APPELLATE CIVIL.

Before Mr. Justice Jackson.

CHITTURU JAGANNADHAM (PLAINTIFF), APPELLANT,

1931, April 21.

v.

BURA PYDAYYA AND EIGHTEEN OTHERS (DEFENDANTS 1 TO 8 AND 10 TO 20), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 58—Claim made after sale—Jurisdiction of Court to consider—Order rejecting claim in such case—Conclusive against claimant if no suit is brought by him within prescribed year to set it aside.

Under Order XXI, rule 58 of the Code of Civil Procedure the Court has jurisdiction to consider a claim even when it is made after the sale, and its order rejecting the claim is conclusive against the claimant if he does not bring a suit within the prescribed year to set it aside.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 187 of 1926 (Appeal Suit No. 365 of 1925, District Court's file) preferred against the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 301 of 1923.

Y. Suryanarayana for appellant.

S. Subramania Sastri for third to twelfth respondents.

Cur. adv. vult.

JUDGMENT.

This is a suit for recovery of possession of property described in two schedules A and B.

The appeal is only concerned with the B schedule property, identified as plots B-2 and B-3 by the District

* Second Appeal No. 2103 of 1927.

JAGANNADHAM v. BURA PYDAYYA.

Munsif, an identification which the Subordinate Judge may be taken to accept.

On the findings of fact the plaintiff must fail as regards these two plots, unless he can show that defendants 5 and 9 and their legal representatives 3, 6 to 12 are estopped from defending the suit, because in a previous proceeding they put in a claim under Order XXI, rule 58 of the Code of Civil Procedure and upon its rejection did not bring a suit within the prescribed year. Both the lower Courts have held that there can be no estoppel because the order rejecting the claim was passed after the property had been knocked down in Court auction, and at that point for disposing of claims under Order XXI, rule 58, the Court was *functus officio*.

The order runs:—

"The properties attached are sold to-day. This petition is put in too late, and unnecessarily delayed. Hence rejected." *Abdul Kadir Sahib* v. *Somasundaram Chettiar*(1) cited by the Subordinate Judge has no application because there the lower Court had refused jurisdiction and had not acted under Order XXI, rule 58. But in *Gopal Chandra Mukerji* v. *Notobar Kundu*(2) the Calcutta High Court has held it to be incompetent to an execution Court to proceed with an application under Order XXI, rule 58, after the sale has actually taken place. The reasoning is not easy to follow. Rule 60 provides for the Court releasing property from attachment after investigating a claim and "it is thus plain that an order under rule 60 must be made before the sale has taken place" which would seem to assume that after the sale has taken place the property is *ipso facto* released from attachment, and therefore any investigation after the sale and consequent release is on the face of it absurd. But there is no warrant for this

(1) (1922) 43 M.L.J. 467. (2) (1912) 15 I.C. 58.

assumption. The Code is quite clear on the point when an attachment is released, and sets forth under Order XXI, rule 55, the three occasions when the attachment shall be deemed to be withdrawn. In the circumstances of the present case the attachment would normally cease on satisfaction being made through the Court after the full payment of the purchase-money. Until that point of time the attachment undoubtedly subsists and while it so subsists it would be a strange state of the law if a Court is to be precluded from hearing the complaint of the lawful claimant. At any rate there is nothing in the Code that precludes it. The judgment continues:

"This is also made clear by sub-rule (2) of rule 58 which provides for the adjournment of a sale pending the investigation of the claim . . . "

No doubt if sub-rule 2 enjoined that pending a claim the sale must be adjourned, it would look as though no investigation after sale was ever contemplated; but sub-rule 2 leaves the adjournment to the Court's discretion—it is *may* not *must*. It is quite conceivable that during a sale a claim may be made, so seemingly ridiculous that the Court declines to inconvenience the bidders by adjournment, and disallows the claim subsequently under rule 61. Or, as in the present case, a claim may be put in after the sale, and may be considered and rejected. If on the other hand the claim is accepted the claimant will have his remedy even though the hearing has been after the sale, under Order XXI, rules 99 and 100, as the Calcutta case points out; and it cannot be said that the investigation of the claim is infructuous.

In another Calcutta Case, *Kali Charan* v. *Sarajini Debi*(1), a single Judge has held that, if the Court admit

(1) A.I.R. 1926 Cal. 468.

JAGANNADHAM v. BURA PYDAYYA.

the application under Order XXI, rule 58, before the sale, and then complete the sale, it precludes itself from considering the application; a ruling which affords a good example of the danger of holding that a Court while still fully competent to maintain an attachment is incompetent to hear a protest against that attachment. Surely, to put the point figuratively, if a Court has hands to seize it should also have ears to hear.

Gopal Chandra Mukerji v. *Notobar Kundu*(1) is followed in *Puhupdei* v. *Ramcharitar*(2) where again the claim was duly presented before the sale, but was only taken up after the sale was completed. Here it is held to be obvious that after the sale the attachment was *ipso facto* determined. But surely if that were so a sale would be one of the circumstances marshalled in rule 55 as justifiying the assumption that the attachment is withdrawn.

Finally these cases are approved in *Maung Po Pe* v. *Maung Kwa*(3) where it is observed that no case warranting the assumption is to be found in the official reports, possibly because it was too obvious to be reported. But with the greatest respect, when an assumption is found to be unsupported by any provision of the Code of Civil Procedure, I think it unsafe to say that it is too obvious to be reported. An assumption so naked that it can claim authority neither from the Code nor from the authorised reports cannot be said to be beyond suspicion.

I would here observe that Subordinate Courts gravely misdirect themselves when, instead of applying their minds to the binding authority of the statutes and authorised reports, they pursue the *ignis fatuus* of the unreported cases. Here the learned District Munsif

(1) (1912) 15 I.C. 53. (2) A.I.R. 1924 Pat. 76.
(3) A.I.R. 1928 Rang. 80.

seems to have apprehended the correct law at the end of his judgment (18th paragraph), but states that he is bound to follow the decisions which he cites, not a single one of which is binding upon him.

There can be no doubt that the rejection of the claim was by a Court in the proper exercise of its jurisdiction, and defendants five and nine are estopped from raising their defence. But whether any other party in the suit is bound by their estoppel is a question which the lower appellate Court has not determined, though the trial Court has held (paragraph 13) that they were neither managers nor members of a joint family.

In any case the thirteenth defendant is admittedly unaffected. As regards him the appeal fails and is dismissed with costs. As regards the rest I must call for a finding from the lower appellate Court upon existing evidence whether defendants (excepting the thirteenth defendant) other than defendants five and nine are estopped by virtue of the claim petition of 1917 and subsequent failure to bring a suit.

Time for submission of finding six weeks and ten days for objections.

[The Subordinate Judge of Vizagapatam submitted a finding to the effect that the third, fourth and ninth to thirteenth defendants were not estopped by the order on the claim petition and that the sixth to the eighth defendants were estopped by that order. On the appeal coming on for final hearing after the return of the finding, the Court delivered a judgment accepting the finding and passing consequential orders.]

A.S.V.