Shivlal Khupchand Shop Vs Trimbak Kashinath Raktate and Others

Court: Bombay High Court

Date of Decision: March 25, 1975

Acts Referred: Bombay Court Fees Act, 1959 â€" Article 4, 6
Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 63

Citation: AIR 1976 Bom 226 : (1976) 78 BOMLR 358 : (1976) MhLj 354

Hon'ble Judges: Vimadalal, J; Naik, J

Bench: Division Bench

Advocate: K.S. Bhadti, for B.R. Naik, for the Appellant; V.N. Gadgil and Govt. Pleader as per High Court Notice, for the Respondent

Judgement

Naik, J.
This is an appeal by the original plaintiff against the judgment and decree of the learned Civil Judge, Senior Division, Ahmadnagar

in Special Civil Suit No. 7 of 1965 on the file of his Court.

2. The plaintiff-appellant filed the suit giving rise to this appeal under Order XXI, Rule 63 of the Code of Civil Procedure, for setting aside the

order passed by the Executing Court under Order XXX, Rule 60 and for a declaration that he has a right to attach the properties in suit.

3. The facts leading to this suit which are numerous are briefly these, in so far as they are relevant: One Sakharam had three sons viz., Gangadhar,

Tatya and Kashinath. Sakharam died in 1910 leaving behind his sons and ancestral properties. After Sakharam"s death, Gangadhar was the Karta

of the joint family. It may be mentioned that Gangadhar"s brothers Tatya and kashinath also died soon after the death of Sakharam. Tatya died

living behind a minor son Babu who died in 1959 and the 2nd defendant Mathurabai is the widow of Babu. Kashinath died leaving behind his

minor son, Trimbak who is the 1st defendant. It appears that Gangadhar had executed a pronote in favour of the plaintiff on 2-11-1929 for Rs. 18,

565/-. The plaintiff filed Special Civil Suit No. 6 of 1936 on 5-2-1936 against Gangadhar, his wife and two sons and his two nephews viz., Babu

and Trimbak. The plaintiff alleged that Gangadhar in his capacity as the manager of the joint family, had borrowed monies from the plaintiff from

time to time for meeting the expenses of the joint family business of agriculture and the expenses of the joint family and also for the maintenance of

the joint family and for a legal necessity and the benefit of the joint family. It is in respect of such advanced alleged the plaintiff, that the suit pronote

was executed by the 1st defendant Gangadhar and that since the consideration for the pronote was advanced for the joint family purposes all the

defendants were liable for the said debt. Though the suit was heard ex parte, the learned Judge dismissed the suit against the other defendants and

decreed that suit only against Gangadhar for Rs. 18,500/- together with future interest on Rs. 12,5000/- and costs. he held on the issues settled by

him for decision, that the suit is not maintainable against defendants 2 to 5. No appeal was preferred by the plaintiff against that judgment and

decree. That ex parte decree was passed on 23-11-1938. The plaintiff thereafter filed Special Darkhast No. 81 of 1941 and requested that the 11

agricultural lands mentioned in the execution application be leased through the Collector as required by Section 22 of the Deccan Agriculturists

Relief Act 1879. The darkhast was sent to the Collector on 13-3-1942. Gangadhar died on 21-1-1945 and his sons and nephews were brought

on record. It appears that on 7-12-1945, the sons and nephews of Gangadhar purported to effect a partition of all the family lands, and as appears

from Exh. 63, the extract of mutation, an application about the same being made to the revenue authorities, the revenue authorities effected

mutation of the lands as per that alleged partition. When the Darkhast was thus pending the Bombay Agricultural Debtors" Relief Act, 1947 having

come into force, the darkhast, application was treated as an application u/s 4 read with Section 19 of the said Act. The Special Court under the B.

