Mt. Aziz Jahan Begam vs Sardar Singh And Ors. And Sabir Husain on 14 September, 1954

Equivalent citations: AIR1955ALL241, AIR 1955 ALLAHABAD 241

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This is a second appeal filed on behalf of the defendant. The plaintiff-respondent had obtained a money decree against one Sabir Husain. After the passing of the decree, and probably after the application for execution had been filed, on 23-3-1932, Sabir Husain transferred the property now in dispute in the name of his wife, the appellant, for payment of her dower debt. On 8-3-1932, the property was attached by the decree-holder. On 9-4-1932, the appellant filed an objection, under Order 21, Rule 58, Civil P. C. She claimed that her husband had sold the property to her in lieu of her dower debt, that she was the owner in possession of the property and that her husband had no interest in the property which could be attached or sold, in execution of the money-decree. This objection was however, rejected on 12-4-1932, and the learned Munsif passed the following order :

> "This is an objection by Mst. Aziz Jahan Begum under Order 21, Rule 58, Civil P. C. The attachment was made on 8-3-1932. The present objection was lodged on 9-4-1932. It has been unnecessarily and designedly delayed. It is summarily rejected."

After the rejection of the objection under Order 21, Rule 58 the decree-holder proceeded with the execution of the decree and on certain dates in the year 1933 the property "was sold in two lots. The decree-holder purchased the property and oh 22-11-1933, he was delivered formal possession. On 23-2-1944, the decree-holder auction purchaser filed the suit, out of which this appeal has arisen, for possession of the property and for mesne profits. The suit was resisted on several grounds and five issues were framed by the trial court which were as follows :

> "1. Whether this court had no jurisdiction to attach the property in suit?
>
> 2. Whether the defence is, barred under Order 21, Rule 63, C. P. C.?
>
> 3. Whether defendant 1 was in possession of the properties in suit from before the execution of the sale in lieu of dowers? If so its effect?

4. To what mesne profits, if any, are the plaintiffs entitled?

5. To what relief, if any, are the plaintiffs entitled?

The first issue was decided in plaintiff's favour and the court also decided issues Nos. 4 and 5.

The issue No. 3 was, however, left undecided as on issue No. 2 the court came to the conclusion that the defence was barred by the provisions of Order 21, Rule 63, Civil P. C.

2. The defendant filed an appeal and the lower appellate court agreed with the decision of the trial court and dismissed the appeal.

3. When the case came up for hearing before a learned single Judge he referred it to a Division Bench and, by reason of certain observations in a Division Bench ruling of this Court in --Kanhaiya Lal v. Banke Behari', AIR 1938 All 542 (A), the case was referred to a Full Bench for decision.

4. The points raised by learned counsel for the appellant are, firstly, that the order rejecting the application on the ground that the objection was designedly or unnecessarily delayed was not an order contemplated by Order 21, Rule 63, C. P. C., and, therefore, it is not conclusive; and, secondly, that even if it be deemed to be conclusive, it only determines the question of possession of the judgment-debtor on the date of the attachment and it does not debar the defendant from pleading her title on the basis of the sale deed.

5. As regards the first point learned counsel has not been able to cite before us a single decision in his favour and has only relied on the observations in Kanhaiya Lal's case (A), mentioned above. The answer to the first point raised by learned counsel will depend upon the interpretation of Order 21, Rule 63 of the Code. Provisions of Order 21, Rules 58 to 63 and analogous provisions in the previous Acts were introduced with the object of expeditious decision of disputed claims made against attachment and sale of immovable property so that execution proceedings should not be long delayed. In -- 'Sardhari Lal v. Ambika Pershad', 15 Ind App 123 (PC) (B), their Lordships of the Judicial Committee, pointed out that :

> "The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion oh such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him."

In the Civil Procedure Code of 1859 (Act 8 of 1859) there were two sections dealing, with objections to attachment of property and investigation of the claim of the objector. In 8. 247 there was a provision that no such investigation shall be made if it appeared that, the making of the claim or

objection was designedly and unnecessarily delayed, with a view to obstruct the ends of justice. Section 246 provided that : "In the event of any claim being preferred to or objection offered against, the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding Section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the- suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220." It is not necessary to quote the rest of the Section but at the end of the section there was a provision that :

> "The order which may be passed by the Court under 'this section' shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

Finality therefore attached to an order under Section 246 and not to an order under Section 247 which gave the court power to summarily dismiss an objection on the ground that it was designedly or unnecessarily delayed with a view to obstruct the ends of justice. Section 243 provided that an order disallowing the objection was not subject to appeal but the claimant was left the right to establish his claim by a regular suit within a period of one year from the date of the order under Section 248. If an objection was, however, summarily rejected under Section 247 it was open to the objector to file a suit within the ordinary period of limitation and not within the restricted period of one year.

