

Ramla Vs. Gyarsa

Ramla Vs. Gyarsa

SooperKanoon Citation : sooperkanoon.com/751507

Court : Rajasthan

Decided On : Apr-16-1963

Reported in : AIR1964Raj69

Judge : D.M. Bhandari, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 63 - Order 21, Rule 63

Appeal No. : Second Appeal No. 266 of 1958

Appellant : Ramla

Respondent : Gyarsa

Advocate for Pet/Ap. : N.M. Kasliwal, Adv.

Disposition : Appeal allowed

Judgement :

D.M. Bhandari, J.

1. This is a Civil Second Appeal in a suit filed by the decree-holder under Order 21, Rule 63,
2. Ramla had a decree against Chokhla in execution of which he attached the house property in dispute after the judgment-debtor was dead. Gyarsa defendant

respondent filed a claim petition under Order 21, Rule 58, C. P. C. claiming the house attached to be his own. This claim petition was allowed on the 14th of July 1955. Thereupon Ramla brought the present suit making Gyarsa and three minor sons Sagra and others of Chokhla judgment-debtor as parties. No proceedings were, however, taken for the appointment of the guardian ad litem of the minors and eventually the suit was dismissed as against the minors. The suit proceeded against Gyarsa alone was dismissed by the Civil Judge, Alwar on 17th of March 1958 on the ground that the legal representatives of the judgment-debtor were necessary parties to the appeal, and as they were not made parties the appeal could not succeed. Ramla has come in Second Appeal in this Court making Gyarsa alone a party to the appeal. He is absent at the time of hearing and the appeal is heard ex parte.

3. It is contended by the learned counsel for the appellant that the legal representatives of the judgment-debtor were not necessary parties to the suit when the suit was filed by the decree-holder. Learned counsel for the appellant has relied on :

(i) Ghasi Ram v. Mangal Chand, ILR 28 All 41, (ii) Mst. Maryam Bibi v. Ram Das, AIR 1922 All 404, (iii) Suppan Asari v. Alima Bibi, AIR 1934 Mad 587, (iv) Harchandrai v. Gopaldas, AIR 1939 Sind 177, (v) Smt. Radharani Dassi v. Smt. Binodamoyee Dassi, AIR 1942 Cal 92. The lower appellate Court had relied on Maung Khin Gyi v. Rahim Ullah Khan, AIR 1937 Rang 249 in support of his judgment.

4. After a careful consideration of the matter, I am of the view that it cannot be said that in all suits under Order 21, Rule 58, C. P. C. judgment-debtor is a necessary party. Take the case in which a claimant has succeeded in proceedings under Order 21, Rules 58 to 61 and the decree-holder has to bring a suit under Order 21, Rule 63 as in the instant case. Ordinarily in such a suit the decree-holder is interested in defeating the claim of the claimant and in obtaining an order in favour of the judgment-debtor. In such a suit the judgment-debtor does not suffer if he is not being made a party and it may be said that he is not a necessary party. Cases may, however, arise in which there is the possibility of passing an order to the

prejudice of the judgment-debtor if the suit filed by the decree-holder is decreed. In such a case the judgment-debtor may become a necessary party. As an illustration of this last situation, we may consider a case in which the decree-holder seeks to avoid a transfer made by the judgment-debtor in favour of the claimant on the ground that such a transfer was made in order to defeat and defraud the creditors. Such a suit is a representative suit and must be filed as such by a decree-holder on his own behalf and on behalf of the other creditors of the judgment-debtor. To such a suit the judgment-debtor is a necessary party as his action in making a transfer is to be adjudged as void on account of fraud. The transferee, if the transfer is adjudged void, may claim the return of the purchase money from the judgment-debtor and there is the possibility of the judgment-debtor being faced with difficulties on that account.

5. But the exceptional cases apart a suit under Order 21, Rule 63 by the decree-holder is for the purpose of establishing the right of the judgment-debtor in the property attached and any order passed in favour of the decree-holder in such a suit is generally not to be considered to the prejudice of the judgment-debtor. After all the decree-holder is seeking a declaration that the property which is sought to be attached belongs to the judgment-debtor and is liable to be attached and sold in the execution of his decree. In such a case, in the event of any decree being passed by (sic) the decree-holder the judgment-debtor stands to gain and he is not a necessary party. Someone else is fighting for him. If the decree-holder loses, then, if the judgment-debtor is not a party to the suit, the decision in that suit is not binding on the judgment-debtor. (See AIR 1942 , Cal 92).

