

Calcutta National Bank Ltd. vs Rahmat Ali Fateh Ullah on 20 November, 1952

Equivalent citations: AIR1953ALL452, AIR 1953 ALLAHABAD 452

JUDGMENT

1. This is an appeal from the order dated 3-1-1952, passed by the learned Civil Judge of Allahabad in which the dispute is about certain aeroscraps which were attached before judgment. The material facts are as follows :

2. On 17-12-1947, the Calcutta National Bank Limited, which is the appellant before us, brought a suit for the recovery of Rs. 42,753/13/3 against one Qudratullah and his son, Rahmat Ali Fateh Ullah. The latter is the respondent before us. The bank's case was that the father and the son were carrying on business jointly and while the father borrowed the money from the bank the son was a guarantor and both of them pledged the aero-scraps which they had bought from the Defence Department. Along with the plaint, the bank filed an application for attachment before judgment. In the affidavit which was filed in support of the application it was alleged that the aeroscraps were the property of both the defendants. It was also alleged that the defendants were trying to dispose of their properties and were trying to remove them from the local limits of the jurisdiction of the court with a view to defeat or delay the execution of the decree that might be passed in the suit. An apprehension was also expressed that the defendants might leave the Indian Dominion. Learned Civil Judge ordered notice to issue and directed that attachment be made in the meanwhile. The attachment was accordingly made. On 20-3-1948, Rahmat Ali Fateh Ullah made an objection to the attachment and prayed that the attachment might be withdrawn. In the affidavit filed in support of the petition of objection, it was stated that it was absolutely wrong that he ever intended to abscond or leave the Indian Dominion or to dispose of his property in order to defeat or delay the realisation of the decree that might be passed. Further, it was alleged that he and Qudrat Ullah had separate business in oil, metal and other articles on a large scale and, in order to hamper the same, the attachment before judgment had been obtained on wrong and incorrect facts. It was stated that Qudrat Ullah had immovable property of the value of Rs. 70,000/- from which the amount of the plaintiff could be realised and he had nothing to do with the amount claimed. It WAS denied that he ever stood as a guarantor. The objection of Fateh Ullah was dismissed by the learned Civil Judge on 10-12-1948. An appeal was filed against that order in this Court and that was also dismissed on 17-1-1949. No suit for a declaration of the title of Rahmat Ali Fateh Ullah in respect of the aeroscraps has been filed by him as contemplated by Order 21, Rule 63, Civil P. C. On 9-4-1949, learned Civil Judge decreed the suit as against Qudrat Ullah only, but dismissed it as against Raomat Ali Fateh Ullah on the finding that he never stood as a guarantor for the advance of the loan to Qudrat Ullah. A first appeal against that decree (First Appeal No. 171 of 1949) has been filed by the bank and is pending in this Court. On 9-5-1949, the bank applied for the execution of the decree by the sale of the attached aeroscraps. On 18-8-1949, Rahmat Ali made an application that as the suit had been dismissed against him and the aeroscraps were his property they might be delivered to him. On 14-2-1950, Rahmat Ali filed an objection under Section 47, Civil P. C., contending that the

aeroscraps being his property and the suit having been dismissed against him they could not be sold in execution of the decree against his father, Qudrat Ullah. By the order, dated 3-1-1952, learned Civil Judge held that the aeroscraps in dispute were the property of Rahmat Ali Fateh Ullah and as the suit against him had been dismissed he was entitled to get them back and they were not liable to be sold in execution of the decree against Qudrat Ullah. He directed accordingly. This order purports to dispose of both the application, dated 18-8-1949, and the objection under S, 47 dated 14-2-1950. This appeal has been filed by the bank against that order.

3. Sri Ambika Prasad, learned counsel for the appellant, contends firstly that as no suit for a declaration of title was brought by Rahmat Ali as contemplated by Order 21, Rule 63, Civil P. C. within a period of one year as prescribed by Article 11 of the First Schedule to the Limitation Act, 1908, that order has become conclusive now and it was not open to the learned Civil Judge to determine that the aeroscraps were the property of Rahmat Ali Fateh Ullah.