A. D. R. Act held on 12-6-1950 that the judgment-debtors were not debtors whose debts did not exceed Rupees 15,000/- and, therefore the

darkhast was re-transferred to the civil Court. After that retransfer on 10-12-1951, the plaintiff made an application to the executing Court for

amending his darkhast so as to include a prayer for attachment and sale of 11 properties. That application was resisted on several grounds and

without deciding the several contentions of the judgment-debtors, the trial Court rejected that application by holding that the said properties could

not be attached in view of the provisions of Section 22 of the D. A. R. Act of 1879. the plaintiff thereafter preferred First Appeal No, 428 of

1952, That appeal was allowed by this court holding inter alia, that since the D. A. R. Act, 1879 was repealed by the B. A. D. R. Act of 1947,

there could be no bar to the attachment of the agricultural lands and this court while remanding the matter specifically observed that the court

below should proceed with the darkhast in accordance with law on hearing the other contentions raised by defendants, 2, 3, 4 and 5, inasmuch as

other contentions were not at all decided by the Executing Court. After the remand the properties were attached by the Executing Court. As

against that the 3rd defendant and others preferred First Appeal No. 237 of 1956. That appeal was allowed by this Court. But then Letters Patent

Appeal No. 7 of 1961 being preferred the same was allowed on 29-11-1962 and it was held that the properties were liable to attachment. That is

why the contesting defendants viz., the nephews of Gangadhar preferred a claim Petition No. 140 of 1963 under Order XXI, Rule 58. They

contended that they were not bound by the decree obtained against their uncle Gangadhar and that since there was a partition, between them and

Gangadhar''s sons after the death of Gangadhar in 1945, and six out of the eleven properties share, the said properties were not liable to be

attached in execution of the decree in special civil suit No. 6 of 1936 which was obtained by the plaintiff against Gangadhar. That contention having

prevailed with the executing Court, the executing Court raised the attachment with respect to the six properties. It is an against such background,

that the plaintiff filed the suit giving rise to this appeal under O. XXI, R. 63 of the Civil Procedure Code. The plaintiff alleged that Gangadhar was

the karta of the joint family as was alleged by him in Special Civil Suit No. 6 of 1936 and he, therefore, contended that the decree passed in

Special Civil Suit No., 6 1936 was binding on the contesting defendants. he also alleged that the alleged partition of 1945 between Gangadhar''s

sons and nephews was only a make belief to defraud his claim and that in fact there was no partition. He also contended that the contention of the

claimant-defendants is barred by res judicata by reason of the decision in First Appeal No. 428 of 1952 and other appeals.

4. The suit was resisted by the defendants that they are not at all bound by the decree passed on Special Civil Suit No. 6 of 1936 and that the

monies were not at all taken for the benefit of the joint family and they also contended that the partition of 1945 was a genuine partition and since

then each branch is in possession of its share and the six suit properties have fallen to their branch. They further contended that it is not their

contention, but on the other hand it is the contention of the plaintiff which is barred by res judicata by reason of the dismissal of the Special Civil

Suit No. 6 of 1936 against them. they also contended that no proper court-fees were paid by the plaintiff on the plaint.

5. The learned Civil Judge having regard to the fact that Special Civil Suit No. 6 of 1936 has been dismissed against the defendants, held that it

was not necessary to decide the question as to whether Gangadhar borrowed the monies as manager of the joint family or for the legal necessity.

he also held that it was not necessary to decide the defendant''s contention about the plaintiff''s suit being barred by res judicata. He, however, held

that there was a partition as alleged by the defendants and that therefore the suit properties were not liable to be attached and sold in execution of

the decree in Special Civil Suit No. 6 of 1936, which was dismissed against the claimants defendants.

6. Aggrieved by that judgment and decree, the original plaintiff has preferred this appeal.

7. Mr. Bhadti, the learned Advocate for the plaintiff-appellant has assailed the judgment of the learned Civil Judge by contending that as there was

no decision in Special Civil Suit No. 6 of 1936 as to whether the monies were raised by Gangadhar as the Karta of the joint family and for the

benefit of the joint family, it is perfectly open to the plaintiff to contend and prove in this suit that the monies were in fact taken by Gangadhar as the

Karta and for the benefit of the joint family of which other defendants were coparceners. He also argued that there was no satisfactory evidence to

prove the alleges partition between the sons of Gangadhar and the nephews of Gangadhar and that that partition if any, appears to have been made

to defraud the plaintiff. He also attacked the finding of the learned Civil Judge on the point of the Court-fees to be paid on the plaint. While the

question of court-fees would be decided by us after issuing notice to the Government Pleader, I am of the view that there is no substance in the

contention of Mr. Bhadti so far as the merits of the case are concerned.

