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and the limitation must be that, where it is shown that the guardian absents himself or herself deliberately in pursuance of a plan in order to obstruct a litigation, or the absence is not *bona fide*, the minor cannot claim the benefit of these decisions.

This appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

1934, December 21.

KARRI SEETARAMAYYA (COUNTER-PETITIONER), PETITIONER,

v.

PAPPU SUBRAHMANYAM (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 58—Claim petition under—Permanent occupancy rights in lands attached set up by claimant in—Investigation of—Permissible under r. 58, if—Order against claimant on petition—Order stating that claimant's interests will not be affected by sale and directing that a note to that effect shall be made in sale list and that sale shall be held subject to that note, if an—O. XXI, r. 97—Obstructor found to be entitled to permanent occupancy rights in land possession of which sought—Proper order to be made in case of—Failure to go into merits of claim to permanent occupancy rights in application under r. 97 by reason of misconstruction of order on claim petition—Failure to exercise jurisdiction, if—Interference in revision under sec. 115 in case of.

A claim petition put in by the petitioner under Order XXI, rule 58, of the Code of Civil Procedure, alleging that he had

* Civil Revision Petition No. 1473 of 1928.

permanent rights of occupancy in the lands attached in execution and that the judgment-debtor's right therein was confined to the collecting of an annual cist and praying either that the attachment should be cancelled and the sale stopped or the sale restricted to the judgment-debtor's right to collect the cist, was dismissed by an order which stated: "Whatever interest the defendant has in the lands put to auction will be sold and this petitioner's rights are not prejudiced thereby. A note shall be made to that effect in the sale list and the sale shall be held subject to that note."

Held that the order had not the effect of conclusively negativing the petitioner's permanent rights of occupancy and that he was not precluded by that order from pleading that he was entitled to permanent occupancy rights in answer to an application filed under Order XXI, rule 97, of the Code of Civil Procedure by the execution purchaser or his representative.

Where, in the application filed under Order XXI, rule 97, the Court below declined to go into the merits of the case, namely, whether or not the petitioner had permanent occupancy rights, by reason of its misconstruction of the order on the claim petition,

held further that there was a failure to exercise jurisdiction justifying interference in revision.

Where, in the application filed under Order XXI, rule 97, the party obstructing is found to be entitled to permanent occupancy rights in the land possession of which is sought, the proper order to make is that the applicant shall be put in possession only of the melwaram right; in other words, that he shall have symbolical possession of the land.

Per RAMESAM J.—The possession of a tenant paying rent to the judgment-debtor (whether the tenant is a tenant at will or from year to year or occupancy tenant) is regarded as the judgment-debtor's possession. A claim by such a tenant is not a claim intended by the Legislature to be investigated into by a petition under Order XXI, rule 58, of the Code.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Kovvur in Civil Miscellaneous Petition No. 132 of 1928 dated 23rd April 1928 in Original Suit No. 512 of 1922 on the

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file of the Court of the District Munsif of Cocanada.

P. Venkataramana Rao for *V. Viyyanna* for petitioner.

G. Lakshmanna and *G. Chandrasekhara Sastri* for respondent.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

RAMESAM J.—The facts out of which this civil revision petition arises are fully stated by my learned brother. There are two stages in this matter. The first is the claim petition, Execution Application No. 3433 of 1924, purported to be filed under Order XXI, rule 58, Civil Procedure Code—Exhibit A dated 21st November 1924. The order upon this is Exhibit B dated 16th December 1924. The second stage is in 1928 the obstruction by the petitioner before us to the decree-holder in delivery proceedings followed by the application of the decree-holder under Order XXI, rule 97. The order on this petition is the order against which this revision petition has been filed. In this order the District Munsif held that the obstructor, that is the tenant on the land, is precluded by the order Exhibit B from setting up his tenancy; he therefore directed delivery free of the tenant's claim.

