CRIMINAL REVISION.

Before Greaves and Panton JJ.

1923

Dec. 7.

BHIMRAJ BANIA

v.

EMPEROR.*

Goonda—Warrant under the Goondas Act issued by the Judicial Secretary to the Government of Bengal—Legality of warrant—Jurisdiction of the High Court to interfere on revision—Letters Patent, 1865, cl. 28—Criminal Procedure Code (Act V of 1898), ss. 435 and 439—Goondas Act (Beng. I of 1923), ss. 3, 4, 5 and 6.

Clause 28 of the Letters Patent does not give the High Court jurisdiction to revise the order of a Secretary to the Government of Bengal issuing a warrant under the Goondas Act (Beng. I of 1923), as such Secretary was not an officer or Court possessing criminal jurisdiction in 1865 nor was the case subject to reference to, or revision by, the High Court at the time.

Such Secretary is not, by virtue of the powers conferred on him by the Goondas Act, an "inferior Criminal Court," within s. 435 of the Criminal Procedure Code, and the High Court cannot interfere, under s. 439 of the Code, in the matter of the warrant issued by him under the Act.

ON the 18th September 1923, Mr. H. P. Duval, the Judicial Secretary to the Government of Bengal, issued a bailable warrant, under the Goondas Act (Beng. I of 1923), s. 4 (*2*), for the arrest of the petitioner, requiring him to submit, by petition, on the 22nd September, any representation he desired to make to the advising Judges, appointed under s. 5 (*1*) of the Act. The petitioner was accordingly arrested on the 19th and detained in the Presidency Jail till the 26th. The portion of the warrant relating to the heads of the charges is set out in the judgment of the High Court.

* Criminal Revision No. 1030 of 1923, against the order of the Judicial Secretary to the Government of Bengal, dated Sep. 18, 1923.

investigation is thinking not of the subsequent effects of that decision as *res judicata*, but is thinking of and dealing with a Court that is doing something. The Court has attached and is going to sell. The meaning is that the act of the Court is to be valid unless there is a suit. It means that the attachment held valid in the claim case shall be valid, and the attachment removed shall be as though it never was, so far as the parties are concerned. The rule seems to mean that subject to a suit *factum valet*, the act of the Court shall not be questioned save in that way. The effect of the decision as to possession in other proceedings in which that question may again arise is not the matter to which the words "shall be conclusive" are directly addressed. As a decision it would doubtless have effect, upon the general principles of law expressed in *Ram Kirpal* v. *Rup Kuari* (1), *Mungal Prosad* v. *Girija Kant Lahiri* (2), *Beni Ram* v. *Nanhumal* (3). But if the attachmen is removed and later on another attachment is made, the question of possession is a question of possession at a different date. If there has been, in fact, no change in the position, it may well be that the second claim case will be governed by the first. The position will be much as in the case of a second suit for a subsequent instalment of rent. The first decision may take all the fight out of the second case, though the actual issue is not the same. Still a suit would lie to impeach the second order by trying out the ultimate question of right. It has to be noticed that a claimant is not bound to proceed under Order XXI, rule 58. He can proceed by a suit to set aside the sale. If the act of the Court in the first claim case came to nothing because that attachment was abandoned, it seems

(1) (1883) I. L. R. 6 All. 269. (2) (1881) I. L. R. 8 Calc. 51.
(3) (1884) I. L. R. 7 All. 102.

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unreasonable to hold that the claimant must sue the decree-holder at a time when he may have no intention to assert a right to levy on the property, and that otherwise he cannot sue at all when the decree-holder does want to attach the property. It seems time enough as against A to come to the ultimate trial of a right existing as between B and C (in the last resort a right triable by suit) when it is necessary so to do in order to set aside an attachment or a sale by A. A possibility of an attachment in the future seems to be an insufficient basis for a suit by C against A to declare C's right as against B at a date in the past, to which A's rights can nevermore relate. This possibility is really not sufficient to distinguish the decisions cited by the present appellant. In *Gopal Purshottam* v. *Bai Divali* (1) Sir Charles Sargent in no way proceeds upon the fact that the decree was satisfied. He observes:—"We agree with the lower appeal "Court that, when the plaintiff withdrew his attach-"ment, the parties were restored to the *status quo* "*ante*. The object of the claim which was preferred "by the defendant was, as contemplated by section 278, "Code of Civil Procedure, to obtain the removal of the "attachment, and when that attachment was removed "by the judgment-creditor's own act * * there was "no longer an attachment or any other proceedings "in execution on which the order could operate to the "prejudice of the claimant and, therefore, no necessity "for bringing a suit to set aside the order." That was a case where the decree-holder had actually bought, by leave from the Court and by agreement with the judgment-debtor after the rejection of the plaintiff's claim in execution, the very property disputed in the claim case. If the decree was satisfied, it was satisfied out of that purchase money. In