4. The first question is whether the provisions of Rule 63, Order 21, apply also to attachment before judgment. Rule 8 of Order 38, Civil P. C., provides:

"Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money."

5. In the Full Bench case of -- 'Mallikharjuna Prasada Naidu v. Virayya', AIR 1918 Mad 26 (FB) (A) it was held that Order 21, Rule 63, Civil P. C., applies also to orders on claims preferred to property attached before judgment In -- 'Bisheshar Das v. Ambika Pershad', AIR 1915 All 275 at p, 276 (B) it was held that the effect of Order 38, Rule 8 was to incorporate the provisions of Order 21, and amongst them, the provisions of Rule 63. We are bound by this decision and must hold accordingly.

6. There is, however, one difference between an objection under Rule 58 of Order 21 and that under Rule 8 of Order 38. An objection under Rule 58 can be made only by a person who is not a party to the decree. This is clear from the very language of the rule. On the other hand, the objection under Rule 8 of Order 38 can be made even by a person who is a party to the suit. In -- 'Hafiz Ahmad Ali Khan v. Anand Sanap', AIR 1937 All 635 (C), it was held:

"There is nothing in Rule 8. Order 38 to indicate that the Legislature intended to confine the operation of that rule only to claims preferred by persons who are not parties to the suit. Any objection raised by a defendant to attachment before judgment may also be investigated and decided by the Court in accordance with the provisions of Rule 8, Order 38, Civil P. C. The decision of the Court as regards the claim preferred to property attached before judgment is however not final and can be assailed by means of a separate suit instituted within the period of limitation. The decision of a claim in accordance with Rule 8 cannot be treated as a decision under Section 47, Civil P. C., for the simple reason that Section 47 comes into play only when there is an application for execution pending before the Court."

7. Learned Civil Judge has distinguished AIR 1937 All 625 (C) on the ground that in the order by which Rahmat Ali's objection was dismissed, the points raised by him that he was not a guarantor and his property was not liable to be attached were not considered, and all what the Court then considered was as to whether or not a 'prima facie' case had been made out for attachment before judgment. He reproduced the following portion from that order :

"It was further suggested that the mention of the movables in the agreement was probably an interpolation by the Bank. The latter part of the contention is however one which cannot be considered at that stage. The agreement on the file makes out a 'prima facie' case for the plaintiff and that is all what can be said with regard to it at this stage."

He further pointed out that the bank's case was that Rahmat Ali was a guarantor and if this was ultimately accepted then the aerocraps even if they belonged to him exclusively, could be sold in execution of the decree, but as the suit was dismissed as against him he saw no reason why the articles belonging to him should not be returned to him. It will be noted, however, that the bank's case was that the aerocraps belonged both to the father and the son whereas Rahmat Ali's case was that they belonged to him exclusively. This point was not determined by the learned Civil Judge when disposing of the objection under Order 38, Rule 8, Civil P. C. If a point is not determined in an objection under Rule 8 it must be deemed to have been decided against the objector and the provisions of Rule 63 are attracted. Reference may here be made to the Full Bench case of -- Venkatarathnam v. Ranganayakamma', AIR 1919 Mad 738 (FB) (D), in which it was held that an order refusing to investigate a claim, to attached property on the ground that there was delay in filing it is an order passed "against" the claimant within Order 21, Rule 63, Civil P. C., and Article 11, Limitation Act. A similar view was taken in -- 'Ambika Prasad v. Messrs. Soorajmull Nagarmull Firm', AIR 1939 Cal 620 (E). It was held:

"In order to bring a case within the purview of Order 21, Rule 63, Civil P. C., the question as to whether the claim was investigated or not is immaterial and if an adverse order is made against the plaintiff in the claim proceeding he is bound to institute a suit under Order 21, Rule 63, Civil P. C., failing which the order becomes conclusive and final."

In the above case reliance was placed upon the earlier cases of the Calcutta High Court.