8. As the judgment in Special Civil suit No. 6 of 1936 is not clear we thought advisable to go through the plaint in that suit. The certified copy of

the plaint is at Ex. 64. A perusal of the averments in that the plaintiff had made the self-same contentions which he has made in the instant suit for

holding the defendants'' share liable for being attached in execution of the decree passed in that special civil suit. In fact a perusal of that plaint

would show that the draftsman had in view the observations of the Division Bench of this Court reported in Vithalrao v. Vithalrao, 25 Bom LR 151

: AIR 1923 Bom 244 while drafting the plaint. In fact it has been stated specifically in the plaint that monies were taken by Gangadhar as the Karta

of the joint family agriculture and for joint family expenses and for the maintenance of the joint family and that since the suit pronote was executed

by Gangadhar in respect of some total of such sums, not only Gangadhar is liable as an executant of the pronote but even the other defendants are

personally liable for the advances which were made form time to time for the purposes stated therein. thus clearly there was an allegation that the

suit was based against the other defendants on the original consideration and so far as Gangadhar is concerned, it was based on the pronote and

also the consideration. Therefore, when the learned Judge dismissed the suit against the other defendants and decreed it only against Gangadhar by

recording a finding on Issue No. 2 as to whether the suit is maintainable against defendants 2 to 5 against the plaintiff, it would appear that if the

plaintiff still wanted to hold the defendants" share in the joint family responsible for the same, it was his duty to prefer an appeal against that

judgment and decree. Since the plaintiff has not chosen to do so, it would appear that as contended by the defendants it is not their contentions,

but it is plaintiff"s contentions in the plaint which have been made in a bid to hold the contesting defendants liable for the debt, which are barred by

res judicata by reason of the decision in Special Civil Suit No. 6 of 1936. I find no substance in the contention of the plaintiff about the defendants

contention being barred by res judicata by reason of the decision in First Appeal No. 428 of 1952 and subsequent appeals. In fact as pointed out

by me while stating the facts leading to the stage of the suit being filed, while allowing Appeal No. 428 of 1952 this Court has specifically observed

in its remand order that the Court below should proceed according to law after considering the other contentions raised by defendants Nos. 2, 3, 4

and 5. That was because the decision of the trial Court dismissing the amendment application was arrived at only on an interpretation of the repeal

of the D. A. R. Act of 1879 and not on any consideration of the contentions of the defendants which were raised on merits. Since these

contentions were repelled finally and the attachment was levied the defendants immediately filed claim Petition No. 140 of 1963 with success. That

being the position it would appear that the contentions of the defendants are not barred by res judicata by reason of the decision in First Appeal

No. 428 of 1952 or subsequent appeals inasmuch as the contentions of the defendants were not at all considered or required to be considered in

those appeals.

9. As regards the submission of Mr. Bhadti that the alleged partition between the sons and nephews of Gangadhar if fraudulent, I find that there is

absolutely no substance in this contention. It is true that a bald allegation is made in the plaint about that partition being made with a view to defraud

the plaintiff. But then when the plaintiff went in the witness box and examined himself, he had not said a word about that partition being fraudulent.

On the other hand he has given important admissions to the effect that there was a partition between the sons and nephews of Gangadhar after his

death and that the lands in suit are in the possession of defendants 1 and 2 since the time of the partition and it is they who are making the wahivat

of the same. There is absolutely nothing in his evidence at the trial to show that the partition was not genuine or not intended to be acted upon or

was not equitable. On the other hand, as pointed out above, he has fully attested the genuineness of the partition set up by the defendants. So also

his witness Jaivant has stated in his evidence in chief itself that during their minority the nephews of Gangadhar were residing with Gangadhar and

that after his death the coparceners separated and have been living independently. It would thus appear that at the trial the plaintiff has admitted in

unequivocal terms that there was in fact a partition between has admitted in unequivocal terms that there was in fact a partition between