On the first matter, my learned brother has fully considered the decisions and the construction to be placed upon Exhibit B and the effect to be given to it. I agree with him in thinking that it is not such an order as to compel the claimant to file a regular suit within one year under Order XXI, rule 63. But apart from this, it seems

to me that there is another reason why Exhibit B should not have such an effect. When a claim petition is filed under Order XXI, rule 58, where the claimant sets up some interest adverse to the judgment-debtor so as to entitle him to ask the Court to raise the attachment in respect of the whole of the property or a portion of the interest in the property attached, the Court may refuse to investigate and dismiss the petition on the ground of delay (Proviso to rule 58) or may proceed to investigate. Then the claimant should adduce evidence to show that he had some interest in, or was possessed of, the property which was attached (rule 59). If the Court then comes to the conclusion that the property was not in the possession of the judgment-debtor or some trustee for him or a tenant paying rent to him, the Court allows the claim to raise the attachment wholly or partially (rule 60). But if all that the claimant has established is a mortgage or charge, the attachment may continue subject to the mortgage or charge (rule 62). But if the Court comes to the conclusion that the property is in the possession of the judgment-debtor or a trustee for him or his tenant, the Court has not got to raise the attachment wholly or partially but proceed to sell the property. There is no claim to be allowed (rule 61). Reading rules 60 and 61, we see that where all that the claimant has is merely the interest of a tenant paying rent to the judgment-debtor (whether the tenant is a tenant at will or from year to year or occupancy tenant), such a person's possession is regarded as the judgment-debtor's possession and there is no attachment to be released. That is, for the purpose of investigating

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into the objections to attachment and the raising of the attachment wholly or partially, the possession of a tenant under the judgment-debtor is not regarded as antagonistic to the judgment-debtor, however substantial the question whether the tenant is an occupancy tenant may be for other purposes ; his possession is regarded as that of the judgment-debtor and if this is all the claim that is set up, on the face of it, it is no objection to the attachment even if fully made out. Therefore, the Court should always reject such a petition on the ground that the tenant's claim is not a kind of claim, enquiry of which is contemplated in a claim petition under Order XXI, rule 58. This is absolutely clear from the conclusion at which the Court has to arrive in rules 60 and 61 and the consequence of such conclusions. I am therefore of opinion that a claim by a tenant of the judgment-debtor is not a claim intended by the Legislature to be investigated into by a petition under Order XXI, rule 58. Therefore it is not an order upon which a suit within one year should be filed by the party against whom the order is made.

On the second point, if the obstruction is caused by a person claiming to be an occupancy tenant and therefore entitled to be in physical possession, the Court should investigate into the matter and, if it finds that the claim is a *bona fide* claim, the Court should dismiss the application of the decree-holder-purchaser in so far as it seeks to get physical delivery. The Court should not dismiss the petition totally ; it should order delivery under Order XXI, rule 96, though the purchaser seeks delivery under Order XXI,

rule 95. In such a case, some form of delivery is necessary to make the proceedings complete as against the judgment-debtor, so that in a regular suit against the obstructor by the purchaser there should be no further objection by the judgment-debtor that the execution proceedings are not complete and that the suit does not lie under section 47 of the Code of Civil Procedure [*Vide* the remarks and the procedure indicated in the Full Bench judgment delivered to-day in *Abdul Azim Sahib* v. *Chokkan Chettiar*(1).] If the Court finds against the occupancy tenant, then delivery of physical possession can be ordered (Order XXI, rule 95): the Court ought to investigate the matter. The Court disallowing the objection on the ground that the tenant was precluded by the former order on the claim petition is not one of the courses indicated in the Code and is therefore irregular and the irregularity is so material and of such serious consequences that we should interfere in revision. Apart from the order on the claim petition, it is possible that the tenant might show his occupancy rights otherwise than by what he adduced in the claim petition. He may show that the village is an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act. This is another reason why the District Munsif's order is irregular. I concur with the order proposed by my learned brother.

VENKATASUBBA RAO J.—This case has been referred to a Bench by KRISHNAN PANDALAI J. and the question raised is as regards the effect of an order made upon a claim petition. In execution of a decree obtained against one Damojipurapu

(1) (1935) I.L.R. 58 Mad. 893 (F.B.).

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Sithamma, the decree-holder attached certain lands and applied for sale thereof. A claim petition was then put in under Order XXI, rule 58, of the Civil Procedure Code by Karri Sitaramayya (the petitioner before us), wherein he alleged that he had permanent rights of occupancy in the lands in question and that the judgment-debtor's right was confined to the collecting of an annual cist of Rs. 300, and went on to say that the decree-holder was not entitled to bring the lands to sale but should be directed to sell the judgment-debtor's right, which, as above mentioned, was limited to the collecting of the cist. On those allegations, he prayed in the alternative, either that the attachment should be cancelled and the sale stopped or the sale restricted to the judgment-debtor's right to collect the cist. The Court made the following order :

> " This application was filed late and the sale is going on. Whatever interest the defendant has in the lands put to auction will be sold and this petitioner's rights are not prejudiced thereby. A note shall be made to that effect in the sale list and the sale shall be held subject to that note. This petition is dismissed."