8. In the Act of 1877 (10 of 1877) these provisions were re-drafted. Sections that" are relevant for our purposes are Sections 273 to 283. Section 278 is more or less analogous to our Order 21, Rule 58 and it was in this section that a provision was made that no investigation shall be made where the Court considered that the claim or objection was designedly or unnecessarily delayed. Section 283, which is analogous to Order 21, Rule 63, provided that :

> "The party against whom an order under Section 280, 281 or 232 is passed 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, the order shall be conclusive."

This section having confined the collusiveness to an order under Sections 280, 281 and 282 a summary dismissal under Section 278 was not covered by this section.

7. It is not necessary to refer to the provisions of Act 14 of 1882, which more, or less, reproduced the sections of the earlier Act relating to this matter. The relevant sections of the Code of 1882 are Sections 278 to 283. What is noticeable, how--ever, is that up to the year 1908 when the present Code was enacted finality was attached to orders under Sections 280, 281 and 282 and not to an order summarily dismissing an objection, under Section 278. In the Code of 1908 the language of Order 21, Rule 63, which replaced Section 283 of the old Code, was materially altered and it is now as follows :

> "Where a claim or an objection is preferred, the party against whom an 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, the order shall be conclusive."

Rule 63 does not confine the collusiveness to an order under Rule 60, 61 or 62 of Order 21, but it says that when an objection is made the party against whom an order is made shall be precluded from setting up a claim to the property unless he had filed a suit to establish the right which he had claimed. In the Act of 1859 the period of limitation was prescribed in the Code itself and that was of one year, but now the period of one year's limitation for a suit under Order 21, Rule 63 is prescribed under Article 11, Limitation Act of 1908.

8. Coming now to the care before us, there can be no doubt that an objection was preferred to the attachment of the property by the appellant and that objection was dismissed. There seems to be no reason for excluding an order under Rule 58 summarily dismissing an application from the scope of the words "the party against whom an order is made". There can be no doubt that the order was against the party who had preferred the objection. When the Legislature amended the language of Order 21, Rule 63 and omitted the words in the previous Acts which confined the collusiveness to an order after investigation it must be assumed that it was done with the deliberate object of widening its scope.

This view has been taken by every -High Court in India and learned counsel has not cited a single case in his favour except certain observations which amount to 'obiter' in a Division Bench ruling of this Court in AIR 1938 All 542 (A). The judgment was delivered by Bennet, Acting Chief Justice. The decision went in favour of the defendant-appellant so that the suit filed by the plaintiffs was dismissed. 'Though there were no materials on the record to show that there were any objections filed under Order 21, Rule 58 and the case had been fought out on the ground that the objector was a party to the decree and the objection was under Section 47, Civil P. C., and the order was therefore, binding on the parties, the learned Judges expressed an opinion that even if the objection was under Order 21 Rule 58, the order could not be deemed to be an order under Rule 62 to which finality could attach under Rule 63. With great respect to the learned Judges the reasoning does not appear to me to be at. all clear, nor is it possible to ascertain what exactly they intended to lay down.

No reference was, however, made to a previous decision -- '(Durga Das v. Gori Mal)', AIR 1928 All 327 (C), by Mr. Justice Bennot himself who delivered the judgment of the Bench. In 'Durga Das' case (C)', Mr. Justice Bennot sitting with Mr. Justice King had held, that if an objection" to an attachment was dismissed under the proviso to Rule 58 of Order 21, on the ground that the objection was intentionally or unnecessarily delayed a suit to contest that order must be filed within a year. The same view was taken by a Bench of this Court in -- 'Gobardhan Das v. Makundi Lal', AIR 1923 All 435 (D) which is the earliest case on the point that, had been cited by learned counsel. The facts of that case were exact-ly similar to the facts of the case before us. An objection was filed to the attachment of the property. That objection was dismissed on the ground that it was filed too late. This was interpreted as an order under the proviso to Rule 58 of Order 21 and the learned Judges referred to the change in the language. Order 21, Rule 63 of the Code of 1908 does not lay down that an order under Rule 60, 61 or 62 will only be conclusive, while Section 283 of the Code of 1832 had

provided that orders under Sections 280, 281 and 282 (which corresponded with Rules 60, 61 and 62 of the new Code) will, be conclusive if no suit was brought within one year. The change in the language has clearly had the effect of widening the scope of Rule 63.

