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brought to sale. In our opinion, the view taken by the Subordinate Judge cannot possibly be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

W. M. C. *Appeal allowed.*

APPELLATE CIVIL.

Before Mookerjee and Roe JJ.

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May 21.

HARINATH CHOWDHURY

v.

HARADAS ACHARJYA CHOWDHURY.*

Deposit in Court—Money paid under compulsion of Law—Want of bona fides—Action for recovery of money—Civil Procedure Code (Act V of 1908), O. XXI, r. 46 cl. (1)—Attachment of debt due to a stranger on the allegation that the garnishee's creditor was benamidar of the judgment-debtor—Deposit by garnishee, conditional, on enquiry—Withdrawal of the money from Court by the attaching creditor without notice to the garnishee—Court's power of enquiry.

Where debt due to a stranger was attached on the allegation that he was benamidar of the judgment-debtor and the attaching creditor withdrew the money by leave of the Court without notice to the garnishee, in a suit by the latter for the recovery of the money deposited, it being found that there was no benami transaction as alleged :

Held, that the rule that money paid under compulsion of a legal process was irrecoverable can only be pleaded where the party who has got the benefit of his opponent's payments, acts *bonâ fide*.

Marriott v. *Hampton* (1) distinguished.

Ward & Co. v. *Wallis* (2) followed.

* Appeal from Appellate Decree. No. 3656 of 1913, against the decree of Annada Kumar Sen, Subordinate Judge of Mymensingh, dated Aug. 11, 1913, confirming the decree of Lutfar Rahaman Munsif of Mymensingh, dated July 17, 1912.

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Clause (3) r. 46 of O. XXI of the Civil Procedure Code does not contemplate of cases where the deposit was purely conditional on enquiry being held as to judgment-debtors' rights and a withdrawal by the attaching creditor of the money so conditionally deposited, without notice to the garnishee, even though made with the leave of the Court, is a grave abuse of judicial process.

It is true that O. XLVI does not expressly contemplate of an enquiry as is enjoined in O. V., rule 45 of the Rules of the Supreme Court in England, but the Court has inherent power to enquire.

SECOND APPEAL by Harinath Chowdhury, the defendant.

The defendant, Harinath Chowdhury, sued one Benoychand Kotary for money due and got an *ex parte* decree. He attached a debt due on a hand-note by the plaintiff to Rai Manilal Nahar Bahadur on the allegation that the latter was benamidar of Benoy. The plaintiffs deposited the money in Court but an order was passed by the Court to the effect that money was not to be paid out to the defendant until the question of benami had been decided. Subsequently Rai Manilal brought a suit on the hand-note against the plaintiff and obtained a decree, it being found that Rai Manilal was not Benoy's benamidar. The defendant had in the meantime withdrawn the money deposited in Court by the plaintiff without notice to him though with the leave of the Court and before any enquiry as to the benami had been gone into. The plaintiff thereupon sued for the recovery of the money which he had deposited and which had been withdrawn by the defendants. Both the lower Courts found in favour of the plaintiff. Hence this second appeal by the defendant.

Mr. A. B. Guha (with him *Babu Birendra Kumar De* and *Babu Akhil Bandhu Guha*), for the appellants, contended that money paid into Court under compulsion of a legal process was irrecoverable [*Marriott*

v. *Hampton* (1)] even if he paid under a mistake of fact or obtained a fraudulent judgment unless such a judgment was set aside: *De Medina* v. *Grove* (2). The plaintiff has no cause of action as O. XXI, r. 46, cl. (3) of the Civil Procedure Code gives a valid discharge of his debt. At most, Rai Manilal can bring an action in tort for fraudulent misrepresentation against the defendant. Money paid into Court was not plaintiff's but his creditor's money. By suffering a judgment to be passed, the plaintiff cannot create a right in himself. Sections 69 to 72 of the Indian Contract Act have no application to the facts of this case.

Babu Jyoti Prasad Sarbadhikari and *Babu Prokash Chandra Majumdar*, for the respondents, were not called upon.

MOOKERJEE AND ROE JJ. The problem which requires solution in this appeal may be concisely stated. On the 30th June, 1909, A sued B for recovery of money. On the same day A obtained an order for attachment before judgment under rule 5 of Order XXXVIII of the Code of Civil Procedure. The property attached was a debt due ostensibly from C to D; but the debt was attached on the allegation that B and not D was the person beneficially interested in it. The result was that a prohibitory order was issued upon C on the 13th August, 1909. A obtained an *ex parte* decree in his suit against B C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October, C applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D, and provided also that interest ceased to run upon his debt from that date. The Court, thereupon, ordered that the

(1) (1797) 7 T. R. 269. (2) (1846) 10 Q. B. 152.

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money, if deposited, would be retained in Court till the adjudication of the question, whether B or D was beneficially interested therein. On the faith of this order, the money was brought into Court on the 13th December 1909. Thereafter, without notice to C or D, the Court, on the application of A, paid out the money to him. D, who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. C now sues A to recover the money, which he had deposited in Court and which, without notice to him or to his creditor D, had been withdrawn by A. The Courts below have decreed the claim and A has appealed to this Court. The substantial question in controversy on the merits in this litigation, consequently, plainly is, whether B or D was beneficially interested in the debt. The Courts below have concurrently answered this against A, and have found that B had no interest in the money, in other words, that not B but D was the real creditor of C. This is a finding of fact which cannot be successfully challenged in second appeal; indeed, no attempt has been made to assail it before us; but the question has been mooted, has C any cause of action against A? On behalf of A, it has been argued that there is no cause of action, *first*, because the money was recovered under compulsion of legal process, and cannot accordingly be recovered by any form of suit; and, *secondly*, because by virtue of Order XXI, rule 46, of the Code of Civil Procedure, the money, as soon as deposited, ceased to be the money of the plaintiff, and, that, consequently, he is not entitled to recover it back. In our opinion, there is no foundation for either of these contentions.