8. In -- 'Cannanore Bank Ltd. v. Pattarkandy Aryanveettil Madhavi', AIR 1942 Mad 41 (F), a Full Bench of the Madras High Court held that Order 21, Rule 63 applies to all orders which are against claims preferred under Rule 58. The test to see whether an order is under Rule 63 is whether the order is against the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. Where a petition of objection is dismissed only with the remark that it was not pressed it was held to be an order "against" the objector and required him to file a suit within a year from the date of the order if he wished to re-open the matter.

9. In this Court also, it was held that an order refusing to entertain an objection to the attachment of property in execution of a decree upon the ground that it was too late fell within the purview of Order 21, Rule 63, Civil P. C., and the suit to recover possession of the attached property after the objection had been disallowed must be filed within a year from the date of such order vide -- 'Gobardhan Das v. Makundi Lal', AIR 1923 All 435 (G). See also -- 'Debi Das v. Rup Chand', AIR 1927 All 593 (H) and -- 'Damodar Das v. Pearey Lal', 1930 All LJ 1322 (I).

10. A Full Bench of the Avadh Chief Court also took the same view in -- 'Ran Bahadur Singh v. Salig Ram', AIR 1931 Oudh 1 (FB) (J). It was held that an order passed by the executing Court on an objection filed under Order 21, Rule 58, which was not pressed subsequently and was therefore dismissed was an order covered by Order 21, Rule 63.

11. The position in the present case thus is that Rahmat Ali made an objection under Order 38, Rule 8, C. P. C. claiming the aerocraps to be his exclusive property and not liable to attachment. The trial court did not determine the question of his title or of his liability, but dismissed the objection on the ground that there were good reasons for the attachment to continue. This attachment did not cease 'ipso facto' under Order 38, Rule 9, Civil P. C., on the dismissal of the suit against Rahmat Ali because it had not been determined previously that the aerocraps belonged to him only. The bank's case was that the aerocraps belonged to both the defendants. It is only by the order under appeal that the title of Rahmat Ali in respect of the scraps has been determined. Never before was it so determined. The non-determination of Rahmat Ali's title in respect of the scraps and the dismissal of his objection on 10-12-1948, must, in view of the authorities referred to above, be treated as an order passed "against" him under Rule 63 of Order 21, a rule which applies also to orders passed on objections filed under Rule 8, Order 38. No suit having been brought by Rahmat Ali for a declaration of his title in respect of these scraps within the statutory period of one year, it is not open to him now to go behind the order by which his objection under Rule 8, Order 38, was dismissed and claim the aerocraps as his property.

12. Learned counsel for the respondent contends that the observations in AIR 1937 All 635 (C) are obiter dicta. We have carefully gone through the judgment and are of the opinion that they are not obiter dicta. The contention on behalf of the appellant that Rahmat Ali cannot now ask the Court for the adjudication of his title in respect of aerocraps must prevail and, on this ground the appeal must be allowed.

13. On the question of fact whether or not the aerocraps belong to Rahmat Ali alone, the sale account, dated 30-1-1947, Ex. A and the delivery orders, Exs. B and C coupled with the evidence of P. K. Sinha, Supervisor in the Ordnance Depot and Toorani Khan, a clerk in the Ordnance Depot, prima facie go to show that the aerocraps were purchased by Rahmat Ali only. But it must be remembered that the matter is one between the father and the son. It is also to be noted that Rahmat Ali did not produce any account-books to show that he and his father had separate business. The aerocraps were bought by him for about Rs. 74,000/-. He admits that he had only Rs. 25,000/-. He adds that he got the balance from his mother and maternal uncle. The mother and the maternal uncle were not produced. He admits further that he did not execute any deed in favour of his maternal uncle. It may be that the aerocraps might have been purchased jointly by the father

and the son but as the son alone went at the auction to make the bids so the sale account and the consignment note were made by the Defence Department in his name only". It is, however, not necessary to record any definite finding on this point as it has been held above that Rahmat Ali is barred from raising the plea of his title in respect of the aerocraps.

14. The appeal succeeds and it is hereby allowed with costs of both the courts. The order of the lower court dated 3-1-1952, is set aside. The aerocraps shall not be delivered to Rahmat Ali Fateh Ullah. They will be sold in execution of the decree. The execution record will now be returned to the lower court to proceed with the execution in the light of the order passed in this appeal.