Learned Judges followed a decision of a Full Bench of the Madras High Court in -- 'Venkataratnam v. Ranganayakamma', AIR 1919 Mad 738 (FB) (E). There are decisions of the Calcutta, Bombay, Rangoon, Patna and Lahore High Courts all against the appellant. It is not necessary to refer to them. The consensus of opinion is in favour of the respondents and against the appellant. And I must, therefore, hold that an order summarily rejecting an objection under Order 21, Rule 58 on the ground that it ha4 been designedly or unnecessarily delayed is an order contemplated under Order 21, Rule 63.

9. Taking up the next question learned counsel has drawn our attention to the provisions of Rules 60, 61 and 62 of Order 21 and has urged that all these rules indicate that the Court has to investigate not the question of title but the question of possession and if the executing court finds that the objector is in possession of the property, even though he may have no right to it and may be a rank trespasser, the objection must be allowed. Learned counsel has, therefore, urged that finality should attach only to the question of possession and not to the question of title.

10. As I have already said the provisions of Order 21 Rules 58 to 63 entitled the executing court to make a summary enquiry so that the execution proceedings may not be unnecessarily delayed it being left to the parties concerned to have their rights determined by way of a regular suit, the only difference being that if an objection was filed under Rule 58 then the period of limitation was cut down to one year. The executing court was not expected to go into an elaborate discussion as regards title, especially as no finality attached to the order beyond what is contained in Order 21 Rule 63 and it was left to the parties within the short period of limitation to have the matter re-agitated before a proper court. The language of the various provisions of the Code, however, do not indicate that the investigation made by the executing court is necessarily confined merely to the question of possession.

If a property is sought to be attached and a person claims to be in possession of it under a 'bona fide' claim of title, the court has to be satisfied that he has such a 'bona fide' claim. If the court decides in favour of the objector, the decree-holder or the judgment-debtor will have to file a suit under Order 21, Rule 63 to establish his claim that the judgment-debtor has a saleable interest in the property. In my opinion, learned counsel has gone too far in his submissions that even if the court found that the objector had no bona fide claim, to the property merely on the basis of his wrongful possession the court would decide in his favour. The language of Order 21, Rule 59 read with the subsequent rules indicates that both the question of interest claimed as also the question of possession of the property can be raised and can be investigated by the executing court.

Rule 59 provides that:

> "The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached."

11. The claim or objection to be investigated under Rule 60 is set out in Rule 58 as follows : "……any property attached in execution of a decree….. .is not liable to such attachment…."

and the property will not be liable to attachment if the judgment-debtor has ho saleable interest in it. What property is liable to attachment is mentioned in Section 60 of the Code and that section does not provide that property in which a judgment-debtor has a saleable interest cannot be attached or sold merely because the judgment-debtor is not in possession or because a trespasser is in wrongful possession of the property. Whether a judgment-debtor is or is not in possession of the property, if he has a saleable interest therein, such interest can be sold. Proceedings under Rules 60, 61 and 62 being more or less of a summary nature, they deal mainly with possession but a claim of an objector on the basis of possession can be allowed only if he is in possession under a 'bona fide' claim of title. If the objector is in possession of the property, 'prima facie' it would be assumed that he has a right to such possession but if it is established that the objector is not in possession under a 'bona fide' claim of title and the judgment-debtor has a saleable interest in the property then there appears to be no good reason why that saleable interest should not be attached and sold.

