(1926) 09 BOM CK 0023

Bombay High Court

Case No: Second Appeal No. 91 of 1926

Chunilal Jivanlal Shah		APPELLANT
	Vs	
Pira Miyaji Ghanchi		RESPONDENT

Date of Decision: Sept. 7, 1926

Citation: AIR 1927 Bom 234 : (1927) 29 BOMLR 285 : 101 Ind. Cas. 335

Hon'ble Judges: Shah, J; Fawcett, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Shah, J.f

1. The plaintiff in this case obtained a decree in Suit No. 227 of 1920 against the trustees of the deceased Dwarkadas Parshottam and in execution of that decree he attached certain debts which were alleged to be due to the deceased Dwarkadas. Among those debts, there was a debt of Rs. 490 said to be due by the present defendant to Dwarkadas. The defendant was served with a notice of the attachment of that debt and he filed his statement in the Court on November 18, 1921, contending that the amount actually due by him to Dwarkadas was Rs. 21 and not Rs. 490. After certain adjournments the executing Court made the following order on January 28 :-

Public notice to be issued under Order XXI, Rule 66, to sell the attached dues in possession of the third person, belonging to the deceased defendant and an auction warrant to be issued with the Nazir''s order.

2. The attached dues included this particular debt. The plaintiff purchased this particular debt at the auction sale and filed the present suit to recover the debt from the defendant. The defendant pleaded that the amount claimed by the plaintiff was not due but a much smaller sum was due. In the trial Court the following issue was raised : "Is not the Court''s sale dated March 11, 1922, conclusive and binding upon the defendant ?" The finding on this issue was that the sale was conclusive as to the

amount due, and accordingly the plaintiff''s claim was decreed. The defendant was not allowed to question the amount said to be due by him to the deceased Dwarkadas Parshottam.

3. The defendant appealed to the District Court of Ahmedabad and the learned Assistant Judge who heard the appeal also accepted that view and dismissed the appeal. The learned appellate Judge observed that.-

The only point which was argued in appeal was, that there was no inquiry made under Order XXI, Rules 53-62, of the CPC and that there was no order passed by the Court, determining whether the debt existed or not.

4. The learned Judge held that there was an order, which required to be set aside within a year by a suit under Rule 63 and as no such suit was filed by the defendant, that order was conclusive against him in the present suit.

5. The defendant has preferred this second appeal and has raised the same contention which was raised before the lower appellate Court. He contends that the order made in execution proceedings by the executing Court was not an order under Rules 58-63, that there is no order determining the amount due by the defendant to the deceased Dwarkadas and that the order, such as it was, was really made under Rule 66 of Order XXI. I have already stated the order in question. The point at issue between the parties is whether this order is to be read as determining the amount which was due by the defendant to the debtor of the present plaintiff under an investigation contemplated by Rules 58 to 63. On behalf of the respondent it has been urged that this order is really an order under Rule 63 and that though the order refers to a public notice under Rule 66 in so far as it orders the attached dues to be sold, it implies a determination of the amount said to be due by the defendant to the judgment-debtor of the plaintiff. We have looked at the execution proceedings, as they were looked at by the lower Courts; and there is nothing to show that the Court in fact determined the question which was raised by the present defendant as to the amount due by him to the deceased Dwarkadas. The order made on January 28, 1922, is consistent with the view that the executing Court then left the question as to what was due by the defendant to the deceased Dwarkadas open as between the parties and may have for the purposes of Rule 66 accepted the amount as given by the present plaintiff. It may be mentioned that it was not obligatory upon the executing Court to go into the question as to what was in fact due by the present defendant to the deceased Dwarkadas. In fact it has been held by this Court in Toolsa Goolal v. John Antone ILR (1887) Bom. 448 that the Court may make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the garnishee admits it to be due, or for so much as he admits to be due to the judgment-debtor ; but, where the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold. This was a case under the Original Jurisdiction of this Court. It may be that under Rules 58 to 63 of Order XXI, if the person whose debt is attached objects to the

attachment, it may be open to the Court to determine the question as to whether the debt is due or not with a view to determine whether the attachment should be set aside. If the Court in fact determines it the order may be referable to Rule 63. If an order falling under Rule 63 of Order XXI is made, the party against whom the order is made would be bound to sue within twelve months from the date of the order, if he wants to question the correctness of that order. Otherwise the order would be conclusive against him. But where it is not clear at all whether the question raised by the garnishee in this case was one which the Court was bound to determine and where also it is not clear that the Court in fact determined it, it would not be reasonable to spell out an implied order under Rule 63 from such order as we have in the present case which is referable to Rule 66 of Order XXI. There is a material difference between an order which falls under Rule 63 and an order which falls under Rule 66. In the one case if the party affected does not sue within twelve months to set it aside it becomes conclusive. In the other case it has no such effect. It seems to me that where the Court has to deal with a point of this nature, it should always make it clear whether it purports to make an order under Rule 63 or under Rule 66. In the present case there is no express order referable to Rule 63. The lower appellate Court has accepted the contention of the respondent that such an order is to be implied from the order made on January 28, 1922, with reference to the public notice to be issued under Rule 66. In the present case we are unable to hold that such an order could be implied.

