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**(1986) 10 KL CK 0041**

**High Court Of Kerala**

**Case No:** A.S.No. 406 of 1986

Union Bank of India

APPELLANT

Vs

K.C. Cheriak and 2  
Others

RESPONDENT

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**Date of Decision:** Oct. 29, 1986

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 58, Order 21 Rule 58(1), Order 21 Rule 58(2), Order 21 Rule 58(5)

**Citation:** (1986) 23 KLJ 1040

**Hon'ble Judges:** T. L. Viswanatha Iyer, J; K.S. Paripoornan, J

**Bench:** Division Bench

**Advocate:** T.L. Ananthasivan, for the Appellant;

**Final Decision:** Dismissed

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**Judgement**

Paripoornan, J.

The plaintiff in O. S. No 439 of 1983, Sub Court, Trivandrum, is the appellant in this appeal. The defenders, three in number, are the respondents. The suit was filed for realisation of money The plaintiff-Bank advanced, under a cash credit facility, a loan of Rs. 25,000/- to the third defendant on 7-2-1976 The third defendant mortgaged the plaintiff schedule property by depositing the title-deeds to the plaintiff-Bank on 5-10-1976. The third defendant committed default in payment. The plaintiff filed O.S. No. 321 of 1978 in the Sub Court. Trivandrum for recovery of money due from the third defendant. The suit was decreed on 8-2-1979. In execution, the properties were brought to sale. The execution petition was filed on 10-9-1980 Defendants 1 and 2 filed a claim petition, under Order XXI Rule 58 C.P.C. stating that they purchased the plaintiff schedule property bona fide and for consideration. They stated that the decree obtained by the plaintiff in OS. No 321 of 1978 does not bind defendants 1 and 2. Stating that the mortgage in favour of the plaintiff subsists and that it is entitled to file the suit for sale of the mortgaged property, the present suit was laid. The third defendant remained exparte. Defendants 1 and 2 resisted

the suit. They contended that the suit is barred by res judicata in view of the order passed in the claim petition in the former suit. Defendants 1 and 2 pleaded that they had no knowledge about the transaction between the plaintiff and the third defendant. The first defendant is a bona fide purchaser for value of the plaint schedule property and the building. It was so done after making reasonable enquiries and after obtaining the Encumbrance Certificate from the Sub Registry. There was no encumbrance. The plaintiff did not obtain the original document in respect of the plaint schedule property. The decree in O S No. 321 of 1978 will not bind defendants 1 and 2. There was no collusion between the third defendant and defendants 1 and 2. The present suit is not maintainable and deserves to be dismissed. The court below upheld the defence plea and held that the suit is not maintainable. The plaintiff has come up in appeal.

2. We heard counsel for the appellant, Mr. T. L. Ananthasivan. It was argued that defendants 1 and 2 were not parties in the earlier suit and so the present suit for realisation of the mortgage money is maintainable. It was further stated that it is open to the mortgagee to institute a second suit for recovery of the mortgage money. There is no force in the aforesaid submissions. It is conceded that the claim petition filed by defendants 1 and 2 under O. XXI R. 58 in execution in O.S. 321 of 1978 was upheld. The question for consideration is whether the view of the court below that in such circumstances under Order XXI Rule 58 (2) there is a clear bar for adjudication of the right and interest in the property between the parties or their representatives by a separate suit.

3. Order XXI Rule 58 C.P.C. is as follows:

58. Adjudication of claims to, or objections to attachment of property-Where any claim is preferred to, or any objection is made to the attachment or. any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,-

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit;

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any persons; or

(d) pass such order as in the circumstances of the case it deems fit,

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1). refuses to entertain it, the party against whom such 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, an order so refusing to entertain the claim or objection shall be conclusive.

Under Order XXI Rule 58 (1) C.P.C, a claim or objection may not be entertained in the circumstances stated in the proviso thereto. In such cases, under O. 21 R. 58 (5) C. P. C, the party against whom order is made, may institute a suit to establish the right which he claims to the property in dispute. If the claim or objection is entertained, under sub-clause 2 of Rule 58 of order 21 C.P.C, all questions relating to right, title or interest in the property attached arising between the parties to a proceeding or their representatives, shall be determined by the court dealing with the claim or objection and not by a separate suit. Any order passed on such adjudication shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. The party against whom an adverse order is passed under O.21 Rule 58 (2) read with sub-clause (4) thereof can ventilate his grievances by filing an appeal. It is also made clear that the adjudication of the claim or objection shall be determined by the court dealing with the claim or objection and not by a separate suit. In these circumstances, we are of the view that the present suit cannot be treated as one filed under Order XXI Rule 58 (5) of C. P. C, and the sole question as to whether the amount due to the plaintiff can be realised by the sale of the property was the very question decided by the execution court in proceedings under O 21 R 58(2), read with clause (4) thereof. Such an adjudication having been decided once cannot be agitated again in a fresh suit filed by the plaintiff. We hold that the present suit filed by the plaintiff-Bank is barred. The court below was justified in holding so.

4. The only further question is whether a further suit for realisation of the amount will lie. The decree in O.S. No 321 of 1978 is dated 8-2-1979. It is an executable decree, though the plaint schedule property cannot be proceeded against in view of the order passed in execution in O.S. No. 321 of 1978. Since the decree in OS. No. 321/78 is executable, we hold that it is not open to the plaintiff to bring a suit for realisation of the very same amount. The court below was justified in holding so. No other point was argued in the appeal. This appeal is without merit. It is dismissed in limine.