(1) (1895) I. L. R. 18 Bom. 241, 243.

Krishna Prosad Roy v. *Bepin Behari Roy* (1), this Court followed that decision. The principle is that the object of making a claim in execution is to remove the attachment, that when the attachment is withdrawn that object is gained, and that, if there exists no attachment or proceeding in execution on which the order in the claim case can take effect, one is not bound to bring a suit complaining of such order. It is no answer at all to say that a decree-holder's suit under rule 63 has always to be brought after the attachment is removed. If the decree-holder succeeds, he gets the attachment restored as at the date it was made and that is what he fights for.

In these circumstances, it seems to me that this suit is not barred by Article 11 of Schedule I to the Limitation Act as being a suit by a person against whom an order has been made to establish the right which he claims to the property comprised in the order. I think, therefore, that the appeal should succeed.

The result, therefore, is that the decree of the lower Appellate Court is set aside, and the case is sent back to that Court for a retrial on the merits in accordance with the observations made above. The appellant will be entitled to his costs in this Court, and those already incurred in the lower Appellate Court. All other costs to abide the result.

PAGE J. The determination of this appeal involves the consideration of the meaning and effect of Order XXI, rule 63, of the Code of Civil Procedure. On the 4th November 1910, on the application of the present respondent, two plots of land were attached in execution of a decree which the respondent had obtained

(1) (1903) I. L. R. 31 Calc. 228.

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against the appellant's husband. The appellant thereupon preferred a claim to the property attached under Order XXI, rule 58, Code of Civil Procedure. The claim was dismissed for default on the 7th January 1911. Immediately afterwards the execution proceedings instituted by the respondent were dismissed for default, and the attachment was released. Subsequently the property in dispute was again attached in execution of the same decree, and the respondent purchased both the plots at the execution sale, and took symbolical possession of them in August 1918. On the 23rd November 1918 the appellant launched the present suit for confirmation of her possession of both the plots, and for an injunction. The question for determination is whether, having regard to the provisions of Order XXI, rule 63, Code of Civil Procedure, and Article 11 of the first schedule to the Indian Limitation Act of 1908, the appellant's suit, which was brought more than a year after her claim had been dismissed, is now maintainable. Rule 63 of Order XXI provides that "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 dis-"pute, but, subject to the result of such suit, if any, "the order shall be conclusive." The respondent contends on appeal that, if a person elects to take advantage of the procedure laid down in Order XXI, rules 58 to 63, of the Code of Civil Procedure, he must be content to abide by the provisions of the rules which he has invoked, and that, if an order is made rejecting his claim or objection, he must institute a suit within a year from the date of such order, notwithstanding that the execution proceedings in respect of which his claim had been preferred have in the meantime come to an end. In my opinion, that

contention is unsound. Whether the decree is satisfied, or set aside, or reversed, or whether the decretal amount is paid into Court under rule 55, or whether the attachment is voluntarily withdrawn by the decree-holder, or whether the order of attachment is discharged, in my opinion, the same result follows, namely, the parties are put back in the same position as they were in before the execution proceedings were launched. When a claim or objection is preferred under rules 53 to 68, the applicant seeks to obtain the release of the property from attachment. It may or may not in that behalf be necessary for him to establish a possessory or proprietary title to the property. That depends upon the circumstances of each case. Under rule 60, the claimant has to satisfy the Court that the property when attached was not in the possession of the judgment-debtor, or in possession of some person on his behalf. When the attachment is discharged, or withdrawn, or is deemed to be withdrawn under rule 55, the object sought by the applicant under rule 58 is, for the time being, at any rate, attained. No doubt the property may, in some cases, again be attached; but such further attachment must, in my view, be regarded as a new process of execution, and the claimant will be entitled to prefer a fresh claim under rule 58 against the further attachment of the property. Now, the object sought by the institution of a suit under rule 63 is, in my opinion, different. It is a suit instituted to establish the right of the claimant to the property in dispute, and not merely to remove the attachment. In the case of *Morshia Barayal* v. *Elahi Bux Khan* (1), the Court construed the words of rule 63 "a suit to establish the right which the plaintiff claims to the property in dispute." At page 383, Mr. Justice Mitra observes: "The subject matter of

