (1) also speaks of any claim to such property. Therefore, what is contemplated under Rule 63 is the pendency of the claim in respect of the property.

10. The position becomes clear if the proviso is read in full. It uses the words "any objection to the attachment of such property". The emphasis is on the words "attachment of such property". There is no manner of doubt that the property in respect of which an objection under Order XXI, Rule 58 was made in this case was in respect of the attached property. Thus, it appears to me that the words "such claim or objection" used in the proviso to Rule 92 (1) of Order XXI cover the claim or the objection filed under Rule 58 which is kept pending or alive under Rule 63. In this view of the matter where a suit under Rule 63 is pending, confirmation of sale under Rule 92 is to be stayed until the disposal of the claim or objection in the suit under Rule 63.

11. The only provision for the confirmation of the sale is contained in Rule 92 of Order XXI of the Code. The introduction of this proviso to Rule 92 (1) removes a lacuna in the Rule. The Supreme Court had earlier laid down in the case of Janak Raj v. Gurdial Singh, AIR 1967 SC 608 that:

"Ordinarily, if no application for setting aside a sale is made under any of the provisions of Rules 89 to 91 of Order XXI, or when any application under any of these rules is made and disallowed, the Court has no choice in the matter by confirming the sale and the sale must be made absolute. If it was the intention of the Legislature that the sale was not to be made absolute, because the decree had ceased to exist, we should have expected a provision to that effect either in Order XXI or in Part II of the Civil P. C. of 1908 which contains Sections 36 to 74 (inclusive)."

If a claim or objection had been made and disposed of under Rule 58 and the law provided for the filing of a suit for establishment of the same claim or objection, then until the disposal of the same it would be only seen just and proper that the confirmation of sale was stayed. This has now been provided for by the aforesaid proviso to Rule 92. I am therefore, of the opinion that until the disposal of the suit under Rule 63 the confirmation of sale has to be stayed under the provision of Rule 92(1) of Order XXI of the Code.

12. In this view of the matter, the revision merits to be allowed and the order of the learned District Judge has to be and is hereby set aside. The sale of the property in dispute shall remain stayed until the disposal of the suit. In the circumstances of the case I make no order as to costs. However, I would direct that the suit No. 2 of 1977 shall be disposed of at the earliest as otherwise it may cause loss to the auction purchaser.