

Mangilal and ors. Vs. Kedarnath and ors.

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Court : Rajasthan

Decided On : Mar-20-1973

Reported in : AIR1973Raj186; 1973()WLN231

Judge : C.M. Lodha, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 58 and 63

Appeal No. : Second Appeal No. 288 of 1972

Appellant : Mangilal and ors.

Respondent : Kedarnath and ors.

Advocate for Def. : Gopal Raj, Adv. for Respondent No. 1 and; S.K. Lohare, Adv. for Minor-Respondent Nos. 3 to 8

Advocate for Pet/Ap. : J.N. Thanvi, Adv.

Disposition : Appeal dismissed

Judgement :

C.M. Lodha, J.

1. The respondent Kedarnath is the auction-purchaser of the house in dispute, sold in execution of a money decree obtained by one Moolchand against Bastiram, who is now dead and is represented on the record of this case by his widow, sons

and daughters arrayed as respondents Nos. 2 to 8. The appellants before me are the brothers and the mother of the deceased Bastiram.

2. It appears that when the house in question was attached in execution of the decree obtained by Moolchand, the present appellants preferred an objection under Order XXI, Rule 58, Civil P. C. but the same having not been prosecuted by them was dismissed in default. They, however, did not file a suit under Order XXI, Rule 63 Civil P. C. within the period prescribed by law, but instituted a suit under Section 42, Specific Relief Act for declaration of their title to the property in dispute. Admittedly this suit was also finally dismissed as barred by limitation.

3. Some time later, the auction-purchaser viz. Kedarnath filed the present suit in the Court of Munsiff City. Jodhpur for possession of the property in question on the ground that the appellant-defendants had dispossessed him after he had obtained possession of the same in the course of execution proceedings. The defendants resisted the suit on the ground that the property belonged to them and the same had been wrongly attached and sold in execution of the decree obtained by Moolchand against Bastiram.

4. After recording the evidence produced by the parties, the learned Munsiff decreed the suit. Aggrieved by the judgment and decree of the trial court the defendants filed appeal in the Court of District Judge, Jodhpur, but were unsuccessful. Hence they have come in second appeal to this Court.

5. Learned counsel for the appellants has urged that the courts below had wrongly rejected their plea of title to the property in question on the ground that their objection under Order XXI, Rule 58, Civil Procedure Code had been dismissed and no suit having been filed under Order XXI, Rule 63, Civil Procedure Code that order had become conclusive. It is argued that it is only an order passed after investigation that can operate as final and conclusive subject to the result of the suit and not an order dismissing the objection in default. In support of his contention learned counsel has relied on *Shivapadegowda v. Annihchar*, AIR 1954 Mys 142, *Sheoraj Singh v. Gajodhar Prasad*, AIR 1942 Oudh 465 and *Krishna Ballav Ghosh v. Sashimukhi Bose*, AIR 1949 Orissa 11.

6. I have examined the authorities relied upon by the learned counsel for the appellants and am of opinion that the principle laid down therein is not applicable to the facts and circumstances of the present case. In this connection I would like to draw attention to the language of Order XXI, Rule 63, Civil Procedure Code which reads thus:--

'Rule 63. 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.'

7. It may be pointed out that the authorities relied upon by the learned counsel for the appellants deal with a state of things contemplated by Order XXI, Rule 103, Civil Procedure Code.

8. In *Dwarika Sami v. Mt. Anandi*, AIR 1950 Pat 25 it was held that there is distinction between an order passed under Order 21, Rule 63 and an order passed under Order 21, Rule 103, the reason for the distinction being the difference in the wordings of the two rules and that an order against the claimant or the decree-holder, as the case may be, would be final under Order 21, Rule 63 even if the order was not passed after investigation into the merits of the objection. Therefore, the decisions under Order 21, Rule 63, Civil Procedure Code cannot be of much assistance in deciding the question whether the order would fall under Rule 103 or not.

9. Again in *Cannanore Bank v. Madhavi*, AIR 1942 Mad 41 (FB) the Full Bench of the Madras High Court held that an order passed under Order 21, Rule 63, Civil P. C. is final notwithstanding the fact that there was no investigation into the merits of the claim by the court passing it. It was further held that Order 21, Rule 63, Civil Procedure Code applies to all orders which are against claims preferred under Rule 58, and that the test to see whether an order is one passed under Rule 63 is whether the order is against the claimant or the decree-holder, as the case may be, and that it is not necessary that the order should have been passed after investigation. Therefore, where the order 'petition not pressed'. It is dismissed' is passed on a petition which falls within Rule 58 and the petitioner has not sought

permission to withdraw it without prejudice to his rights it is obviously an order which is against him and requires him to file a suit within a year from the date of the order, if he wishes to re-open the matter.

10. I respectfully agree with the observations made in the two cases referred to above. In this view of the matter the order passed against the present appellants under Order XXI, Rule 58 C. P. C. must be treated as final and conclusive.

11. No other point was pressed in support of the appeal.

12. The appeal has, therefore, no force and is hereby dismissed. Costs of this appeal will be easy.

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