

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

WRIT PETITION (WP) NO.3972 of 2018

1. Sau Kiran W/o. Ravindra Nakaskar,
aged about 42 years, Occupation :
household, Resident of ShivChhaya
Colony, Shankar Nagar, Amravati,
Tahsil and District : Amravati.

.... Petitioner(s)

// VERSUS //

1. Ajay s/o Manakchand Bilala, aged
about 45 years, Occ.: Business,
Proprietor of Paras Corporation,
Kothadi Bazar, Akola, Tq. and Distt.
Akola, through Power of Attorney
Holder, Vijay Manakchand Bilala, aged
: Adult, Occ. Business, R/o Kothadi
Bazar, Akola.
2. Rambhau s/o Daulatrao Patil,
aged about 72 years, Occupation :
Business, Proprietor of Kulswamini
Trading Co. R/o Near Renuka Mata
Mandir, Renuka Nagar, Akola, Dist.
Akola.
3. Chandrashekhar s/o Rambhau Patil,
aged about 46 years, Occupation :
Business, Proprietor of Chhatrapati
Traders, Akola authorized signatory
and manager of Kulswamini Trading
Company, Both R/o. Near Renuka
Mata Mandir, Renuka Nagar, Akola,
Distt. Akola.

4. Satish s/o Ramgopal Toshniwal,
aged about 58 years, Occupation :
Business, Proprietor of Satishkumar
Ramgopal Old Grain Market Akola,
Akola, Distt. Akola.

... Respondent(s)

Shri A.C. Dharmadhikari, Advocate for the Petitioner/s

Shri Rohit Joshi, Advocate for the respondent No.1

Mrs. R.S. Sirpurkar, Advocate for the respondent Nos.2 and 3

CORAM : ANIL S. KILOR, J.

DATED : 03rd May 2023

ORAL JUDGMENT :

1. Heard.
2. **Rule.** Rule made returnable forthwith. Heard finally by consent of the parties.
3. In the present writ petition, the orders below Exhs.40 and 41 dated 18.04.2018 passed by the Second Jt. Civil Judge Senior Division, Akola, rejecting both the applications, is under challenge.
4. The application Exh.40 is an application moved under Order XXI Rule 58 of the Code of Civil Procedure (CPC), raising

objection to attachment of properties, whereas, the application Exh. 41 is under Order XXI Rule 59 of the CPC for stay of sale.

5. The petitioner is the objector, who moved the applications Exhs.40 and 41. The petitioner is the daughter of the Judgment Debtor (JD) No.1/ respondent No.2 and sister of JD No.2/respondent No.3.

6. The Decree Holder (DH) /respondent No.1 filed the execution proceeding in pursuance of the decree passed in his favour in the suit filed by him for recovery of money against the respondent Nos.1 to 3.

7. In the execution proceeding, the DH filed an application for attachment of immovable property under Order XXI Rule 54 of the CPC. Accordingly, the order of attachment was passed by the Executing Court, however, before the properties were attached, they were put to sell.

8. The petitioner moved the applications Exhs.40 and 41, raising objection under Order XXI Rule 58 of the CPC to the

attachment of the properties and for stay of sale of attached properties, respectively.

9. The Executing Court vide impugned order below Exhs.40 and 41 dated 18.04.2018, rejected both the applications, which is the subject matter of the present writ petition.

10. I have heard the learned counsel for the respective parties.

11. The learned counsel for the petitioner submits that the Order XXI Rule 58 of the CPC mandates full inquiry into questions relating to right, title and interest in the property attached, which arises between the parties to the proceeding and it further mandates that the Court inquiry in the said claim shall determine such question. It is submitted that the learned Executing Court without making inquiry into the right, title and interest of the petitioner in the properties attached, rejected the applications Exh. 40. Accordingly, he submits that the impugned order is illegal and bad in law.

12. It is submitted that the learned Executing Court has wrongly held that even assuming for the sake that money was borrowed for personal use, then too a father in discharge of his antecedent personal debts subject to their not being illegal or immoral, can alienate the entire of the family property for satisfying his debts. It is submitted that however, there is no findings recorded by the Executing Court satisfying the condition of such alienation by the father of the petitioner. He, therefore, submits that the impugned order is erroneous. In support of his contention, he has placed reliance upon the judgment of the High Court of Madras in the case of *Southern Steelmet and Alloys Limited Vs. B M Steel, Madras*¹.

13. On the other hand, the learned counsel for the respondent No.1 strongly opposes the present petition and supports the impugned order.

14. It is submitted that the Executing Court has rightly considered the rights of the petitioner in the properties attached

1 1978 LawSuit(Mad) 31

and thereupon, has arrived at a conclusion that the father had every right to alienate the family properties in discharge of his antecedent personal debts. He therefore, submits that the learned Executing Court has not committed any illegality or error in rejecting both the applications moved by the petitioner. In support of his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court of India in the case of *Arshnoor Singh Vs. Harpal Kaur and Others*² and the judgment in the case of *Ramesh Damodhar Deshmukh Vs. Damodhar Domaji Deshmukh and others*³

15. In the light of the rival contentions, I have perused the record and also the judgments cited by the learned counsel for the respective parties.