I am inclined, therefore, to agree with the decision of a Bench of the Patna High Court in --'Premsukh Das v. Satyanarain Singh', AIR 1945 Pat 485 (F), and the observations made by Rankin C. J. in -- 'Najimunnessa Bibi v. Nacharaddin Sardar1, AIR 1924 Cal 744 (E), that it was impossible to separate altogether the question of possession and of title. The argument of learned counsel therefore that under Rule 63 the decision must be confined to the question who was in possession on the date of the objection and the order is conclusive only to this extent that if no suit is brought within one year the party against whom the order was made cannot claim that he was in possession of the property but the question of title is not affected at all, does not appeal to me.

12. In execution of a decree when a decree-holder seeks to attach the property on the ground that his judgment-debtor has a saleable interest in it the person objecting to the attachment cannot merely claim to be in possession of the property; he has to assert if he wants to save the property that the judgment-debtor has no saleable interest in the property and though the proceedings under Order 21, Rules 58 to 63 being summary proceedings the court may not enter into an elaborate enquiry into the question of title the court will have to be 'prima facie' satisfied that the person objecting to the attachment and sale was in possession under a 'bona fide' claim.

13. Whether the court has dismissed the objection summarily, or on the ground that the objector was not in possession, or on the ground that the objector had no title to the property will have no effect on the finality of the order. Order 21, Rule 63 provides that on a dismissal of a claim or an objection the person against whom the order is made has a right to institute a suit to establish his claim to the property and subject to the result of such suit, if any, the order shall be conclusive. If the order is against the objector and he has to file a suit under Order 21, Rule 63 he can only succeed in defeating the claim of the decree-holder to proceed against the property and have it sold in satisfaction of his decree by proving his own title to the property and by establishing that the judgment-debtor had no saleable interest in it.

The mere proof that the plaintiff was in possession on the date of the attachment, even though, he was in possession as a rank trespasser, would not avail in defeating the claim of the decree-holder to attach and sell up the right, title and interest of the judgment-debtor if the judgment-debtor had a saleable interest in the property. The words therefore 'subject to the result of such suit, if any, the order shall be conclusive' must mean that if a suit was not filed then the relief which the objector could have obtained in a suit under Order 21, Rule 63 to defeat the decree-holder's claim would no longer be available to him.

14. A point was raised, though not developed by learned counsel that though the appellant may have no right to file a suit because of the provisions of Order 21, Rule 63 he can raise that point by way of defence. This matter, however, is concluded by a larger Pull Bench of this Court in --'Badri Prasad v. Muhammad Yusuf, 1 All 381 (FB) (H). In that case the auction-purchaser, having purchased the property and having failed to get actual delivery of possession from the executing court, filed a suit for possession and the objector, whose objection had been dismissed but who had not filed a suit, pleaded in defence that he was the owner of the property and the plaintiff had no right to get possession, it was held that such a plea was barred by the provisions of Section 283 of the Code.

15. There is no force in this appeal and it is dismissed with costs.

Agarwala, J.

16. This is a defendant's second appeal and arises out of an action brought by the plaintiff-respondent for possession over certain property and for mesne profits. The facts are simple. The plaintiff-respondent had ' a money decree against one Sabir Hussain. Sabir Hussain owned the property in dispute and transferred it to his wife, the defendant-appellant by means of a sale deed dated 23-2-1932. On "8-3-1932, the plaintiff-respondent got this property attached in execution of his decree on the assumption that this was Sabir Husain's property. On 9-4-1932 the defendant-appellant filed an objection under Order 21, Rule 58, Civil P. C., claiming that her husband had sold the property to her in lieu of her dower debt and had put her in possession of the same and that her husband had no subsisting interest in the property which could be attached or sold in execution of the money decree. The execution court refused to go into the merits of her claim on the ground that the objection was "unnecessarily and designedly delayed". On this ground the objection was "summarily rejected".

No investigation having been made by the execution court into the merits of the objection, the defendant-appellant did not pursue the matter any further. The decree-holder proceeded with the execution proceedings and in the year 1933 the property was sold in two lots, the decree-holder himself being the purchaser. Formal delivery of possession was made to him on 22-11-1933. He does not appear to have done anything for over eight years. Thereafter he applied to the revenue court for mutation of his name in the revenue records but his prayer was rejected on 20-8-1943, as he was found not to be in possession of the property and as the defendant-respondent, whose name was entered in the revenue papers, was found to be in possession. On 23-2-1944, he filed the suit which has given rise to this appeal for possession, over the property and mesne profits as already stated.

