

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 01-10-2021
Pronounced on: 09/11-2021

CR No. 41/2018
CM No. 3269/2021
IA No. 1/2018

S. K. Puri

... Petitioner/Appellant(s)

Through: Mr. Gagan Basotra, Sr. Adv. with Ms. Navdeep Kour, Adv.

V/s

Pardeep Kumar Puri and others

... Respondent(s)

Through: Mr. I. K. Sharma, Sr. Adv. with Mr. Mohit Kumar, Adv.

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
09-11-2021

1. The instant revision petition is directed against order dated 24.9.2018 passed by the court of Principal District Judge, Jammu.
2. Before advertng to the grounds of challenge urged in the instant petition by the petitioner, a brief background of the case is delineated hereunder:
 - i) A suit for recovery of Rs.73,22,000/- under Order 37 CPC came to be instituted by the predecessor-in-interest of respondent 1 namely Shayam Puri against the predecessor-in-interest of respondents 2 to 4 herein being file No. 101/suit before the court of Principal District Judge, Jammu (hereinafter the trial court).

- ii) In terms of order dated 30.1.2009, during the pendency of the suit, an application came to be filed by plaintiffs for attaching the property of the defendants before judgment while apprehending that the defendants in order to defeat the suit of the plaintiffs are hellbent to alienate and dispose of the property comprising of Cybernetic School, its buildings and land. The said order came to be passed taking into account the contention of the plaintiffs as also a copy of the agreement to sell relating to the said property purported to have been entered into between the defendant with one Manmohan Singh and Mir Showkat Hussain. The said order dated 30.1.2009 had been passed subject to the condition that if the defendant furnishes a surety to the extent of the suit amount and the costs, the property will be released.
- iii) The suit came to be decreed by the trial court in terms of judgment and decree dated 8.8.2017.
- iv) An execution petition came to be filed on 21.11.2017 by the decree holder for execution of decree before the executing court.
- v) An application came to be filed on 14.8.2018 by the petitioner herein as an objector in terms of Order 21 Rule 58 CPC (for short O21 r58) contending therein that he has purchased the property in question as a *bona fide* purchaser in terms of sale deeds dated 22.3.2012 and 15.6.2012 and

as such had been in possession of the said property. The objector prayed for recalling of order dated 3.5.2018 passed by the executing court whereby warrant of attachment of the property in question had been issued.

- vi) The judgment debtor also had filed an application on 11.9.2018 for setting aside judgment and decree, and for staying the execution contending in the said application that she is in possession of the property and is running a school therein the said property under the name and style of “Cybernetic Secondary School” spread over two acres of land with a built-up area of 4038 sqm and 4055 sqm area of playground.
- vii) Both the applications filed by the objector petitioner herein as also the judgment debtor came to be dismissed by the executing court in terms of orders dated 24.9.2018 and 19.12.2018 respectively. While the defendant judgment debtor did not challenge order dated 19.12.2018 and same assumed finality, the objector petitioner herein challenged order dated 24.9.2018 in the instant petition.
3. The impugned order is being challenged by the objector petitioner herein *inter alia* on the grounds that the same has been passed erroneously and is unsustainable having been passed without taking into account provisions of Order 38 Rule 21 CPC. The impugned order is further stated to have been passed without application of mind and in a slipshod and cryptic manner. The

impugned order is also stated to have been passed without disclosing the effect of initial order of attachment before judgment passed by the court on 30.1.2009 which too is stated to have been passed in violation of Order 38 Rule 5 and 7 read with Order 21 Rule 54 CPC. The trial court is also stated to have not followed further subsequent procedure after passing of the attachment order dated 30.1.2009 as provided under Order 21 Rule 54 CPC and that the decree holder cannot derive any interest or right over the property in pursuance of the said attachment order dated 30.1.2009. It is further urged in the grounds that the trial court had failed to take any subsequent steps in pursuance of the attachment order dated 30.1.2009 provided under Form 24 of Appendix-E as well as Form-5 of Appendix-F of CPC as the said order was not pasted on the property in question and no report was ever sought by the concerned agency so much so that the said order was not even communicated to the concerned through Deputy Commissioner/Tehsildar for necessary action resulting into non-endorsement of attachment order in the necessary revenue records and thereby not providing any clue or knowledge of the said attachment order to the objector petitioner herein who purchased the said property from the predecessor-in-interest of the defendant judgment debtor on the basis of *FardeIntikhab* duly attested by the concerned agency which *Intikhab* did not mention the passing of the attachment order dated 30.1.2009. The property

thus is stated to have not been under *custodia legis* of the trial court and that the trial court without taking into account the said position erroneously rejected the application of the objector petitioner herein. It is further urged in the grounds that the initial order of attachment dated 30.1.2009 passed by the trial court is null and void and non-est, and, therefore, the executing court could not have placed reliance on the said attachment order dated 30.1.2009 while passing the impugned order dated 24.9.2018. It is further urged in the grounds that the court below did not balance the equities and attached the entire land comprising of 8 kanals and 7 marlas while as the court below ought to have attached only 2 kanals and 7 marlas of land having regard to the circle rate of the said land notified by the Deputy Commissioner vide notification dated 28.3.2018 notifying the rate of the land per kanal as Rs. 86.46 lakh for commercial and Rs. 50.82 lakh for residential plot and that since the present land being commercial, the court below could have directed auction for two kanals while protecting the interests of the petitioner herein being a bona fide purchaser of the property in question. The executing court is stated to have thus divested the objector petitioner herein of the whole property resulting into an irreparable loss to the petitioner.

