

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****Miscellaneous Appeal No. 75 of 2017****Reserved on 22.01.2021****Pronounced on 27.01.2021**

Ramesh Kumar Singh, S/o Shri Vikram Singh, Aged About 47 Years, R/o Gandhi Nagar, Orrisa Road, Post Office & Police Station Raigarh, District Raigarh, Chhattisgarh, 496001 (Debtor No.1).

**---- Appellant****Versus**

1. Magma Fincorp Ltd., Previously known as Magma Shrachi Finance Limited a Company Duly incorporated under The Companies Act 1956 having its Office At 24, Park Street Calcutta, West Bengal (Decree Holder).
2. Ajay Jaiswal, S/o Kishan Prasad Jaiswal, R/o Near Panjri Plant, Ramniwas Chowk, Post Office & Police Station Raigarh, District Raigarh, Chhattisgarh 496001 (Debtor No.2).

**---- Respondents**


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|---------------------|---|-------------------------------------------------------------------------|
| For Appellant       | : | Mr. Vineet Kumar Pandey, Advocate.                                      |
| For Respondent No.1 | : | Mr. B. Gopa Kumar appears along<br>with Shri Himanshu Pandey, Advocate. |
| For Respondent No.2 | : | None as notice upon him has been<br>dispensed with.                     |

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**Hon'ble Shri Justice Sanjay S. Agrawal, J**

**CAV Order**

1. This Miscellaneous Appeal has been preferred by Judgment-Debtor/Ramesh Kumar Singh, under Order 43 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'), questioning the legality and propriety of the order dated 09.08.2017 passed in Execution Case No.11/2011, whereby the learned Executing Court has rejected the application filed by him under Order 21 Rule 106 of CPC.
2. Briefly stated the facts of the case are that for execution of the Award dated 20.06.2009 passed by the Arbitrator, an application enumerated under Order 21 Rule 6 of CPC was made by Respondent No.1/Decree-Holder registered as Execution Case No.11/2002. Upon receiving the summons of the notice, the Appellant/Judgment-Debtor/Ramesh Kumar Singh appeared through his counsel and pursuing the matter. According to him, when the matter was fixed on 26.07.2017 for submission of his reply, a direction for issuance of possession warrant with regard to the attachment of his movable properties was issued as neither he nor his counsel was present on the said date. An application for its setting aside was made by the Appellant under Order 21 Rule 106 of CPC while assigning the reasons that on the relevant date, he went to the Village Lara while his counsel was engaged before the Juvenile Justice Board. The said application is, however, rejected by the Court below observing

*inter alia* that the said Judgment-Debtor/Ramesh Kumar Singh has been appearing since 12.11.2012 and has failed to submit his reply and, therefore, it would not be appropriate to grant him further time in the matter and in consequence, rejected the said application.

3. According to the learned counsel for the Appellant/Judgment-Debtor/Ramesh Kumar Singh, the Court below without considering the reasons assigned in the said application filed under Order 21 Rule 106 of CPC has committed an illegality in rejecting the same. While referring to the order sheet dated 26.07.2017, it is contended by him that the counsel for the Appellant was in fact appeared before the Clerk of the Court and noted the further date of hearing as 30.08.2017, yet by ignoring the said noting and even in absence of the parties, the order impugned has been passed, which, therefore, deserves to be set aside.
4. On the other hand, learned counsel for the Respondent No.1/Decree-Holder has supported the order impugned as passed by the Court below.
5. I have heard learned counsel for the parties and perused the entire papers carefully, attached with this appeal.
6. From perusal of the papers attached with the memo of appeal, it appears that an execution proceeding was initiated by the Respondent No.1/Decree-Holder under Order 21 Rule 6 of CPC for execution of the Award dated 20.06.2009 passed by the

Arbitrator, which was registered as Execution Case No.11/2012. It appears further that upon receiving the summons of it, the Judgment-Debtor/Ramesh Kumar Singh appeared through his counsel and took time in order to file his reply with regard to the application, dated 18.02.2016 made by the Decree-Holder, wherein a prayer was made by him for issuance of attachment warrant of Appellant's movable and immovable properties. The matter was adjourned from time to time for its reply and when it was fixed for 26.07.2017, a direction was issued for attachment of movable properties of the Appellant. However, a bare perusal of the said order sheet would reveal the fact, particularly the right column of it, that counsel for the Appellant Mr. Mohammad Aslam was appeared and noted the further date of hearing as 30.08.2017. It appears further from the said order sheet that neither the Decree-Holder nor the Judgment-Debtors were present on the said date, yet the Court below has not only issued a direction for depositing the requisite Process Fee for issuance of notice upon the other Judgment-Debtor, namely Ajay Jaiswal but has directed further for issuance of attachment warrant of the Appellant's movable properties. The approach of the Court below under such circumstances appears to be unjustified as in absence of the Decree-Holder, the Court may at the most make an order for its dismissal but cannot proceed as such in view of the provision prescribed under Rule 105 of Order 21 of CPC, which provides as under:-

**“Order 21 Rule 105”**

**Hearing of application** :-- (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application *ex parte* and pass such order as it thinks fit.”

7. By virtue of sub-rule (2) of the aforesaid provision, it is evident that the Court may in absence of the Decree-Holder make an order for the dismissal of the execution proceeding initiated by him but, in absence of him no order as such could be passed *ex parte* against the Judgment-Debtor by virtue of sub-rule (3), as the Decree-Holder was found to be absent on the said day, i.e., 26.07.2017.
8. Be that as it may, the Appellant/Judgment-Debtor/Ramesh Kumar moved an application for setting aside the aforesaid *ex parte* order of attachment dated 26.07.2017 under Order 21 Rule 106 of CPC by submitting *inter alia* that on the said date he could not appear as he went to the village Lara for his commercial work while his counsel was engaged before the Juvenile Justice

Board. It appears further that the reason as assigned therein, duly supported by an affidavit, was neither controverted nor any counter affidavit denying the version of the Appellant was filed by the Decree-Holder. In view of that, the reasons as assigned should have been accepted by the Court below while considering the same in a liberal manner in order to provide substantial justice to the parties.

9. It is to be noted at this juncture the provisions prescribed under Rule 106 of the said Order, which reads as under:-

**“Order 21 Rule 106”:-**

**“106. Setting aside orders passed *ex parte*, etc.- (1)**

The applicant, against whom an order is made under sub-rule (2) of rule 105 or the opposite party against whom an order is passed *ex parte* under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order or such terms as to costs, or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an *ex parte* order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order.”

10. Sub-rule (1) of the aforesaid provision empowers the Executing Court to set aside the orders passed ex parte against the party, who was absent at the time of hearing of application under Rule 105 of CPC, if he is able to show sufficient cause for his non-appearance at the time of hearing.
11. In the instant matter, the reasons so assigned, as observed hereinabove, which was not only duly supported by an affidavit, but was even not controverted by the Decree-Holder and, as such, there was no reason to disbelieve the same. That apart, whether the Appellant has made out sufficient cause or not, in the application filed, the Court below was required to look at all the facts pleaded in the application. However, without considering the same, the order impugned has been passed even in absence of the Decree-Holder by escaping over the provision prescribed under sub-rule (2) of Rule 105 of Order 21 of CPC.
12. In view of the above, the appeal is allowed and the order impugned dated 09.08.2017 passed in Execution Case No.11/2012, is set aside and the attachment warrant issued vide order dated 26.07.2017 is accordingly quashed. No order as to costs.

Sd/-  
**(Sanjay S. Agrawal)**  
Judge