

“Is a separate suit for setting aside attachment of the property attached in execution of a decree maintainable in law and if so when can such a suit be maintainable?”

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“Is a separate suit for setting aside attachment of the property attached in execution of a decree maintainable in law and if so when can such a suit be maintainable?”

This question often creeps up in our mind, when we deal with adjudication of claims to or objection to attachment of properties attached in the execution proceedings. Though the answer appears to be very simple, a small amount of ambiguity comes up when one reads sub rule (2) and sub rule (5) of Order 21 Rule 58 CPC, that appear to be self contradictory.

This article tries to shed some light on the relevant provisions of C.P.C and to find out the legal answer to the above question.

The provision under Order 21 Rule 58(1) deals with the adjudication of claims to, or objections to attachment of property. The provision is reproduced for easy understanding.

“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.”*

This provision enables the parties to file applications making claim over the property attached in execution of a decree on the ground that such property is not liable to such attachment. When any such application is filed, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions contained in the said rule.

It is to be noted that, Sub Rule (2) of Rule 58 of Order 21 of the Code reads as follows:

“(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.”

Thus there is an embargo on the institution of a separate suit for the determination of such above questions as per Or 21 R 58 (2) C.P.C. So also, sub-clause (4) of Order 21, Rule 58 throws abundant light upon the nature and character of the decision ultimately to be arrived at by the civil court on such adjudication under Order 21 Rule 58(1). It says that, after the claim or objection has been adjudicated upon, 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.

Thus, an order passed under this provision has the effect of a decree and the court has to hold a full-fledged enquiry and decide the dispute on merits but not in a summary manner. This proposition has been upheld by the Division Bench of the Hon’ble Madras High Court in ***“Southern Steelmet And Alloys Ltd. Vs B.M. Steel, Madras”*** reported in ***“AIR 1978 Mad 270 :(1978) 1 MLJ 468”***.

This proposition was also followed by a single bench of our Hon’ble Madras High Court in ***“Alamelu Ammal vs Chinnaswamy Reddiar”*** reported in ***“(1988) 2 MLJ 395”*** holding that ***“It is clear (from the ratio laid down in the above said decision that) in view of the amended provisions of Order 21, Rule 58, C.P.C., the question of filing a separate suit is barred and all questions relating to title or interest in the property attached have to be decided and adjudicated only in the claim proceedings and not by a separate suit”***.

Similarly, in the case of ***“Tamil Nadu Mercantile Bank Ltd vs R.Rangaswamy decided on 13 April, 2010”*** our Hon’ble Madras High Court has reiterated this proposition.

So, since this provision contemplates a detailed enquiry into all questions including questions relating to right, title or interest in the property attached which arise between the parties to the proceeding and mandates that the court enquiring such a claim petition shall determine such questions, there is no necessity for a separate civil suit to decide the same.

Thus, as per this provision under Order 21 Rule 58 (2) CPC, all questions 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 only under this provision and no separate suit is maintainable.

But, it is pertinent to note that, Sub Rule (5) of Rule 58 of Order 21 CPC states that ***“Where a claim or objection is preferred and the court under the proviso of sub rule (1) refuses to entertain it, the party against whom such 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, an order so refusing to entertain the claim or objection shall be conclusive”***.

The cursory reading of this Sub Rule (5), may lead to an initial idea that a suit is maintainable even if the claim petition is dismissed. So one may think that, why then there is a bar created under Sub Rule (2) of Or 21 R58 CPC.

At the first instance, it may appear confusing and that as if the provision under Sub Rule (5) is contradictory to sub rule (2). But a close and combined reading of the proviso under sub rule (1) and the wordings in sub rule (5) of Or 21 R 58 CPC, would candidly lead to the conclusion that they are not contradictory.

By conscious and close reading of the above said two provisions, it can be clearly found that, a separate suit can be filed only if the court ***‘rejects or refuses’*** to entertain the claim petition on any of the grounds envisaged under the proviso (a) or (b) of Or 21 R 58(1) CPC and not if it passes an order under Or 21 rule 58(3), i.e., after determination of the questions referred to under sub Rule (2) after conducting a full-fledged enquiry. i.e., if the court refuses the claim petition holding that the property attached is already sold in court auction or that the claim petition is unnecessarily or designedly belated, a separate suit to establish his right could be filed by a person against whom an order is passed under the proviso of Order 21 Rule 58(1) CPC. Thus the condition precedent for filing a separate suit for the determination of rights is that, a petition under Or 21 R58 CPC must have been filed and it must have been rejected or refused for any of the reasons laid down under the proviso (a) or (b) of Or 21 R 58(1). Otherwise no suit to set aside attachment of property in execution of a decree is maintainable.

Therefore a separate suit for setting aside attachment of the property attached in execution of a decree is not maintainable in law as it is explicitly barred as per Order 21 Rule 58(2) CPC, but if the condition under sub rule (5) of the said provision is satisfied, as detailed above, the party may institute a separate suit for such relief.