4. Heard learned counsel for the parties and perused the record.

5. Before proceeding to deal with the petition in hand, it would be appropriate to refer to the provisions of O21 r58, being relevant

and germane herein. O21 r58 is extracted and reproduced hereunder:

ORDER 21, RULE 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, 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 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 claims or objection shall be conclusive.

6. A bare perusal of above provision suggests that whenever a claim is preferred under O21 r58 against attachment of an immovable property, the court is vested with jurisdiction to adjudicate on the said claim or objection and upon determination of such claim, the court has to, in accordance with such determination, either allow the claim or objection and release the property for attachment, or disallow the claim or objection, or continue the attachment subject to mortgage, charge or other interest in favour of any person or pass such order as in the circumstances of the case it deems fit.

O21 r58 is a solitary provision relating to any claim that may be preferred or any objection that may be raised to the attachment of any property in execution of a decree, thus any sale that is held would undoubtedly be subject to the order that may be passed by the executing court.

The scope of investigation under O21 r58 is to find out whether the property attached in execution is or is not liable to

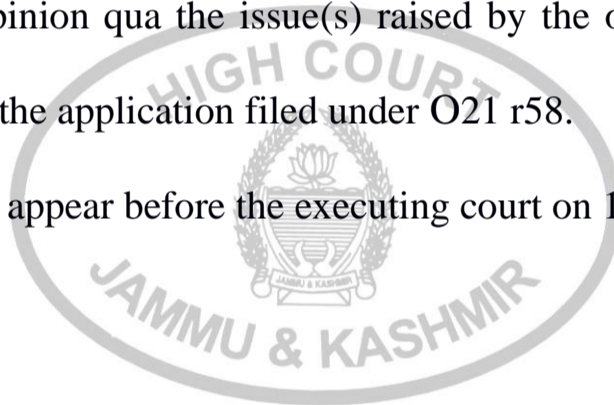
- the attachment. The objector has to establish that the property belonged to him in his own right and he was in possession of it. Once a claim is preferred or an objection is raised against the attachment of the property, the court is not enjoined to adjudicate the matter unless the case is covered by proviso to sub-rule (1) of Rule 58. The court cannot reject a claim without adjudication merely on the ground that the question of title or possession is doubtful or complicated in nature.
7. Keeping in mind the aforesaid provision of law, its ambit and scope, the impugned order may be examined in the backdrop of the grounds urged in the petition and having regard to the facts and circumstances of the case.
 8. Perusal of the impugned order tends to show that the trial court while deciding the application filed by the petitioner herein under O21 r58 has heavily relied upon the order of attachment dated 30.1.2009 passed during the pendency of the suit upon an application filed by the plaintiff in the suit for attachment of the property before judgment. Indisputably the said order had been passed by the trial court at that relevant point of time upon failure of the defendant to comply with the direction of furnishing security to the extent of the suit amount.
 9. Perusal of the record would reveal that the executing court while passing the impugned order has overlooked the fact that the property in question had not actually been attached in terms of order dated 30.1.2009 passed by the trial court, but was actually

attached in terms of order dated 3.5.2018 passed by the executing court, as revealed by order dated 10.9.2018 of the executing court. Thus, placing reliance on the order of attachment before judgment dated 30.1.2009 while deciding the application of the objector petitioner herein filed under O21 r58, by the executing court is not legally tenable. The said attachment before judgment order had in essence paled into insignificance after the passing of order of attachment by the executing court dated 3.5.2018. The executing court thus has grossly erred and in the process failed to address to the issue raised by the objector petitioner herein in the application filed under O21 r58.

10. Perusal of the impugned order further tends to show that no enquiry whatsoever has been held by the executing court in the application filed by the objector petitioner under O21 r58. The application of the objector petitioner has not seemingly received proper and appropriate consideration by the executing court. The impugned order has been passed without adverting to the facts and circumstances of the case inasmuch as the provisions of O21 r58 in its true and correct perspective and has been passed contrary to the mandatory language and scheme of the provisions of O21 r58 thus constituting failure to exercise jurisdiction inasmuch as exercise thereof with material irregularity warranting interference by this court in exercise of revisional jurisdiction.

11. Thus, what has been observed, considered and analyzed hereinabove, the instant petition deserves to be allowed while

- setting aside the impugned order, requiring the executing court to revisit and reconsider the application of the objector petitioner herein filed under O21 r58 in accordance with law affording adequate opportunity of hearing to the concerned parties. Accordingly, petition is **allowed** and impugned order dated 24.9.2018 is set aside with a direction to the executing court to reconsider and revisit the application of the objector petitioner herein filed under O21 r58 in accordance with law uninfluenced by any observation made by this court.
12. Further, nothing hereinabove shall be construed to be expression of any opinion qua the issue(s) raised by the objector petitioner herein in the application filed under O21 r58.
13. Parties to appear before the executing court on 18.11.2021.



(JAVED IQBAL WANI)
JUDGE

Jammu:
09.11.2021
N Ahmad

Whether the order is speaking: Yes
Whether the order is reportable : Yes