6. The lower appellate Court has relied upon the decision of this Court in Tayaballi Gulam Husein v. Atmaram Sakharam. ILR (1914) 38 Bom. 631 From the report of that case, it appears that the objection of the garnishee was that no debt was due. The executing Court disallowed that objection and put up the debt for sale. The decision proceeds on the basis that there was an order falling under Rule 63 of Order XXI. The point considered in the case was whether such an inquiry was open to the Court under Rules 58 and 63 of Order XXI. And the Court dissented from the earlier decision of the Court in Harilal Amthabhai v. Abhesang Meru ILR (1880) 4 Bom. 323 and held that such an inquiry on the objection of the garnishee to the attachment was permissible. There was no point in that case as to whether the order was referable to Rule 66 of Order XXI. In the present case there is no order under Rule 63. But the order that we have was made under Rule 66. Therefore, the fact that this particular debt was put up for sale and purchased by the plaintiff does not prevent the defendant from putting forward the plea which he had put forward in the execution proceedings.

7. I desire to make it clear that I do not go so far as to hold that it was not open to the executing Court in this case to determine the contention of the present defendant and to decide the question as to what particular amount was due by him to his creditor with a view to determine as to how far the attachment was liable to be set aside. I express no opinion on that point, as it is not necessary to do so. It is sufficient to observe that in the present case it does not appear that the point was in

fact decided by the Court, and I cannot say that it was obligatory upon the Court to decide the question for the purpose of taking action under Rule 66. It was open to the Court to take the course which it seems to me it took in this case without deciding the question raised by the present defendant. From the wording of the order passed on January 28, 1922,I am not at all satisfied that the Court really meant to act under Rules 58 to 63 and that there was no investigation contemplated by those rules. The Court has simply acted under Rule 66, and therefore there is no order under Rule 63 which has become conclusive so as to prevent the defendant from pleading that the amount claimed is not due.

8. I, therefore, allow this appeal, set aside the decrees of the lower Courts and remand the case to the trial Court for disposal on the merits.

Fawcett, J.

9. I think in view of the decision in Toolsa Goolal v. John Antone ILR (1887) 2 Bom. 448 that it is not clear that the Subordinate Judge did in fact decide on the dispute as to the amount of the debt attached. That decision distinctly lays down that there is no other Course open to the judgment-creditor, who has attached a debt which the garnishee denies, than to have it sold, or to have a receiver appointed. No doubt that decision is very seriously affected by the ruling in Tayaballi Gulam Husein v. Atmaram SakhaRam ILR (1914) 38 Bom. 631 where Harilal Amthabhai v. Abhesang Meru ILR (1880) 4 Bom. 323 was dissented from, and it was held that an executing Court could go into the question whether the debt which the garnishee denies was actually due. In fact Scott C.J. in his judgment at p. 637 goes further and says:-"It is of importance that Garnishee''s claims and objections should be decided at least as promptly as other objections to attachment." But, on the other hand, Toolsa Goolal v. John Antone was not referred to either in the arguments before the Court or in the judgment of the Court in Tayaballi''s case, and it is not, therefore, directly dissented from. Again Toolsa Goolal''s case has been followed by other High Courts, namely, in Maharaja of Benares v. Patraj Kunwar ILR (1905) All 262 and Ma Saw Yin v. Hocto. ILR (1926) Rang. 100. But it is to be noticed that in the latter two decisions the Court adopted a very important addendum to what was said in Toolsa Goolal''s case, namely, that if the first of the two alternative courses was adopted, the sale of the debt should be after giving notice to the intending purchasers of the fact that the existence of some of them was denied by the debtor. That obviously is a very desirable precaution to be taken in the interests of the auction-purchaser. In the present case, no doubt, no such reservation was made in the proclamation of sale ; but, on the other hand, the judgment in Toolsa Goolal''s case contained no such reservation and its omission does not therefore justify the inference that the executing Court had decided the dispute as to the amount of the debt. But certainly there is an important difference between the ratio decidendi in Toolsa Goolal''s case and Tayaballi''s case.

10. Here we are concerned with the objection that the defendant is debarred from showing that he really did not owe the amount of the debt that was attached and sold, and I think such an objection should be clearly made out before it is allowed. In the present case, as shown by my learned brother, there is a reasonable doubt whether there was any order made against the defendant in execution proceedings within the meaning of Order XXI, Rule 63. I, therefore, agree that the appeal should be allowed and the case remanded.

11. Per Curiam. AS regards costs, we order that the defendant should get his costs of this appeal and in the lower appellate Court. The costs in the trial Court and all further costs will be costs in the suit.

12. It is hardly necessary to add that the parties will be at liberty to adduce evidence.