

Qamaruddin Vs. Kamta Prasad and ors.

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Court : Allahabad

Decided On : Aug-13-1976

Reported in : AIR1977All202

Judge : Om Prakash Trivedi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 63 - Order 22, Rule 2

Appeal No. : Second Civil Appeal No. 19 of 1971

Appellant : Qamaruddin

Respondent : Kamta Prasad and ors.

Disposition : Appeal allowed

Judgement :

Om Prakash Trivedi, J.

1. The facts giving rise to the present appeal may be summaris-ed as follows. Kamta Prasad obtained a decree against Baqar deceased whose legal representatives are respondents 3 to 6. In execution of the decree he put the disputed house to sale. Thereupon Qamaruddin filed an objection under Order XXI, Rule 58, C.P.C. alleging that the house belonged to him and did not belong to the judgment-debtor and was not liable to attachment and sale in execution of the

decree against the judgment-debtor. His objection was dismissed and thereafter he filed a suit under Order XXI, Rule 63, C.P.C. for declaration that the house belongs to him and not the judgment-debtor and that it is not liable to be sold in execution of the decree of respondent No. 1. While the matter was pending before the trial court, judgment-debtor Baqar died but no application for substitution of his legal representatives was moved by the appellant. The trial court, therefore, held that the suit had abated because the legal representatives of the judgment-debtor had not been impleaded in time. It also dismissed the application for setting aside abatement and the application for substitution of heirs. The suit was also dismissed in its entirety on the ground that it had abated. On appeal the District Judge held that the entire suit abated.

2. It is in these circumstances that Qamaruddin comes to this court in second appeal. The submission of appellant's learned counsel Sri D. C. Mukherji is that the courts below erred in dismissing the suit without deciding the question as to whether the right to sue survived in favour of Qamaruddin against the decree-holder Kamta Prasad even after the suit had abated against Baqar judgment-debtor and secondly that the courts below were in error in holding that Baqar judgment-debtor was a necessary party to the suit under Order XXI, Rule 63 C.P.C. and the entire suit did not abate because the right to sue survived against Kamta Prasad decree-holder. Both these submissions are, in my opinion, well-founded. The courts below clearly erred in not applying their mind to the question as to whether if the suit had abated against Baqar defendant-judgment-debtor for failure to apply for substitution of heirs within time, right to sue did or did not survive in favour of the appellant against the main defendant Kamta Prasad decree-holder. The court below appears to have come to its conclusion on the basis of a decision of this Court in the case of Ghasi Ram v. Mangal Chand, ((1906) ILR 28 All 41) (FB) where a Full Bench of this court observed that if an unsuccessful claimant brings a suit and he seeks to establish his claim against both, the decree-holder and the judgment-debtor, the latter is of course a necessary party. The suit out of which the appeal in (1906) ILR 28 All 41 (FB), arose was a suit by a decree-holder under Order XXI, Rule 63. C.P.C. for declaration that the property belonged to the judgment-debtor and it could be sold in execution of his decree. He had brought the suit because a person who claimed

to have purchased the property from the judgment-debtor had succeeded in his objection under Order XXI, Rule 58 C.P.C. The case which the Bench was considering, therefore, was not a case filed by third party seeking to establish his right to property under Order XXI, Rule 63 as in the present case. The suit not having been brought by the judgment-debtor, the observations made by the Bench were clearly not applicable. In the case of *Suppan Asari v. Alima Bibi* : AIR1934 Mad587 it was held that in a suit by the claimant under Order 21, Rule 63 the judgment-debtor is not a necessary party. I am in respectful agreement with this opinion. Similar view was expressed by the Orissa High Court in the case of *Sanyasi Behera v. Onarasi alias Varanasi Kantamma* : AIR1969 Ori16 the Court held that in a suit under Order 21, Rule 63 the judgment-debtors are not necessary parties. In a suit for declaration by the unsuccessful claimant filed under Order XXI, Rule 63, the relief is always claimed against the decree-holder for declaration that the property belongs to the claimant and is not liable to attachment and sale in execution of decree at the instance of the decree-holder. In such a declaratory suit at the instance of claimant no relief is normally claimed against the judgment-debtor for in the very nature of things the cause of action is against the decree-holder who is seeking to put the property of the claimant to attachment and sale in execution of his decree. To such a suit, therefore the judgment-debtor is not a necessary party at all and an effective decree can be passed even in the absence of the judgment-debtor. Even the Calcutta High Court in the case of *Hashim Ali Khan v. Hamidi Begum* : AIR1942 Cal180 relying upon the obiter observations of this court in (1906) ILR 28 All 41 (FB) held that in a suit by the claimant under Order 21, Rule 63 the judgment-debtor is not a necessary but only a proper party. I have, therefore, no hesitation in holding that in a suit under Order XXI, Rule 63 by an unsuccessful claimant for declaration that the property under attachment belongs to him and not the judgment-debtor and is not liable to attachment and sale in execution of the decree, the judgment-debtor is not a necessary party with the result that such a suit can be decided effectively even in the absence of judgment-debtor. It must follow from this inevitably, that the right to sue or survived in favour of Qamaruddin against the decree-holder Kamta Prasad even if the heirs of Baqar, the judgment-debtor, were not brought on record. The only result of inaction would have been that the suit of Qamaruddin would have stood abated

only against Baqar but the whole suit did not abate having regard to the terms of Order XXI, Rule 63 C.P.C. because the right to sue survived against the decree-holder Kamta Prasad. The view taken by the two courts below that the entire suit stood abated was wrong.

3. The appeal is allowed and the judgment and decree of the District Judge Hardoi, dated 19-11-1970 and the judgment and decree of Munsif East Hardoi, dated 16-5-1970 are set aside with this modification that the suit of Qama-ruddin abates only against Baqar deceased defendant but does not abate against Kamta Prasad, respondent No. 1. The case is remanded to the trial court with the direction that it shall proceed to decide the suit against Kamta Prasad, the surviving defendant, according to law, in the circumstances of this case parties shall bear their own costs. The stay order dated 12-8-1974 is vacated.

4. The sum of Rs. 1500.00 deposited in the trial court under the orders of this court will be refunded to the appellant on a proper application being made.

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