17. The plaintiff-respondent alleged (sic) sale-deed in favour of the defendant-appellant(sic) fictitious and fraudulent and that the defendant (sic) was debarred from putting forward her claim to the ownership of the property because of Rule 63 of Order 21, C. P. C. The defence was that the defendant-appellant was in possession of the property and that the sale-deed was in lieu of the dower debt and was a perfectly genuine, valid transaction and that Rule 63 of Order 21 did not bar her defence. The court did not go into the question as to who was in possession and whether the sale-deed was fictitious or genuine, because it held that the defendant was debarred from raiding these pleas by virtue of Order 21, Rule 63 Civil P. C. The defendant-appellant filed an appeal to the lower appellate court, but the appeal was dismissed. The defendant-appellant then filed the present second appeal, and the main question in the case is whether Order 21, Rule" 63 barred the defence.

18. If a property belonging to a third person is attached in execution of a decree that person is not bound to come to court and raise and objection before the execution court. He is at liberty to keep quiet and resist the delivery of possession over the property when the auction-purchaser proceeds to take possession over it. The Civil Procedure Code, however, provides a simple, expeditious and summary procedure for the investigation of claims of third parties. They may take advantage of it or they may not. If they do not take advantage of it, they lose nothing. This summary procedure is described in Rules 58 to 63 of Order 21. These rules are headed as "Investigation of Claims and Objections'". Rule 58 provides that where any claim is preferred 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 investigate, the claim or objection in the same manner as if the objector or claimant were a party to the suit. The duty to investigate is mandatory. But there is a proviso to this rate which provides that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed." Rule 58, therefore, merely empowers the Court to investigate a claim and in certain circumstances to refuse to do the same.

It is worthy of note that the rule nowhere lays down that the claim shall be 'dismissed' on the ground of the delay in preferring it. Then Rule 59 provides for the production of evidence by the claimant. Rules 60, 61 and 62 contemplate three different kinds of orders; Rule 60 provides for allowing of the objection after investigation and the release of property from attachment; Rule 61, provides for disallowing of the claim to the attached property after investigation. Where the claimant is a mortgagee of or charge-holder over the attached property, Rule 62 empowers the court to continue the attachment subject to such mortgage or charge when the mortgagee or charge-holder is not in possession. Then follows Rule 63 which reads as follows.

> "Where a claim or an objection is preferred the (Sic)ty against whom an order is made may in (sic) suit co establish the right which he (sic) the property in dispute, but, subject (sic) result of such suit, if any, the order shall be conclusive."

19. As already observed, Rule 58 does not contemplate any order against the claimant on the merits of his claim but only directs the court not to make an investigation where it considers that the claim and objection has been designedly or unnecessarily delayed. An order on the merits of the claim is passed only under Rules 60, 61 and 62. It seems to me that Rule 63 embraces orders passed on the

merits of a claim and cannot possibly refer to orders which have not been passed on the merits. The key words in the rule are "the order shall bo conclusive" 'Conclusive' of what? Obviously of "what it decides". The decision must necessarily have reference to "the right" which a party "claims to the property in dispute" because it is for the establishment of that right that, a suit has to be brought if the order is to be questioned. It is urged that an order refusing to investigate a claim on the ground that it was delayed is also "against a party" and is, therefore, 'conclusive' against him. But if it is to be 'conclusive' it can be only with reference to what it decides and as it merely decides that there was delay in preferring the claim, the collusiveness of the order can attach only to that fact. How can there be any 'conclusiveness' in respect of the merits of the claim which were not even gone into?

20. The doctrine of conclusiveness of judgments is well known. So far as suits are concerned, it is embodied in Section 11, Civil P, C., but that section is not exhaustive of the application of the doctrine. The doctrine is applicable to proceedings other than suits as. well. But to whatever proceedings it may be applied its basic and essential condition is that there must have been a 'Judicium'. That is, hearing and final decision upon the point in controversy, "Res Judicata," said Lord Romilly in -- 'Jenkins v. Robertson', (1867) 1 SC & Div. 117 (I) "by its very words, means a matter upon which the "court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion res judicata signifies that the court has after argument and consideration, come to a decision on a contested matter."