16. In this case at hand, the whole controversy revolves around the scope of Order XXI Rule 58 of the CPC and therefore, before proceeding further, it would be appropriate to refer to the Order XXI Rule 58 of the CPC, which reads thus:

2 (2020)14 SCC 436
3 1999(1) Mh. L.J. 153

“58. Adjudication of claims to, or objections to attachment of, property.—*(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained: Provided that no such, claim or objection shall be entertained—*

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or (b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the

party against whom such 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, an order so refusing to entertain the claim or objection shall be conclusive.”

17. After reading the provision of Order XXI Rule 58 of the CPC, it is evident that if the objection is made under the clause (1) of Rule 58 of Order XXI of CPC, the Court can refuse to entertain such objection where before the claim is preferred or objection is made, the property attached has already been sold; or where the Court considers that the claim or objection was designedly or unnecessarily delayed.

18. Thus, once the objection is held to be non entertainable on the above referred grounds, there is no obligation cast upon the Executing Court to adjudicate upon the merit of the claim.

19. Whereas, under clause (2) of the Rule 58 of Order XXI of the CPC, the adjudication is warranted and required, if the objection survives and it is not refused to entertain under clause (1) of Rule 58 of Order XXI of the CPC. If the objection survives, an inquiry under the said Rule is not of summary nature and should be fully realistic and after giving an adequate opportunity to the parties

concerned to prove the claim of right, title and interest in the property attached, as held by the Madras High Court in the case of *Southern Steelmet and Alloys Limited* (supra).

20. In the case at hand, the learned Executing Court, while rejecting the application Exh.40 and 41, in the last paragraph of the order, has observed thus:

“This conduct of objector and another daughter in view of the circumstances discussed supra indicates that they are intentionally and deliberately planted by J.Ds. to obstruct the execution and to protract and delay the proceedings. Net residue therefore result into passing the following order.”

21. From the above referred paragraph, though it appears that the learned Executing Court refuses to entertain the objection under Rule 58 of Order XXI of the CPC, the Court, at the same time, has adjudicated the objection on merit by considering the rights of the petitioner in the properties attached.

22. At this juncture, it is therefore, pertinent to note that if the Executing Court refuses to entertain objection under Rule 58 (1) of Order XXI of the CPC, the parties against whom such order is made, may institute the suit to establish the right which he claims

in the property in dispute, whereas, if the objection is entertained and it is adjudicated, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. Furthermore, if the objection is entertained, a separate suit is not maintainable.

23. In the present matter, as in the concluding paragraph of the impugned order, though the Executing Court appears to have refused to entertain the objection under Rule 58(1) of Order XXI of the CPC, the Court, at the same time, while adjudicating the right of the petitioner, it is observed thus:

“Even assuming for the sake that money was borrowed for personal use then too a father can by incurring a debt, even though the same be not for any purpose necessary or beneficial to the family so long as it is not for illegal or immoral purposes, lay the entire joint family property including the interest of his sons open to be taken in execution proceedings upon a decree for the payment of that debt.

The father can, so long as the family continues undivided alienate the entire of the family property for the discharge of his antecedent personal debts subject to their not being illegal or immoral.

In other words, the power of the father to alienate for satisfying his debts, is coextensive with the right of the creditor to obtain satisfaction out of family property including the share of the sons in such property.

Aforesaid preposition is banked upon the ratio laid down by the Hon'ble Appex court in the case of Virdhachalam Pillai ..vrs.. Chaldeal Syriam Bank Ltd. , Trichui and another [AIR 1964 Supreme Court 1425].

So even assuming for the sake that attached property is joint family property then too considering the aforesaid discussion and ratio cited supra the contention is not material.

Further, after the order of attachment was passed on dated 25082017 and thereafter order of sale of attached property in public auction was passed on 22022018 this objector has moved various applications which never pressed for hearing and also filed separate Miscellaneous Application no. 87/2017 which came to be withdrawn and only after sale proclamations is issued application in hand is moved by taking the matter on board.”

24. Moreover, while holding that the respondent No.2, the father of the petitioner, had right to dispose of all the family properties for discharge of his antecedent personal debts and further holding that the petitioner has, thus, no right in the properties in dispute, no findings are recorded by the learned Executing Court as regards fulfillment of the condition that the family property was alienated for any illegal or immoral purposes, which is required to be noted as per the findings recorded by the learned Executing Court itself in the impugned order.

25. If it is considered that order is under Rule 58 (4) Order XXI of the CPC, no detailed inquiry has been made by the Executing

Court and if it is held that it is under Rule 58(1) Order XXI of the CPC, the findings determining the rights of the petitioner would come her way in filing a separate suit.

26. In the circumstances, I am of the opinion that the matter needs to be remanded back to the learned Executing Court for the above referred reasons, to decide the applications Exhs.40 and 41 afresh, after hearing both the parties. Accordingly, I pass the following order:

- (i) The writ petition is **partly allowed**.
- (ii) The order below Exhs.40 and 41 dated 18.04.2018 passed by 2nd Jt. Civil Judge Senior Division, Akola in Spl. Darkhast No.23 of 2017, is hereby quashed and set aside.
- (iii) The matter is remanded back to learned Executing Court, Akola to decide the applications Exhs.40 and 41 afresh, by keeping the observations made in this order.

Rule accordingly. No costs.

[ANIL S. KILOR, J.]