



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR
SECOND APPEAL NO.412 OF 2022

1. Savita W/o Shankarrao Kothare
Aged about 57 years, Occ: Housewife,
2. Shankarrao S/o Haribhau Kothare
(dead) Original Judgment Debtor
3. Dhanashree Amol Barhate
Aged about 35 years, Occ: Household
(L.R. of Shri Shankarrao Kothare)
4. Shri Sumedh S/o Shankarrao Kothare,
Aged about 26 years, Occ: Mentally Retarded,
(LR of Shri Shankarrao Kothare, represented
through his mother Smt. Savita Shankarrao Kothare)
5. Rupali W/o Pradeep Dahiwade,
Aged about 33 years, Occ: Employed,
(LR of Shri Shankarrao Kothare)

All R/o Plot No.57, Dambhare Layout,
In front of NIT Garden Trimurti Nagar, Nagpur
Dist. Nagpur.

...APPELLANTS
(Orig. Objectors)
On R.A.

...V E R S U S...

1. Dr. Mrs. Sulbha W/o Prakash
Meshram, Aged about 48 years,
Occ: Medical Practitioner,
Original Plaintiff.
2. Dr. Prakash S/o Dashrath Meshram
Aged about 53 years, Occ: Medical Practitioner

Respondent Nos.1&2 R/o 267,
Loksewa Nagar, Jaitala,
Khamla Road, Bhamti, Nagpur.

...RESPONDENTS
(Orig. Decree holders)
On R.A.

Shri Shakil Deshmukh, Advocate for Appellants.
Shri P.S. Sadavarte, Advocate for respondents.

CORAM :- M.W. CHANDWANI, J.
DATE :- 20/03/2025

ORAL JUDGMENT:

1. By order dated 18.11.2022, the following substantial questions of law were framed :

“(i) Whether it was proper on the part of the executing court to not to frame any issue on the objection filed by the present appellants? Whether the First Appellate Court was right in not reversing the impugned order dated 08/03/2018 below Exh.8 on the ground that issues were not framed?

(ii) Whether the executing court had gone in to the merits of the case when in Paragraph No.8 of the impugned order it specifically stated that the submission made in the application/ objection needs to be taken into consideration? And whether it was proper on the part of the First Appellate Court, to hold that the First appeal was not maintainable in such facts and circumstances?

(iii) Whether the finding of the first appellate Court that the appeal is not maintainable in the present case is legal and proper?”

2. With the consent of parties, the matter is taken up for final hearing at the admission stage. It is not necessary to go into the matrix of the case in detail, it will suffice to say that the money decree against deceased Shankarrao Kothare, the original

defendant no.1 and other 10 defendants was passed, directing them to pay the amount of Rs.8,75,000/- alongwith interest @18% per annum from 01.01.2004 till realization of the amount. The execution proceedings bearing Special Darkhast Not.6/2015 came to be filed. The appellant-wife of deceased Shankarrao Kothare (original defendant no.1) filed an application (Exh.8) on 26.11.2015 in execution proceedings before the executing Court stating therein that NMC House No.2001/57 on Plot No.57, Ward No.74, in the Layout of M/s. Magaswargiy Rail Karmachari Gruh Nirman Swanstha of Mouza Parsodi, Nagpur as well as movable property kept in the said house belongs to her and thereofre, it should not be attached in the decree against her huband. Pending the said objection, original defendant no.1– Shankarrao died on 13.06.2016. His legal representatives were brought on record including the present appellants.

3. The learned executing Court by order dated 08.03.2018 passed below Exh.8, rejecting the said application, allowed the application for attachment below Exh.17 and thereby attached the property subject to filing of the details of immovable property owned by the judgment debtor. It is to be mentioned here that on 24.04.2018 respondents filed another application (Exh.28) for

attachment of the very same property which was mentioned in the objection of the appellants (Exh.8) which came to be allowed on very same day.

4. An unsuccessful attempt has been made before the learned District Judge. Feeling aggrieved with the dismissal of objection and allowing the application below Exh.17, the present appeal came to be filed.