As regards the first ground, it is clear that the principle of the rule in *Marriott* v. *Hampton* (1),

(1) (1797) 7 T. R. 269 ; 2 Sm. L. C., 10th Ed., 420.

which has been the bulwark of the argument for the appellant, is of no real assistance to his cause. The principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon: "After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person." To the same effect is the observation of Grose J: "It would tend to encourage the greatest negligence, if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence J. added that if the case alluded to, that is, the decision of Lord Mansfield in *Moses* v. *Macferlaan* (1), be law, it would go the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at the trial, might still be of avail in a new action to overrule the former judgment, which is too preposterous to be stated. The principle was again formulated by Patteson J. in *Cadaval* v. *Collins* (2): "Money paid under compulsion of law cannot be recovered back as money had and received. And, further, *where there is bonâ fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." We refer to this statement in order to emphasize the qualification to the general rule formulated in the following terms by Kennedy J. in *Ward & Co.* v. *Wallis* (3): "There must be *bonâ fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the

(1) (1759) 2 Burr 1009. (2) (1836) 4 A. & E. 858, 866.

(3) [1900] 1 Q. B. 675.

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principle laid down in that case [*Marriott* v. *Hampton* (1)] into force; if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriott* v. *Hampton* (1) may not prevent the defendant from recovering the money back."

Let us examine the application of this principle to the circumstances of the present case. Here money was deposited by the plaintiff C on the faith of an order which stated explicitly that the money would be retained in Court, pending the determination of the question, whether the money belonged to B, the then judgment debtor of A, or to D the alleged creditor of the depositor C. That enquiry was never made; but the Court, without notice to the depositor and his alleged creditor, paid out the money to the present defendant, on his application, so that neither C nor D was allowed an opportunity to defend his rights. We need not hold that this conduct of A was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of the decision in *Marriott* v. *Hampton* (1) has no application to these circumstances.

As regards the second ground, it is contended that under Order XXI, rule 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Clause (*3*) of rule 46 is in these terms: A debtor prohibited under clause (*1*) of sub-rule (*1*) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. This clearly contemplates a case where there is no dispute that if the suit

(1) (1797) 7 T. R. 269.

results in a decree against the defendant, or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question, whether B or D was beneficially interested in the money. But it has been contended on behalf of the appellant that this order was irregular, as the Code neither contemplates an enquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. Our attention has been drawn in this connection to rule 5 of Order XLV of the rules of the Supreme Court in England. An examination of that rule shows that there is no foundation whatever for the contention of the appellant. There the rules expressly provide for an enquiry in the events which have happened here. Rule 5 is in these terms: "Whenever in any proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person or that any third person has a lien or charge upon it, the Court may order such third person to appear and state the nature and particulars of his claim upon such debt." Rule 6 then provides that after the allegation of any third person under such order as in Rule 5 mentioned and if any other person who by the same or any subsequent order may be ordered to appear or in case of such third person not appearing when ordered, the Court may order execution to issue to levy the amount due from such garnishee. Consequently, the Rules of the Supreme Court in England contemplate, not an *ex parte* order to the

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prejudice of third persons who may be really interested in the debt due from the garnishee, but an enquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type of Rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us, the Court was competent, indeed, it was incumbent upon the Court, to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of the Court of Appeal in *Roberts* v. *Death* (1). In that case the garnishee, who was ordered to bring the money into Court, contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose, whether the money, if deposited, should be paid without enquiry. Lord Justices Brett, Cotton and Lindley unanimously held that it would not be right to make the payment without an enquiry into the question, whether the money was trust-money or not, and they directed that the money should be brought into Court to abide the event of an enquiry. In our opinion, the money deposited in this case did not cease to be the money of the plaintiff, merely because he had brought it into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised.

We feel no doubt whatever that the justice of the case lies entirely with the respondent and that the

(1) (1881) 8 Q. B. D. 319.

Court has full authority to compel the appellant to bring back the money into Court to be repaid to the plaintiff [*Mrinalini* v. *Abinas* (1)].

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

N. C. S. *Appeal dismissed.*

(1) (1910) 11 C. L. J. 533.

CRIMINAL REVISION.

Before Sharfuddin and Chapman JJ.

PARDIP SINGH

v.

EMPEROR.*

1915

July 26.

Special Constables—Dispute regarding ferry—Proceeding for security to keep the peace drawn up against one party—Appointment of members thereof as special constables,—Refusal to act as such—Legality of appointment and of prosecution for such refusal—Police Act (V of 1861) ss. 17, 19.

The only legitimate object of appointing special constables, under s. 17 of the Police Act (V of 1861), is to strengthen the ordinary police force by the addition of suitable persons. When the appointments are not made with such an object, a prosecution under s. 19 of the Act for refusal to act as such will not be permitted.

When the members of one party to a ferry-dispute were appointed as special constables, and the circumstances showed that it was never really intended to utilize them as police officers, the High Court quashed the order of the District Magistrate directing their prosecution under s. 19 of the Act and the issue of warrants against them.

On the 14th April 1915, one Rambirich Singh and

*Criminal Revision, Nos. 794, 797 to 816 of 1915, against the order of D. Weston, District Magistrate of Mozafferpur, dated May 26, 1915.