It is the effect of this order, dated 23rd December 1924, that has now to be considered.

The sale was held ; the lands were purchased by the decree-holder himself, who transferred his right to Pappu Subrahmanyam (the respondent). The present application was filed under Order XXI, rule 97, in 1928 (that is, four years from the date of the order on the claim petition) by Subrahmanyam, who complained that he was obstructed by the petitioner in obtaining possession and prayed for the removal of the obstruction. The petitioner pleaded that he was entitled to

permanent occupancy rights and sought to rely upon a judgment of the High Court delivered in 1919 recognizing those rights. But the lower Court, upholding the respondent's preliminary objection that the order on the claim petition became conclusive under Order XXI, rule 63, as against the petitioner, refused to go into the merits of the case. The question is, has that order the effect of conclusively negativing the petitioner's permanent rights of occupancy ?

Order XXI, rule 63, says that where an order is made against a party, it shall be conclusive subject to the result of a regular suit which under the rule he is entitled to bring, and under article 11 of the Limitation Act such a suit should be brought within one year from the date of the adverse order. As has been pointed out in the referring order of NAPIER J. in *Venkataratnam* v. *Ranganayakamma*(1) and again in the judgment in *Saharabi* v. *Ali*(2), the result of holding that the order has become conclusive under Order XXI, rule 63, is to reduce very often the period of limitation from twelve years to one year, and the question becomes therefore very important in each case, whether the order to be considered is in substance hostile to the party and he is bound to get rid of it by filing a regular suit ; for, under the provision, the order must be one made "against" the party. The question is one of construction of the order made in each case and I must remark, in view of the numerous cases cited before us, that to attempt to construe one order in the light of the observations made in respect of a totally different order is hardly a safe or proper method of dealing

(1) (1918) I.L.R. 41 Mad. 985 (F.B.). (2) (1922) 44 M.L.J. 141.

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with the point; and it should be observed that in not a single case cited by Mr. Lakshmanna for the respondent was the order construed worded in the way in which the present order is. To say that the petitioner is adversely affected by an order which expressly recites that his rights are not to be prejudiced involves an obvious contradiction. The order, after reciting that the petitioner's rights are not to be prejudiced by the sale, goes on to provide that a note to that effect shall be made in the sale list and that the sale shall be held subject to this note. There is an important distinction between the terms of this order and of many other orders which have been construed by the Courts in the cases to which our attention has been drawn. In those orders what invariably the Judge said was, "Let the claimant's objection be noted in the sale proclamation", whereas the present order is of quite a different nature; it is not the mere objection of the claimant that is to be noted (that is worth very little), but it is the Judge's observation that the petitioner's rights are not to be affected by the sale. Had the order been carried out, and, we must presume it was, the bidders would have been informed that the proposed sale was not to affect the permanent occupancy rights claimed by the petitioner—which rights the order in distinct terms safeguards. The reason for the order having been worded in this way is not far to seek. In support of his alleged right, the petitioner relied not upon some vague evidence but upon a definite adjudication by the High Court. The Munsif, in the face of this, was not prepared to summarily reject his claim, nor was he disposed on the last working

day of the Court (it is significant that the order bears the date 23rd December 1924) to enter upon a minute investigation. Therefore, on the one hand, he refrained from giving a positive decision in favour of the claimant and, on the other, he was careful enough to preserve and safeguard such rights as he possessed. There was need for caution, for the Munsif could not have lost sight of the fact that the land in dispute was a large tract comprising an area of one hundred acres. It seems to me impossible to construe the order in question as having negatived the petitioner's rights, for nothing short of a clearly hostile order can operate to produce the result contended for. The decision so much relied upon by the respondent, *Venkataratnam* v. *Ranganayakamma*(1), scarcely supports him. It decided what till then was doubtful that, even where a case fell within the proviso to rule 58 which reads thus :

> " Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed ",

the order should be held to be conclusive. In some later cases it has been held that this and no more is the effect of that decision. KUMARASWAMI SASTRI and DEVADOSS JJ. in *Lingama Naidu* v. *Official Receiver, Madura*(2), after pointing out that the Full Bench ruling must be regarded as a decision on the facts of that particular case, observe that it is confined to cases where the disposal has been either on investigation or on refusal to investigate upon the ground that the claim is filed too late. Similarly, on a difference of opinion between SPENCER J. and

(1) (1918) I.L.R. 41 Mad. 985 (F.B.). (2) (1928) 110 I.C. 511.