5. Mr. Deshmukh, learned counsel for the appellants vehemently submitted that the trial Court as well as the appellate Court misconstrued Order XXI Rule 58 of the Code of Civil Procedure (for short "**CPC**"). According to him, the learned trial Court ought to have treated this objection as regular civil appeal, ought to have framed issues and liberty to adduce evidence ought to have been granted to the appellants but this aspect has not been considered by the executing Court as well as the appellate Court. Rather, the appellate Court concluded that a first appeal is not maintainable against rejection of objection. The sum and substance of the argument of the learned counsel for the appellants is that, if the objection has not been entertained on the premise of proviso to sub-rule (1) of Rule 58 of Order XXI of the CPC then the remedy is filing of a separate suit and if the

objection is not covered by the proviso clause then it is mandatory for the executing Court to give a chance to the parties to the suit to lead evidence, if any. According to him, the objection as well as the appeal has been dismissed on the wrong premise and hence, they are required to be set aside.

6. *Per contra*, Mr. Sadavarte, learned counsel appearing for the respondents vehemently submitted that the objection below Exh.8 was filed before the executing Court even before the death of original defendant no.1-Shankarrao. Therefore, the executing Court as well as the first appellate Court has rightly dismissed the application as being premature. According to him, there is no merit in the appeal and the executing Court as well as the first appellate Court has rightly dismissed the objection on the ground that inspite of giving opportunity, the appellant failed to adduce the evidence and failed to prove that the property exclusively belongs to her. Therefore, he seeks dismissal of the appeal.

7. Having heard the learned counsel for the respective parties, having gone through the orders impugned dated 08.03.2018 and the material available on record, it transpires that by filing application/objection the appellant contended that the house property mentioned in the objection exclusively belongs to

her and therefore, it should not be attached. It is to be noted here that, at the time of filing of objection original defendant no.1- Shankar was alive and after his death, the appellants were added as the legal representatives of deceased Shankarrao. Thus, it appears that the entire case revolves around Order XXI Rule 58; therefore, it is necessary to reproduce the same as under:

“ORDER XXI

EXECUTION OF DECREES AND ORDER

Payment under decree

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 designed 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) all 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, 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.*
- (5) Where a claim or an objection is preferred and the Court, under 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.”*

8. The rule contains detailed enquiry into questions including a question related to right, title or property attached except in cases where the objection is made after the property attached has already been sold or if the Court considers that the claim or objection was resiliently or unnecessarily delayed. Thus, the rule mandates that the Court has to enquire the claim mentioned in the objection and determine such question in wake of the embargo of filing of separate suit for determination of such question.

9. This takes me to the orders impugned. The executing Court has dismissed the application/objection on the premise that no evidence was adduced by the objector in respect of having

sufficient opportunity available to support the same coupled with the reason that immovable or movable property of the appellant is yet to be attached. The executing Court further opined that the objection raised is frivolous, filed only for wasting time and delaying the proceedings. The first appellate Court while dismissing the appeal concurred with findings of the executing Court and also added that the appeal is not maintainable since the objection has been dismissed under Order XXI Rule 58(1)(b).

10. Considering the scheme of adjudication of the claim and the objection provided under Order XXI Rule 58, it appears that all objections made to the attachment of property in execution of a decree are to be adjudicated by the executing Court in the manner prescribed in the Order XXI Rule 58(2) and (3); whereas, sub-rule (4) of Rule 58 provides that adjudication made by the executing Court shall have the same force and shall be subjected to the same condition as the appeal or otherwise as if it were a decree. However, if the objection is not entertained for the reasons mentioned in provisions (a) and (b) to sub-rule (1) of Rule 58 then an appeal is not be allowed against the said rejection and the objector may file a separate suit.

