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within section 47 or section 144 of the said Code. In *Amir Baksh Sahib* v. *Venkatachala Mudali* (1) the learned Judges of the Madras High Court virtually based their decision upon the same line of reasoning, and it seems to us correct. We are of opinion, therefore, that an appeal lay to the learned District Judge in this case and that his decision on the points determined by him was correct. The order of remand was, therefore, justified under the circumstances, and it will be for the court of first instance finally and completely to determine as between the parties all the points raised by the application of Janki Ram and the objections preferred thereto on the part of Sita Ram.

We dismiss this appeal with costs.

WALSH, J. :—I entirely agree. If I were free so to hold I should hold that a suit was expressly excluded by the provisions of order XXI, rule 71. I am unable to frame, satisfactorily to my own mind, any cause of action as between a judgment-debtor and a defaulting purchaser. There is certainly no contractual relationship upon which a suit can be founded, and I am unable to see what the cause of action really is or could be. To suggest that it was intended by this rule to provide machinery for passing an order to meet the justice of the case which any party could immediately afterwards bring a suit to set aside, seems to me to pay rather an extravagant compliment to the subtlety of the compilers of the Code.

Appeal dismissed.

APPELLATE CIVIL.

1922

January, 3.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD MUBARAK HUSAIN AND ANOTHER (OBJECTORS) *v.* SAHU BIMAL PRASAD (DECREE-HOLDER)*

Civil Procedure Code (1908), *order XXI, rule 57—Execution of decree—Order dismissing application "for the present" but maintaining attachment—Fresh attachment not necessary.*

By reason of the default of the decree-holder the court was unable to proceed with the execution of the decree and passed the following order :—"The execu

* First Appeal No. 88 of 1921, from a decree of Kshirod Gopal Banerji, Subordinate Judge of Moradabad, dated the 15th of January, 1921.

(1) (1895) I. L. R., 18 Mad., 489.

tion case should for the time being (*filhal*) be dismissed, but the attachment should remain in force," and this order was submitted to by the parties.

Held, that the order, though not the order which should have been passed, was binding upon the parties, and no fresh attachment was subsequently necessary. *Namuna Bibi* v. *Rosha Miah* (1), dissented from. *Dildar Husain* v. *Shee Narain* (2) distinguished.

FOR the purposes of this report, the facts of the case sufficiently appear from the judgment of the Court.

Mr. *S. A. Haidar*, for the appellants.

Babu *Piari Lal Banerji*, for the respondent.

PIGGOTT and WALSH, JJ. :—The essential point raised by this appeal admits of being briefly stated. The court below had before it an application for execution of a decree with which, on a particular date, it found itself unable to proceed further by reason of the default of the decree-holder. Under order XXI, rule 57, the duty of the court was, either to dismiss the application, or to adjourn the proceedings to a future date. On a dismissal of the application it is provided by the said rule that the attachment shall cease. The court did not follow, as it ought to have done, the provisions of the said rule. The order which it passed was to the effect that the execution case should, for the time being, be dismissed, but that the attachment should remain in force. That is not an order which the court ought to have passed; but the question before us is as to the effect of the said order when passed. The decree-holder on a subsequent date applied to the court to take up the proceedings at the stage at which they stood on the date of the order above-mentioned ; that is to say, he asked the court to proceed with the sale of the property in question without any fresh attachment. The judgment-debtors objected that a fresh attachment was necessary and that objection has been overruled by the court below ; hence this appeal.

There is authority in support of the appellant's contention in the case of *Namuna Bibi* v. *Rosha Miah* (1). We can only say that we do not agree with the decision in that case and that the reasoning on which it is based does not commend itself to us. Moreover, that case is to a certain extent distinguishable from the present, for the execution court in the case now before us went

(1) (1911) I. L. R. 38 Calc., 482. (2) (1918) I. L. R., 41 All., 157.

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out of its way to mark the nature of the order which it purported to pass by using the words "*filhal*," which we must render "for the present" or "for the time being." There can be no doubt as to the order which the court intended to pass and that order was submitted to by the parties. It was, in substance and effect, an order that the execution proceedings do stand adjourned *sine die*. It has, however, been contended before us that the principle laid down by the learned Judges of the Calcutta High Court in the case above referred to has been adopted and enforced by a Bench of this Court. The reference is to the case of *Dildar Husain* v. *Sheo Narain* (1). We are of opinion that that case is distinguishable on the facts. To begin with, the question before the court in that case concerned the rights of a *bond fide* transferee for value. Secondly, there had been no qualifying expression used in the order of dismissal such as we find in the order laid before us in the present case. While, therefore, we desire to lay stress on the fact, already pointed out by us, that the order directing the execution case to be dismissed for the time being and the attachment maintained was not a proper order for the court to have passed, we are not prepared to treat it as a nullity and as having no effect upon the parties between whom it was passed. We think there is no force in this appeal and we dismiss it accordingly with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1921
December, 22.

Before Mr. Justice Stuart.

EMPEROR *v.* ANWAR*

Criminal Procedure Code, section 239—Joint trial—Same transaction—Joint trial of the thief and of the receiver of stolen property.

Two bicycles were stolen from different places, and in each case one Anwar, an employee of a person called Ram Saran who kept a bicycle shop was seen loitering in the neighbourhood about the time when the bicycles disappeared. Parts of each of the stolen bicycles were afterwards found, some in the shop of Ram Saran and some in the house of one Narbada Prasad.

* Criminal Revision No. 657 of 1921, from an order of I. B. Mundle, Sessions Judge of Allahabad, dated the 5th of September, 1921.

(1) (1918) I. L. R., 41 All., 157.