6. Now I come to the case law on the point. In ILR 28 All 41, it has been held that :

'When the decree-holder brings a suit against a successful claimant to establish that the property belongs to his judgment-debtor and that he is entitled to bring it to sale in execution of his decree, the only person against whom he claims relief is the successful claimant. To such a suit the judgment-debtor is not a necessary party.' (p. 43)

In this case, it was further 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 last observations were treated as obiter dicta in AIR 1922 All 404. In this case, I am not concerned how far this dictum is correct.

7. In AIR 1939 Sind 177, it was held that:

'It should be conceded that in a suit under Order 21, Rule 62, Civil P. C. against the successful claimant, the judgment-debtors, his vendors, through whom he holds, are not necessary parties.'

The same view was taken in AIR 1942 Cal 92.

8. Now, let us examine Maung Tun Thein v. Maung Sin, AIR 1934 Rang 332 in which it was held that:

'When a suit is brought under the provisions of Order 21, Rule 63 by an attaching creditor to establish his right to attach and bring to sale certain property, and in order that he may succeed it is necessary to avoid a transfer of the property on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought in the form of a representative suit, on behalf of or for the benefit of all the creditors of the transferor, and the provisions of Order 1, Rule 8, C. P. C. will be applicable, and the transferee and the judgment-debtors, as transferors, will be necessary defendants in such a suit.'

The aforesaid observation does not go contrary to the view taken, by me as discussed hereinbefore. It may be pointed out that the attaching creditor brought the suit in the Rangoon case alleging that the registered deeds of transfer were sham transactions executed without any consideration, in order to defeat and delay the claimants of the judgment-debtors. To such a suit the judgment-debtor may be considered a necessary party.

9. The only case in which difficulty was felt in accepting the view taken in ILR 28 All 41 is Beni Gopal v. Kanhaiyalal, AIR 1951 Ajmer 27. In that case, the claimant

Kanhaiyalal had filed an objection under Order 21, Rule 58, C. P. C. claiming that he was the owner of the property attached by the decree-holder in execution of the decree against the judgment-debtors. That objection was decided in favour of Kanhaiyalal. The decree-holder thereupon filed a suit under Order 21, Rule 63, C. P. C. and the suit was decreed by the trial Court. An appeal was filed by Kanhaiyalal claimant. The judgment-debtor was a party in the trial Court and he was also made a party to the appeal. He died during the pendency of the appeal but it appears that all his legal representatives were not made parties. The appeal was allowed and the decree-holder's suit was dismissed. Then a second appeal was filed by the decree-holder. It appears to have been urged in the Second Appeal by the decree-holder that as all the legal representatives of the judgment-debtor had not been brought on record in the first appellate Court, the appeal should have failed. In reply to this contention it was urged that the judgment-debtor was not a necessary party in such a suit, and as such he was not a necessary party in appeal. Reliance was placed on ILR 28 All 41. The learned Judicial Commissioner felt some difficulty in accepting the view of the Allahabad High Court, on the ground that in the case before him, the trial Court had granted a declaration that the judgment-debtor was not the owner of the property attached and the learned District Judge had reversed the finding without giving a proper hearing to all the legal representatives of the judgment-debtor. Under the circumstances of that case the view taken by the learned Judicial Commissioner is sound but this does not mean that the view of the Allahabad High Court has been dissented. To all suits instituted under Order 21, Rule 63, the judgment-debtor, if not a necessary party, is a proper party. (See *S. N. V. R. Chettiar Firm v. Ma Lay*, AIR 1936 Rang 56).

10. Now if in a suit filed by an attaching creditor the judgment-debtor has been made a party, there may be a contest not only between the decree-holder and the claimant but also between the claimant and the judgment-debtor who are defendants in that suit. Thus, there may be a contest between the defendants inter se. If in such a suit it is held that the judgment-debtor is the owner of some property then it is necessary that the judgment-debtor must be made a party to the appeal filed by the claimant, otherwise the principle of *res judicata* between the co-defendants will operate against the claimant and the appeal cannot be decided in

favour of the claimant in the absence of the judgment-debtor.

11. Thus, on a survey of authorities, it emerges that in a suit filed by the attaching creditor, the judgment-debtor is not always a necessary party. If the judgment-debtor has been made a party, He may be held to be a necessary party in appeal under certain circumstances.

12. In this view of the matter in the instant case the suit filed could not fail on the ground that the legal representatives of Chokhla had not been made parties. It must be taken that Chokhla was not a party from the beginning.

13. The appeal is, therefore, allowed, the judgment and decree of the learned Civil Judge, Alwar dated the 17th of March 1958 are set aside and the case is remanded to him for deciding it in accordance with law. Costs so far incurred shall abide the result.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com