(1) (1905) 3 C. L. J. 381.

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"the suit being the removal of the attachment, the right "which the plaintiff necessarily claims in such a suit is "the right to have the attachment removed. The words "'establish a right which he claims to the property in "dispute' must, therefore, mean the right to have the "attachment removed"; and he proceeds to cite with approval the following observations of Mr. Justice Beverley in the case of *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (1). "Then, if we turn to sec- "tion 283, we see that the suit there referred to is a "suit to establish the right which is claimed to the "property in suit, that is to say, the right which is "claimed in these proceedings, being on the one hand "the right to have the property attached and sold in "execution, and on the other to have it released from "attachment. The words of the section are not the "'right to the property', meaning the title to the pro- "perty, but, the 'right which he claims to the property' "which, we take it, means the right which is claimed "in that proceeding in respect of the property that "is, as we have said, the right to have it sold or the "right to have it released from attachment". With great respect to the learned Judges who made these observations, I am unable to assent to the construction which they placed upon the words of rule 63. In my opinion, in a suit instituted under rule 63 the object of the suit is to establish the plaintiff's title to the property, and not merely to establish his right to have the attachment released. In my opinion, this construction of rule 63 is in accordance with the meaning attributed to the rule by the Judicial Committee of the Privy Council in the case of *Sardhari Lal* v. *Ambika Pershad* (2). Lord Hobhouse, in giving the judgment of the Board in that case, observed: "The order is not conclusive; a suit may be brought

(1) (1888) I. L. R. 15 Calc. 674. (2) (1888) I. L. R. 15 Calc. 521, 526.

"to claim the property, notwithstanding the order; "but then the Law of Limitation says that the plaintiff "must be prompt in bringing his suit. The policy "of the Act evidently is to secure the speedy settle- "ment of questions of title raised at execution sales, "and for that reason a year is fixed as the time within "which the suit must be brought." The *ratio decidendi* of the judgment of the Court in *Phul Kumari's case* (1) would also seem to support the construction which I place upon rule 63. That being so, upon what reasonable ground ought a claimant to be compelled *de bene esse* to institute a title suit under rule 63 within a year after his claim under rule 58 has been rejected, when the object sought by him in making the application under rule 58 has been attained by the release of the property from attachment within the time limited by rule 63? I can see none. In my opinion, in circumstances such as those obtaining in this case, Article 11 of Schedule I of the Limitation Act of 1908 does not apply, and it is not incumbent upon the claimant to institute a suit to establish his title within a year after the date of the order rejecting his claim or objections under rule 58. The determination of the appeal in this sense is, in my view, in accordance with principle; and in consonance with the decisions of the Calcutta High Court and the other High Courts. See *Umesh Chander Roy* v. *Raj Bullubh Sen* (2), *Ibrahimbhai* v. *Kabulabhai* (3), *Gopal Purshottam* v. *Bai Divali* (4), *Krishna Prosad Roy* v. *Bepin Behary Roy* (5), and *Soral'ji Coovarji* v. *Kala Raghunath* (6). I agree that the appeal should be allowed.

Appeal allowed; case remanded.

G. S.

(1) (1907) I. L. R. 35 Calc. 202.
(2) (1882) I. L. R. 8 Calc 279.
(3) (1888) I. L. R. 13 Bom. 72.
(4) (1893) I. L. R. 18 Bom. 241.
(5) (1903) I. L. R. 31 Calc. 228.
(6) (1911) I. L. R. 36 Bom. 156.