> "What we have to be satisfied of," said Scolt-land, C. J., in -- 'Udaiya Tevar v. Katama Nachi-yar', 2 Mad HCR 131 at p. 140 (J) "is that the ground of legal right, upon which the plaintiff sues, was a point raised and opened for decision in the former suits, and that it was finally dealt with by the judgment and decree."
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> "It jr. not enough," said Sir Richard Couch, C. J., in delivering the judgment of the Calcutta High Court in -- 'Pursun Gopal v. Poornanund Mullick', 21 Suth WR 272 (K), "that the former suit has been heard and determined." The cause of action must have been heard and determined."

In -- 'Shokhee Bewa v. Mehdee Mundul', 9. Suth WR 327 (L), Seton Karr and Dwarkanath Mitter, JJ., held that the former suit not having been tried on the merits, the subsequent suit cannot be" said to be on a cause of action heard and deter-

mined in a former suit. Dr. Bigelow, citing a considerable number of American. cases, in his book on Estoppel says, "If the decision was rendered upon a mere motion or a summary application or if the cause was dismissed upon some- preliminary ground, as upon a plea in abatement, e. g., because the wrong forum or mode of suit, had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder non-joinder, non-appearance of the plaintiff, or the like, the parties are at liberty to raise the main issue again in any other form they choose".

Thus it has been held that an order dismissing a claim as premature, or on account of defect in the frame of the suit -- Abdullah Ashgar All Khan v. Ganesh Das', AIR 1917 PC 201 (M), or because it was not properly presented -- 'Saira Bibi v. Chandrapal Singh', AIR 1928 Oudh 503 (N), or for want

of previous notice -- 'Ramireddi v. Subba Reddi', 12 Mad 500 (O), or for non-joinder of parties -- 'Salig Ram v. Tirbhawan Pathak', 1885 All WN 171 (P), or for default, or on the ground of limitation -- 'Har Swarup v. Anand Sarup', AIR 1942 All 410 (Q); -- 'Minalal Shadiram v. Kharsetji', 30 Bom 395 (R); -- 'Brindabun Chunder v. Dhununjay', 5 Cal 246 (S); --. 'Baldeo Singh v. Hira Lal', 9 All LJ 67 (T); -- 'Shanchi Khan v. Karam Chand', AIR 1923 Lah 150 (2) (U) and -- 'Gokal Chand v. Niadar Mal', AIR 1916 Lah 229 (V), is not 'conclusive' upon the merits of the claim. As limitation affects the plaintiff's right of suit it merely bars the right to sue and.

does not bar a defence. The dismissal of an objection under Order 21, Rule 53 on the ground that it was delayed could not be put on a better footing than a dismissal on the ground of limitation. There is no sufficient reason to think that the doctrine of conclusiveness as embodied in Rule 63 of Order 21, embraces within its scope an order which is not at all on the merits but is an order of dismissal of a claim on the ground of delay in preferring it.

21. Rule 63 makes the order covered by it if it is not challenged in a suit filed within the period of Limitation of one year as much conclusive as in the matter of suits, Section 11 makes the decision of a court conclusive between the parties unless it is set aside on appeal or revision by a higher court. It is immaterial that in one case the trial is in a regular way while in the other it is summary. The result is the same in both cases. If the provisions of Rule 63 are for the protection of the claimant or the objector who has succeeded in summary proceedings or investigation, against the decree-holder it must also be that in order that the rule may protect the decree-holder against a subsequent claim by the claimant or the objector, the decree-holder must have 'succeeded' in the summary investigation. Where the decree-holder has not been called upon to answer a claim and the claim has not been investigated at all, it cannot be said that Rule 63 is intended to protect either the decree-holder or the auction-purchaser against any subsequent claim by the same claimant or the objector.

22. The history of the law on the subject also shows that under the Civil Procedure Codes of 1859, 1877, and 1882, it was only a decision on the merits that was made 'conclusive' subject to the result of a suit. The argument advanced in support of the opposite view is based solely upon the change of language in Rule 63 as compared to its corresponding Section 283 in the Code of 1882, Section 283 ran as follows :

> "The party against whom an order under Sections 280, 281, 202 is passed, 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, the order shall be conclusive."

Sections 230, 281 and 282 corresponded respectively to Rules 60, 61, and 62 of Order 21 of the present Code. Under the present Code the language has been changed and the provision is corresponding to Sections 280, 281 and 282 have not been mentioned. The change in the language of the rule has been taken by the Courts to denote a change in the law itself. But a change in the language is not always an indication of the change in the law.