Gangadhar''s sons nephews viz., defendants 1 and 2 and that since then it is the defendants 1 and 2 who are in possession and enjoyment of the

suit six lands. We also find from Ex. 63 the certified copy of the extract of mutation, that after the death of Gangadhar on 21-1-1954, there being a

partition between Gangadhar''s two sons and two nephews an application dated 7-12-1954 was made by them for effecting the mutation in the

light of that partition whereas six lands fell to the share of Gangadhar''s two sons, who also appear to have effected partition inter se, two lands

each fell to the share of Gangadhar''s two nephews. We are told, that it is these four lands which were allotted to the nephews in this partition,

which have been since sub-numbered, and it is these lands which constitute the six lands in the instant suit. It would be therefore unnecessary to

refer to the evidence of the defendants on the point of this partition which has been characterised by the learned Civil Judge as absurd or even

foolish. The fact remains that the fact of partition was effected as is admitted by the plaintiff himself and even his witness and what is more, that

partition is being acted upon as admitted by the plaintiff himself. There is absolutely nothing was not intended to be acted upon. the result,

therefore, is that the defendants have succeeded in proving that was genuine partition after the death of Gangadhar.

10. Since the Special Civil Suit No. 6 of 1936 was dismissed against defendants 2 to 5, including the present contesting defendants, in spite of

identical averments made therein as have been made in the instant suit, for holding the contesting defendants liable for the debt, it would appear that

the present suit is barred by res judicata by reason of the decision in that suit and that even otherwise since these properties were not attached

when the family was joint and there was already a partition by the time the attachment was levied and in that partition the suit properties have fallen

to the share of the defendants, it would appear that the plaintiff is not all entitled to proceed against these properties in execution of his decree. In

the result, I hold that the learned Civil Judge was right in dismissing the plaintiff''s suit.

Vimadalal, J.

11. I agree.

BY THE COURT

12. As regards the question of Court-fees payable in respect of a suit of this nature, we think it desirable to decide that point after hearing the

Government Pleader, as it affects the State revenue and there is no decided case on the point under the Bombay Court Fees Act of 1959. We,

therefore, propose to issue a notice to the Government in regard to the Court-fees, payable, both on the suit as well as the appeal. We direct that

the matter should be placed on board on Monday, 24th of March, 1975, for that purpose.

Naik, J.

13. The plaintiff-appellant had paid Court-fees of Rs. 15/- by treating it as a suit covered by the first Proviso to Section 6(iv)(d) of the Bombay

Court-Fees Act, 1959. an objection being taken by the defendants respondents, the learned Civil Judge agreed with their contention that Section

6(iv)(d) has no application to such a suit. He observed that the said provision applied only to suits wherein a declaration that the property is not

liable to be attached is sought. Since the instant suit is a suit to get a declaration that the properties are liable to be attached, he observed, it was a

converse case than the one provided for by the first Proviso to section 6(iv)(j), as the subject-matter of the suit was susceptible of monetary

evaluation inasmuch as it was the right to attach the property, which is valued at Rs. 15,000/. He, therefore, directed the plaintiff-appellant to pay

ad valorem Court Fees on that valuation.

14. The propriety of this reasoning is challenged by Mr. Bhadti in this appeal.

15. Section 6(iv)(d) of the Bombay Court-fees Act of 1959 provides as under:-

6. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

(iv) (d) - In suits for declaration in respect of ownership, or nature of tenancy, title, tenure, right, lease, freedom or exemption from, or non-liability

to, attachment with or without sale or other attributes, of immovable property, such as a declaration that certain land is personal property of the

Ruler of any former Indian State or Public trust property or property of any class or community - one fourth of ad valorem fee leviable for a suit for

possession on the basis of title of the subject-matter, subject to a minimum fee of eighteen rupees and seventy-five paise;

Provided that if the question is of attachment with or without sale the amount of fee shall be the ad valorem fee according to the value of the

property sought to be protected from attachment with or without sale or the fee of fifteen rupees, whichever is less;

