

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 3597 OF 2022

Roby S/o A.D. John

-- Petitioner

Vs.

Stanley Joseph Nazareth s/o Romuleous
Nazareth & others

-- Respondents

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A.M. Adtani, Advocate for Petitioner

Mr. J.J. Chandurkar, Advocate for Respondent No.1

CORAM : MANISH PITALE, J.

DATE : 01st JULY, 2022

By this petition, the petitioner is challenging order dated 01/02/2016, passed by the Court of 5th Jt. Civil Judge, Senior Division, Nagpur (hereinafter referred to as Executing Court), whereby an objection raised under Order XXI Rule 58 of the Code of Civil Procedure (CPC) has been rejected and also an order dated 22/04/2022, whereby a review application filed in the context of the said order was rejected by the Executing Court.

2. In the present case, the aforesaid objection was raised on behalf of the petitioner by seeking to invoke Order XXI Rule 58 of the CPC, contending that all claims or objections to

attachment of property ought to be decided by the Executing Court.

3. A perusal of order dated 01/02/2016, shows that the Executing Court took into consideration the contentions raised by the petitioner and found that the objection sought to be raised under Order XXI Rule 58 of CPC was without any merit and accordingly, it was rejected. The Executing Court took note of the fact that the petitioner claimed to be the tenant in the suit property since long and further claimed that the landlord agreed with him to sell the suit property in his favour and that he was claiming a decree of specific performance of contract against the non-applicants. Having recorded the said contentions, the Executing Court came to a conclusion that such issues ought to be raised by filing a separate suit and in the facts and circumstances of the case Order XXI Rule 58 of CPC, could not be invoked. The review application was also dismissed by considering the contentions raised on behalf of the petitioner.

4. The learned counsel appearing for the petitioner before this Court vehemently contended that in terms of Order XXI Rule 58 of CPC, when there was an attachment and proposed auction / sale of property in question, the petitioner could raise his grievance only before the Executing Court and nowhere else. It was submitted that the approach adopted by the

Executing Court while passing the impugned order was wholly unsustainable and that, therefore, inference was warranted.

5. The learned counsel appearing for the respondent – Caveator brought to the notice of this Court that in the present case, auction of the property was on the basis of a report submitted by a Commissioner in final decree proceedings, concerning a decree of partition passed by a Competent Court. It was submitted that according to the Commissioner it was found that the decree for partition was inexecutable and it was opined that the property be auctioned so that the proceeds could be distributed amongst the parties. On this basis, it was contended that there was no question of attachment of the property and hence, the impugned order did not deserve interference.

6. This Court has considered the rival contentions of the learned counsel appearing for the parties in the backdrop of the material placed on record. The Executing Court could have exercised jurisdiction and the petitioner could have invoked Order XXI Rule 58 of CPC, provided that the present case concerned attachment of property and sale thereof, for satisfaction of a decree. A perusal of the Order XXI Rule 41 onwards upto Rule 59, would show that the said Rules apply where a decree is for payment of certain monies and the same is not being satisfied by the judgment debtor, constraining the decree holder to approach the Executing Court for attachment

of the property of judgment debtor for sale thereof for satisfaction of such a decree. It is in this context that the Court proceeds to attach the property and to conduct the sale thereof.

7. But, in the present case, there is no such decree for the satisfaction of which the property in question is sought to be attached and then to be sold in order to satisfy the decree. Admittedly, the auction sale of the property has been necessitated because the Commissioner in final decree proceedings concerning a decree of partition has rendered a finding and reported to the Executing Court that the decree being inexecutable, there is no alternative but to sell the property. There is no case of attachment of the property and its sale for satisfaction of a decree. Therefore, when the preeminent factor of attachment of the property is absent in the present case, there is no question of the Executing Court entertaining any application under Order XXI Rule 58 of CPC. Looked at from this angle, this Court is satisfied that the Executing Court did not commit any error in passing the impugned order.

8. In view of the above, the writ petition is dismissed.

JUDGE