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KRISHNAN J., it was held by SCHWABE. C.J. in *Abdul Kadir* v. *Somasundaram Chettiar*(1) that

"the Full Bench held, and held only, that where a decision is given on the ground that the matter has been designedly or unnecessarily delayed, that is a decision and an order against the applicant under Order XXI, rule 63, to which article 11 applies."

Notwithstanding the doubts expressed in these two cases regarding the correctness of the principle laid down by the learned Judges of the Full Bench, we are bound by that decision; but does it necessarily follow that it should be treated as an authority in construing the present order? In the report of that case the whole of the relevant order has not been fully quoted. After referring to certain matters in regard to which the zamindarini was in default, the Judge remarked:

"The petitioner's prayer that the sale should be held subject to this claim for cist, which has not yet been proved, is inadmissible. The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months."

First, it must be noted that there is a clear statement here that the zamindarini is not entitled to an order that the sale should be held subject to her claim; secondly, what is to be notified to the bidders is the assertion of the zamindarini, which in the previous sentence has been found not proved. What happened in the present case is the exact opposite of this: it is not the claimant's assertion that is to be notified but the Judge's decision that by the sale the petitioner's right is not to be affected.

(1) (1922) I.L.R. 45 Mad. 827.

Since the Full Bench decision, in numerous cases the orders were construed as not having negatived the rights of the claimant; *Ayya Pattar* v. *Attupurath Mankkal Karnavan*(1), *Lakshmi Ammal* v. *Kadiresan Chettiar*(2), *Saharabi* v. *Ali*(3), *Kumara Goundan* v. *Thevaraya Reddi*(4), *Lakshminarasamma* v. *Navugotla Pydanna*(5), *Abdul Kadir* v. *Somasundaram Chettiar*(6) and *Lingama Naidu* v. *Official Receiver, Madura*(7). Neither these cases nor those on which Mr. Lakshmanna relies [*Narasimha Chetti* v. *Vijiapala Nainar*(8), *Ponnusami Pillai* v. *Samu Ammal*(9), *Lakshmanan Chettiar* v. *Parasivan Pillai*(10), *Arsamma* v. *Moidin*(11) and *Ramalingayya* v. *Narayanappa*(12)] do, in my opinion, afford us the slightest help, but I cannot help remarking that in no case where the claimant's contention prevailed, was the order so favourably worded as in the present.

On the question whether the revision petition lies (the respondent, I must say, has not taken the objection), the case presents no difficulty. Here, there was a failure to exercise jurisdiction, as the lower Court, by reason of its misconstruing the order on the claim petition, declined to go into the merits of the case, namely, whether or not the claimant had permanent occupancy rights. *Birj Mohun Thakoor* v. *Rai Uma Nath Chowdhry*(13), a decision of the Judicial Committee, is a parallel case. There, where the Court refused to confirm

(1) 1919 M.W.N. 805. (2) (1921) 41 M.L.J. 198.
(3) (1922) 44 M.L.J. 141. (4) (1924) 48 M.L.J. 616.
(5) A.I.R. 1925 Mad. 265. (6) (1922) I.L.R. 45 Mad. 827.
(7) (1928) 110 I.C. 511. (8) (1914) 2 L.W. 206.
(9) (1916) 31 M.L.J. 247. (10) (1919) 37 M.L.J. 159.
(11) (1923) I.L.R. 47 Mad. 160. (12) A.I.R. 1926 Mad. 593.
(13) (1892) L.R. 19 I.A. 154 (P.C.).

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a sale under section 312 of the Code of 1882 believing that it had no power to do so on a wrong construction of the section, their Lordships held that there was a failure to exercise jurisdiction and that the decision was subject to revision. Similarly, where the lower Court on a wrong construction of Order XXI, rule 89, dismissed an application made under that rule, it was held by a Full Bench of this Court that the order was subject to revision; *Sundaram* v. *Mausa Mavuthar*(1).

In the result, the civil revision petition is allowed and the order of the lower Court is set aside, and it is directed to deal with the petition on its merits.

It need hardly be pointed out that, should the petitioner be found entitled to permanent occupancy rights, the proper order to make is (an order binding as much upon the parties here as upon the judgment-debtor) that the respondent shall be put in possession only of the melvaram right; in other words, that he shall have symbolical possession of the land.

The respondent shall pay the petitioner's costs of the civil revision petition.

A.S.V.

(1) (1921) I.L.R. 44 Mad. 554 (F.B.).