16. There is not doubt that Section 6(iv)(d) had no application to a suit under Order XXI, Rule 63 filed by an unsuccessful attaching creditor,

inasmuch as that provision deals with suits for declaration in respect of ownership or nature of tenancy, title, tenure, right, lease, freedom or

exemption from or non-liability to, attachment with or without sale or other attributes, of immovable property. In the instant case, the attaching

creditor filed the suit under Order XXI, Rule 63 for setting aside the order passed in Miscellaneous Application No. 140 of 1963 at the instance of

the defendants and for a declaration that the suit properties are in fact liable to be attached and sold in execution application No. 81 of 1941 which

is filed to execute the decree obtained by him in Special Civil Suit No. 6 of 1936. Clearly therefore this is not a suit for a declaration about

exemption from or non-liability to attachment, nor can it be said to be a suit for a declaration of any other attributes of immovable property which

are referred to in Section 6(iv)(d). ""Attribute"" has been defined in the Concise Oxford Dictionary as ""Quality ascribed to anything; material object

recognized as appropriate to person or office; characteristic quality;"" Liability to be attached in execution of a decree, therefore, could not be said

to be an attribute of the property. In fact if the expression ""attribute of the property"" were to mean or include its liability for attachment, the

Legislature could not have used the expression ""non-liability to attachment"", in Section 6(iv)(d) of the Act, since the expression ""liability"", by

necessary implication would have included non-liability as well, if that were an attribute of the property, I am, therefore, of the view that Section

6(iv)(d) is not applicable to a suit of the instant type.

17. But then we find it difficult to agree with the learned Judge when he says that the suit is covered by Section 6(iv)(j) of the Bombay Court Fees

Act of 1959. Section 6(iv)(j) as amended is to this effect:-

..... In suits where declaration is sought, with or without injunction or other consequential relief and the subject-matter in dispute is not

susceptible of monetary evaluation and which are not otherwise provided for by this Act- thirty rupees.

That was the position when the suit was filed but after the amendment by Maharashtra Act 9 of 1970, for the expression ""thirty rupees"", the

following words have been substituted"" ""Ad valorem fee payable, as if the amount or value of the subject-matter was three hundred rupees.

18. Now, it would appear, as rightly pointed out by Mr. Gumaste, in order that clause (j) of Section 6(iv) may apply, the subject-matter in dispute

should not be susceptible of any monetary evaluation. But then it would not be said that the subject-matter in this suit is not susceptible o monetary

evaluation. As was held by a Division Bench of this Court in Ratilal Manilal v. Chandulal Chhotalal, 49 Bom LR at pp. 483-484), the subject-

matter of a suit is what the suit is about. There the Division Bench was construing the provisions of Section 7(v) of the Court Fees Act, 1870. The

question which was debated before the Division Bench was as to what was the meaning of the expression ""subject-matter of the suit"", as used in

that provision. It was observed at p. 554 (of Bom LR) = (at pp. 484, 484 of AIR) that, in plain English the subject-matter of a suit is what the suit

is about, and that it is not the same thing as the object of the suit. It was further observed that the object of the suit is the claim, in other words,

possession of the house. The subject of the suit, it was observed, is the house itself. Applying this principle, since in the instant case, the subject-

matter of the suit would be either the property sought to be attached or the decretal amount of recovering which they were attached, it would

appear that it could not be said that the subject-matter in dispute is not susceptible of monetary evaluation. That being the position, Section 6(iv)(j)

of the Bombay Court Fees Act of 1959 has no application to a suit of the type with which we are dealing.

19. Which then is the precise section or article applicable to application suit under Order XXI, Rule 63, filed by an unsuccessful attaching creditor.

As we have pointed out Section 6(iv)(d) has no application, since it deals with application converse case of an unsuccessful claimant being required

to file a suit under Order XXI. Rule 63. No other section has been pointed out to us as being applicable to application suit of this type. When we

turn to Schedule I of the Bombay Court Fees Act of 1959, it appear to us that Article 4 is the only proper article which would apply to application

suit of this type and not the residuary Article 1, as was contended by Mr. Gumaste at one stage. Article 4 if to this effect:-

Plaint, application or petition (including memorandum of appeal) which is capable of being treated as a suit, to set aside a decree or order having

the force of a decree.

20. The question which we have to consider is whether this was a plaint to set aside an order having the force of a decree. If that so, this article

would be immediately attracted. Now, Order XXI, Rule 63 provides:-

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.

21. It would appear from the said provisions that in the absence of a suit contemplated by Order XXI. Rule 63, the order which is passed either

under Order XXI, Rule 60 or Rule 61, shall be conclusive. In other words such an order has evidently the force of a decree.