As Maxwell has observed in his book on Interpretation of Statutes 9th Ed., at p. 326;

> "But, just as the presumption that the same meaning is intended for the same expression in every part of an Act is as we have seen, not of much weight, so the presumption of a change of intention from a change of language (of no great weight in the construction of any documents) seems entitled to less weight in the construction of a statute than in any other case, for the variation is sometimes to be accounted for by a mere desire to avoid the repeated use-of the same words, sometimes by the circumstance that the Act has been compiled from different sourecs, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament."

.....It may be questioned whether too much importance has not sometimes been attached to a variation of language."

23. It appears to me that the change in the language was not intended to alter the law, and that the same idea was expressed in a different language possibly because it was considered to "be better. I am inclined to the view that the words in Rule 63 "the party against whom an order is made" should not be read divorced from the context in which they occur. An order which is against a party within the meaning of Rule 63 is made conclusive as to the right which he claims to the property in dispute. It follows, therefore, that the order contemplated in Rule 63 must be one which can be conclusive as to the right which the party claims to the property in dispute. It will be against all principle of common sense and justice and of established doctrine of conclusive-ness of judgments and orders to hold that an order which is not made on the merits of a claim at all but refuses to decide it is still conclusive upon the merits of the claim.

24. It has certainly been held, and there is no dispute about it, that it is not every order of dismissal of a claim that will be conclusive, even under Order 21, Rule 63. For instance, an order of refusal to entertain a claim for want of jurisdiction has been held not to be conclusive within the meaning of Order 21, Rule 63, --'Ningauda Girimallappa V. Nabisaheb Abalal', AIR 1042 Bom 263 (W), --'Cannanaore Bank Ltd.. v. Pattarkandy Arayan-veettil Madhabi', AIR 1942 Mad 41 (FB) (X), --'Mukhram Pande v. Arjun Missir', AIR 1934 Pat 511 (Y), --'Chetanlal v. Lalji', AIR 1937 Nag 170 (Z), so also an order dispensing with the investigations and directing a claim to be noted on a sale proclamation, -- 'Kachinamthodi Parambil v. Chekkutti', AIR 1923 Mad 295 (Zl), an order dismissing the petition alter directions for slopping sale and refusing to investigate claim, AIR 1942 Mad 41 (FB(X), an order dismissing the petition without prejudice to claimant, AIR 1942 Mad 41 (FB) (X), have been held not to be conclusive against the claimant.

25. Left to my self I would have held that the defence in the present case was not barred by Order 21, Rule 63, but all the decisions (except in the case of AIR 1923 All 327 (O) (sic) on this point in cases in which the objection has been expressly dismissed or rejected under Order 21, Rule 58 are all unanimous in laying down that such an order is covered by Order 21, Rule 63, and my Lord the Chief Justice and my brother Bhargava, J. are also of the same opinion. I, therefore, consider it unnecessary to differ from them. But I must make it clear that the present decision is not intended to cover cases in which no order of dismissal has been made under Order 21, Rule 58, but the proper order which should be made under that rule has been made. For instance an order merely saying

that "the claim will not be investigated because it has been unnecessarily and designedly delayed", or simply saying' "file" or orders to similar effect will not be held to be conclusive.

Incised it is the duty of the Courts dealing with objections under Order 21, Rule 58 not to pass orders of dismissal at all. It would be erroneous to think that when the court does not propose to investigate a claim it must necessarily pass an order of dismissal on 'the ground that without that order the application has not been completely disposed "Of. An application is disposed of not only by an order of dismissal or allowing it but by some such order as has been mentioned above. Nothing remains to be done after the orders to the above effect have been passed.

26. On the second point raised by learned counsel for the appellant I am in agreement with the view expressed by my Lord the Chief Justice, Once an order is conclusive under Order 21, Rule 63, it is conclusive not only with regard to the factum of possession on the date of attachment but also with regard to the right of the decree-holder to attach and sell the property.

27. I, therefore, agree to the order though not without considerable hesitation.

V. Bhargava, J.

28. I was prepared to agree entirely with the judgment delivered by my Lord the Chief Justice but, in view of the judgment delivered by my brother Agarwaia, J., I would like to add a few words.

