

Khem Chand Vs. Romesh Chand and ors.

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Court : Himachal Pradesh

Decided On : Oct-16-1984

Reported in : AIR1985HP37

Judge : H.S. Thakur, J.

Acts : Limitation Act, 1908 - Schedule - Article 11; ;[Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rules 58 and 63; ;[Limitation Act, 1963](#) - Schedule - Article 98

Appeal No. : Second Appeal No. 57 of 1971

Appellant : Khem Chand

Respondent : Romesh Chand and ors.

Advocate for Def. : P.N. Nag, Adv.

Advocate for Pet/Ap. : Devinder Gupta, Adv.

Disposition : Appeal allowed

Judgement :

H.S. Thakur, J.

1. The only contention which has been raised by the learned counsel for the appellant in this appeal is that the courts below have gravely erred in holding that the suit was barred by limitation.

2. A few facts relevant to decide this point may be stated. One Shri Charan Dass obtained a decree from the Court of Sub-Judge, Hoshiarpur against one Shri Sohnu. Sohnu died about six years before the filing of the suit and his widow Smt. Ralli succeeded him. Amin Chand another brother of Sohnu died about 31/2 years before the filing of the present suit. Amin Chand executed a will in favour of the plaintiff (who is the grand-nephew of Amin Chand) and got one-half share in the property in dispute. The defendants/respondents, who are the successors of Charan Dass decree-holder got the said property attached in execution of the decree. After the property was attached in execution of the said decree, objections were filed against the order of attachment, under Order 21 Rule 58 C.P.C. by Amin Chand predecessor-in-interest of the appellant. The objection petition was, however, dismissed on June 20, 1959. After the objections under Order 21, Rule 58 C.P.C. were dismissed, Amin Chand predecessor-in-interest of the appellant filed a suit on July 27, 1959 under Order 21, Rule 63 C.P.C. for declaration that he had half share in the said property. Amin Chand died during the pendency of the suit and his successor Khem Chand appellant,

withdrew the suit on July 23, 1960 with liberty to file a fresh one. The execution proceedings were, however, continuing. On May 31, 1960, the respondents, who are successors of Charan Dass decree-holders, got the execution petition consigned to the record room. On the said petition, the following order was made by the Senior Sub-Judge, Hoshiarpur on Nov. 30, 1960 :

'According to the statements of the counsel for the judgment-debtor and the decree-holder, the property described in the objection petition filed by the judgment-debtor under the provisions of Section 47 read with Section 60 C.P.C. is hereby released without deciding the objection petition on merits. They will abide by and comply their statements.

One house described as 'D' was also attached by precept. The period of precept having expired this house is released from attachment. The decree-holder can proceed against the agricultural land by another execution application and this property will stand attached. The execution is dismissed. The file be consigned. Announced.'

3. It may be pointed out that besides other properties, the property described as 'D' is only the subject matter of the dispute. After the first execution petition was dismissed, the decree-holder filed a fresh execution petition and got the property 'D' along with other properties reattached on May 25, 1962. On fresh attachment of the property 'D', the appellant/plaintiff filed a suit in the Court of Sub-Judge, Hoshiarpur which was ultimately decided by the Sub-Judge 1st Class, Una on Aug. 4, 1969. The learned trial Court, however, dismissed the suit as barred by limitation. An appeal was preferred in the Court of the learned District Judge, Kangra at Dharamsala against the decree and judgment passed by the trial Court. The same was, however, dismissed by the learned Additional District, Judge, Kangra on July 9, 1971 also holding that the suit was barred by limitation.

4. It is contended by Mr. Devinder Gupta, learned counsel for the appellant, that the courts below have erred in holding that the suit was barred by limitation. His contention is that by an order dt. 30, 1960, reproduced earlier above, the property in dispute was released from attachment and conferred a fresh cause of action on the appellant to set aside the attachment within the prescribed period of one year. It is emphasized by the learned counsel that objections under Order 21, Rule 58 C.P.C. are limited only to the question of attachment and when the property is released from attachment, there is no necessity of filing a suit under Order 21 Rule 63 of the Civil P.C. All the same, it is contended that the appellant in order to obviate the possibility of any further dispute regarding his right in the property, filed a suit for declaration that the property in dispute was owned by him. Mr. Gupta has drawn my attention to a Full Bench decision in *Habib Ullah v. Mohmood*, AIR 1934 All 267. During the course of the said judgment, Sulaiman, Chief Justice referred to the divergent views of certain High Courts and ultimately observed as under :

'In my opinion, the answer to the question referred to the Full Bench is that on the attachment having ceased to exist within the period of one year from the dismissal of the objection it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case, and that the same rule applies as between the representatives of the decree-holder and the claimant.'

It was further observed in the said judgment that:

'A Bench of this Court agreed with the view expressed in two of the earlier Bombay cases and considered that an attachment which had been objected to by the claimant having been withdrawn 'the claimant was not prevented from maintaining a suit after the expiry of one year.....'

Similar view has been taken by a Division Bench of Patna High Court in Ramchandra Singh v. Mt. Bibi Khodaijatul Kubra, AIR 1945 Pat 369. Relevant observation may be extracted from the said decision for a ready reference :

'On looking into the various decisions dealing with the question of limitation under Article 11, Limitation Act, relating to a suit under Order 21, Rule 63, Civil P.C., I find that the decision of a Division Bench of the Calcutta High Court in 40 C.W.N, 146 is the nearest to the case before us. The headnote of the case correctly summarizes the decision in that case which is to the effect that the conclusiveness of an order in a claim case contemplated by O. 21, Rule 63, Civil P.C., is conditional on the continuance of the execution proceedings and the attachment issuing therefrom, and that consequently when an order is made on an application under Order 21, Rule 58 of the Code dismissing a claim but the sale itself held in that execution proceeding is set aside and the attachment ipso facto comes to an end, a subsequent suit brought beyond one year by the claimant for a declaration of his title is not barred under Article 11, Sen. I, Lim. Act. It was held that it was immaterial that the execution proceedings came to an end within or beyond one year of the date of the order in the claim case.....'

Mr. P. N. Nag, learned counsel for the respondents, has asserted that the view taken by the courts below is fully justified and needs no interference.

5. I have heard the learned counsel for the parties at length. The facts relevant for the decision of the question of limitation have been stated earlier above. No doubt, the objections filed by the appellant were dismissed on June 20, 1959, for the default in appearance but the property in suit was released from attachment by an order dt, Nov. 30, 1960 as referred to above. The essence of Order 21, Rule 58 C.P.C, is that the property attached be released therefrom. The said property was released from attachment by an order dt. Nov. 30, 1960 and the parties were placed in the same position as they stood on the date of filing of the execution petition. Under the circumstances, it was not even necessary to file a suit for declaration of title as contemplated under Order 21, Rule 63 C.P.C. since the property stood released from attachment. The cause of action, however, again accrued to the appellant when the dispute property was re-attached in the execution of the decree. Since the subsequent attachment of the property was made in the execution of the decree on May 25, 1962 and the suit was filed on Sept. 20, 1962, it cannot be said that the suit was barred by limitation. As such, I am of the view that the courts below have erred in holding that the suit was barred by limitation.

6. For the foregoing reasons, the decree and judgment passed by the lower appellate court is set aside and the appeal is allowed with no order as to costs. The case is, however, remanded to the learned District Judge with a direction that the appeal be decided on merits. Since the matter is fairly old, the learned District Judge will finally dispose of the appeal as expeditiously as it is possible.