11. Considering the observations made in the orders impugned by the trial Court as well as the first appellate Court, it is necessary to decide here whether the application/objection has been dealt with under proviso to sub-rule (1) or has been adjudicated under sub-rule (2) of Rule 58. In order to ascertain this fact, it is necessary to see the procedure which is required to be followed while adjudicating an objection under sub-rule (2). Determination of objection under sub-rule (2) necessarily implies and casts a mandatory duty upon the executing Court to allow parties to lead evidence in support of the claim raising objections and pass an appropriate order (See: *Pohlo Ram Sharma and others Vs. Narinder Singh Randhwa and others*¹, *M. Ramchandra Rao Vs. Kuricheti Ravi Vs. Kuricheti Ravi*² and another and *Mukesh Kumar Sanghavi Vs. Saifuddin Qurban Hussain Bohra* ³)

12. Considering the reasons mentioned by the executing Court, it does not appear to me that the objection has been dismissed under proviso (a) or (b) of Rule 58 of Order XXI. Therefore, the finding of the first appellate Court that the appeal is not maintainable does not sustain.

1 2007 SCC OnLine P&H 929

2 1999 (1) A.P.L.J. 397 (HC)

3 2009 (2) M.P.L.J. 475

13. Now let's see whether the Court proceeded to hold enquiry and inspite of that the appellants failed to adduce any evidence.

14. The learned counsel for the respondents submitted that since the application/objection was premature there was no need for the Court to determine the objection under the provisions of Order XXI Rule 58(2). Thus, both parties are *ad idem* that no adjudication was done by the executing Court. No doubt, as per Order XXI Rule 58, the objector may object to the attachment of the property. Since, on the date of filing the objection i.e. 26.11.2015 the property of the appellants was not attached; rather, original defendant no.1-Shankarrao was alive on that date, therefore, there was no need to attach the property of the appellant i.e. the wife of one of the judgment-debtors. That apart, the application (Exh.17) came to be allowed for attaching the property of the appellants with a direction to provide the details of the movable and immovable property of judgment-debtor including the appellants on 08.03.2018. Thus, even after the order below Exh.17 was passed, the house property was not attached. It transpires that after the death of the husband of the appellant on 13.08.2018 another application (Exh.28) came to be filed by the

respondents on 24.04.2018 for attaching house property of the appellant as legal representative of her husband which came to be adjudicated upon by the order dated 24.04.2018.

15. Thus, it is more than clear that the objection of the appellants has not been dismissed under any of the proviso to sub-rule (1) of Rule 58 of Order XXI and therefore, the objection cannot be tried by filing of a separate suit. The executing Court and first appellate Court opined that the objection raised by the appellant is premature. Thus, admittedly the objection has not been adjudicated on merit.

16. No doubt, on the date of filing objection the application for attachment was not filed but the fact remains that pending objection, the claim for attachment was made by the respondent. As soon as the claim for attachment of property is made, the objection to such claim can be filed under sub-rule (1) of Rule 58 of Order XXI of CPC. Therefore, the findings of both the Courts below that the objection is premature are incorrect. Needless to mention that, if the objection is not dismissed under proviso to sub-rule (1) of Rule 58, the executing Court is duty bound to proceed and adjudicate the objection under sub-rule (2) of Rule 58 of Order XXI of the CPC which has not been done in the case at

hand. Therefore, the substantial questions of law framed are answered accordingly. The executing Court and the appellate Court have erroneously dismissed the objection of the appellants. Therefore, the orders impugned are required to be set aside. Hence, the following order is passed:

(i) The appeal is allowed.

(ii) The impugned judgment, order and dated 31.10.2022 passed by the District Judge-8, Nagpur in Regular Civil Appeal No.173/2022 and order dated 08.03.2018 passed below Exh.8 and order dated 08.03.2018 passed below Exh.17 by the 7th Joint Civil Judge, Senior Division, Nagpur in Special Darkhast No.6/2015 are quashed and set aside. The matter is remanded back to the executing Court for deciding the objection of the appellants in view of proviso to Rule 58 of Order XXI of the CPC.

With this, the appeal stands disposed of.

JUDGE

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