22. The next question to be considered is as to whether the suit filed under Order XXI, Rule 63 is a suit to set aside an Order made under Order

XXI, Rule 60. As held by the Privy Council in Bibi Phul Kumari Vs. Ghanshyam Misra, , the essence of a suit u/s 283 of the Code of Civil

Procedure, 1882. (corresponding to Order XXI, Rule 63 of the Code of Civil Procedure, 1908) was to set aside an order. In that case the Privy

Council was considering the question as to what is the correct Court-fees payable under the Court Fees Act 1870 by an unsuccessful claimant,

who was obliged to file a suit u/s 283 of the Code of Civil Procedure, 1882 which corresponds to Order XXI. Rule 63 of the Code of Civil

Procedure, 1908. After referring to the nature of the suit u/s 283, is of the exact description as the one which was contemplated by the provisions

of the 17th Article in Schedule II of the Court-fees payable on a plaint or Memorandum of Appeal in a suit to alter or set aside a summary decision

or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court. It was also pointed out by their Lordships that in

suits of that type the question of value is immaterial. It would thus appear that a suit filed under Order XXI, Rule 63, is in effect a suit to set aside

an order which has the force of a decree and, therefore, Article 4 of Schedule I of the Bombay Court-fees Act of 1959 is the only appropriate

article for a suit of the present type. Column 3 thereof is to this effect:

The same fee as is leviable on a plaint in a suit to obtain the relief granted in the decree or order, as the case may be,

In other words in a suit filed by an unsuccessful attaching creditor under Order XXI. Rule 60, to set aside an order under Order XXI, Rule 60, the

Court-fees payable would be the same as the court-fees payable by an unsuccessful claimant for a suit of the type contemplated by the first

Proviso to Section 6(iv)(d).

23. At one stage Mr. Gumaste submitted that it is Article 1 of Schedule I, which is a residuary article, which would apply to such a suit as in his

view, if Article 4 were to apply for a suit under Order XXI, Rule 63, to be filed by an unsuccessful attaching creditor, there was no need for a

provision being made u/s 6(iv)(d) read with the first Proviso. But then he had to concede that Article 4 is wide enough to cover numerous types of

suits, and that in the absence of the provisions of Section 6(iv)(d) read with the first Proviso and the other Provisions of the Act, it would not be

possible to give effect to the provisions in column 3 of Article 4 of Schedule I. At any rate, as observed by a Full Bench of this Court in

Dayachand Nemchand v. Hemchand Dharamchand ILR (1880) Bo 515 , while considering a similar question under the Court Fees Act of 1870,

since the Court Fees Act is a fiscal enactment, the Court must apply that provision which generally would press least heavily on the subject. I am,

therefore, of the view that the Court-fee payable on the plaint and the memorandum of appeal in the instant case is as provided by Article 4 of

Schedule I read with the first proviso to Section 6(iv)(d). The excess court-fee, therefore, paid by the plaintiff-appellant in the trial Court shall have

to be refunded to him.

Vimadalal, J.

24. I also agree with the order just passed by my brother Naik on the question of Court-fees. Having regard to the prayers in the plaint in the

present suit, as framed, and the decision of the Privy Council in Bibi phul Kuari''s case to which my brother Naik has referred, this suit must be

held to be one to set aside an order passed in summary proceeding in execution. The concluding words of Order XXI, Rule 63 give a

conclusiveness to that summary order, subject only to the result of this suit and, in my opinion, that summary order must therefore be held to have

had the force of a decree. In that view of the matter, I concur in the view of my brother Naik that the present suit is governed by the provisions of

Article 4 of the First Schedule to the Bombay Court-fees Act, 1959, which applies by reason of the provisions of Section 5 of that Act.

BY THE COURT

25. We hold that the plaintiff was liable to pay court-fees in respect of the present suit under Article 4 of Schedule I read with the first Proviso to

Section 6(iv)(d) of the Bombay Court-fees Act, 1959, and that the excess court-fees paid should be refunded to him.

26. As far as the appeal itself is concerned, we dismiss the same with costs.

27. Appeal dismissed.