29. It appears to me that the procedure provided in Rules 58 to 62 of Order 21, Civil P. C., has been prescribed for the protection of a claimant who may find that property not liable to attachment and sale, in the debts of the judgment-debtor is being seized under the processes of the courts. The rules leave open to him his usual remedy of filing a regular suit if he chooses not to appear before the execution court. It is only when he exercises his option of taking advantage of the remedy provided in these rules and voluntarily files his claim or objection that the provisions of these rules come into force. Once he appears before, the execution court with his claim or objection, that claim or objection has to be dealt with by the court. Rule 58 directs the court to make a summary investigation of the claim or objection, treating the claimant or objector as if he were a party to the suit but the proviso gives the discretion not to make the investigation if the claim or objection is designedly or unnecessarily delayed. Rules 59 to 62 lay down the procedure to be followed in the investigation and the nature of the order to be passed by the court on such investigation.

Upto this stage the parties to the proceedings am the decree-holder, the judgment-debtor and the claimant or the objector. But even between these parties the order of the court allowing or rejecting the claim or objection has not been given the force of an order operating as 'res judicata'. The reason obviously is that the investigation is expected to be summary and not a decision after a proper trial as in a regular suit. The provisions of Rule 63 are, however, essentially for the protection of the auction-purchaser against subsequent claims by the same claimant or objector, and for the protection of the claimant or objector who has succeeded in summary proceedings of investigation, against future claims by the decree-holder or the judgment-debtor except to the limited extent of the dispute being taken to court by a regular civil suit within the period of limitation of one year. It is

clear that the rules are framed with the object that, once a claimant or objector has voluntarily chosen to submit his claim or objection to the execution court, the auction purchaser should not be left in uncertainty about the title to the property purchased by him for the longer period of limitation prescribed under the Limitation Act, and similarly the claimant or objector having succeeded should not be subjected to further litigation at the instance of the decree-holder or the judgment-debtor during that longer period.

When such protection is granted by the legislature, no question, arises of applying the principles of 'res judicata'. This protection is granted in view of the fact that an outsider, who may not have been concerned at the earlier stages of the suit or execution proceedings and comes into the picture by purchasing, the property sold by the court, needs some assurance of title in order to give a proper bid which ho can do only if his position does not remain uncertain for a long time. The scheme of the rules is to limit the right of once again moving the courts to the short period of one year in such cases. The rules do not purport to take away any such right by applying the principles of 'res judicata'. No-question of applicability of the principles of 'res judicata' thus arises and there does not appear to bo any unfairness in giving the order of the execution court finality so as to prevent the claimant or objector from again putting the right purchased by the auction-purchaser in jeopardy after having failed to do so within the time allowed by Rule 63.

The execution court proceeds to sell the properly and the auction purchaser purchases it on "the basis of its being liable to attachment and sale in execution of the decree against the judgment-debtor after the claim or objection has been dismissed either under the proviso to Rule 58 because it was designedly or unnecessarily delayed or on merits after investigating the claim, and, consequently Rule 63 gives finality to all such orders after the lapse of a year.

30. I would also like to express my views on the proper form of the order that should be passed by a court when it refuses to investigate a claim or objection under the proviso to Order 21, Rule 58. Whenever an application is presented before a court, the court must pass a final order on it either allowing or rejecting or dismissing the application or partly allowing and partly dismissing it. It would not be proper discharge of duties by a court if it does not pass any order which finally disposes of that application. On the same principle, when an objection or a claim is preferred under Order 23, Rule 58, the court must pass an order which finally disposes of that claim or objection. A mere note by the court that, under the proviso, the court refuses to investigate the claim, or objection does not dispose of it. Refusal to investigate is only a matter of procedure. After the refusal has been recorded, the court has yet to dispose of the claim or objection and must therefore proceed to pass an order rejecting it. The court cannot leave the objection pending after merely saying that the claim or objection is not to be investigated, Consequently, whenever the provisions of the proviso to Order 21, Rule 58 are applied and the claim or objection is rejected, there will invariably be an order and in such cases that is the order referred to in Order 21, Rule 63 so that the claimant or objector, if he desires to do so, must institute his suit within the period of one year from the date of that order.

31. For these reasons I agree with my Lord the Chief Justice and concur in the judgment delivered by him.

(32) BY THE COURT : There is no force in this appeal and it is dismissed with costs.