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 PREM
 BIHARI
 LAL
 v.
 MESSRS
 S. B. BILLI
 MORIA
 AND Co.

the value of Prem Behari Lal's property, consisting of machinery, etc., was. The liquidators have not sued for balance of account. Their case is that the contract of sale was wholly independent of the purchase of the shares. In my opinion this is a totally wrong view of facts. When there is no evidence of inadequate consideration, I hold, for the purposes of this case, that the shares were fully paid up.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

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 April, 22.

BADRI PRASAD (OBJECTOR) v. CHOKHE LAL (APPLICANT).*

Civil Procedure Code, section 122; order XXXVIII, rule 5—

Ex parte order of attachment prior to judgement—Property attached and entrusted to third person—Permission of court not obtained by attaching officer—Suit subsequently dismissed—Attached property lost—Attaching officer's liability to reimburse the defendant.

On the application of the plaintiff in a suit for the recovery of money the trial court passed an *ex parte* order for the attachment prior to judgement of certain cloths belonging to the defendant and valued at Rs. 910. A vakil of the court was named as attaching officer. He took possession of the property and made it over to one Badri Prasad for safe custody, but without taking the permission of the court to do so. The plaintiff's suit was dismissed, but when Badri Prasad was called upon to produce the defendant's property he failed to do so, and an order was thereupon passed against him for its restoration. *Held* in revision that the responsible person was not Badri Prasad but the attaching officer and an order was passed against him for the refund of the price of the cloth—Rs. 910.

Per WALSH, J.—Cases in which either an attachment or an injunction ought to be issued before judgement are extremely rare. The plaintiff ought to be able to satisfy the

court of the practical certainty of his success, and of the existence of grave danger, and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgement. In England the established practice is never to issue an attachment before judgement under any circumstances without making the applicant give an undertaking to be responsible in damages for any loss in consequence of the exceptional order given to him.

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THE facts of this case are fully stated in the judgement of DALAL, J.

Munshi *Narain Prasad Ashthana*, Munshi *Girdhari Lal Agarwala* and Munshi *Baleshwari Prasad*, for the applicant.

Dr. *Kailas Nath Katju* for the opposite party.

DALAL, J.—This matter has arisen out of interlocutory orders passed by a Subordinate Judge without proper attention to the rules dealing with procedure as to attachment prior to judgement. In a suit for recovery of money the plaintiff applied under order XXXVIII, rule 5, for attachment prior to judgement. The court passed an *ex parte* final order of attachment without having any jurisdiction to do so. Under clause 3 of that rule the court is given permission to direct a conditional attachment of the whole or any portion of the defendant's property while proceedings are pending regarding the question as to whether the defendant should furnish security for the claim of the plaintiff or not. After the order of attachment no proceedings, such as are directed in clause 1, were taken by the court. A pleader of the court, Mr. Muhammad Ibrahim, was appointed attaching officer and directed to attach the defendant's cloth of the value of Rs. 910. The cloth was made over to the custody of one Badri Prasad. It appears that Badri Prasad wrote out an undertaking that he would produce this attached property

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whenever so directed by the court or by the Commissioner. The Commissioner thereupon made a report to the court stating that he had made over the property to Badri Prasad, and had completed the performance of the task allotted to him. His report is of importance. No permission as to the action taken by him was desired by the Commissioner from the court. Subsequently, the suit was dismissed, and the defendant applied that the attachment before judgment may be removed. This application was made under rule 9, order XXXVIII. On this application the Commissioner was directed to make over the property to the defendant, but it appears that the Commissioner was unable to recover it, and he made such a report to the court. The court thereupon called upon Badri Prasad to restore the property, and his defence was that he was not really a custodian on behalf of the court. His defence was not accepted, and a decree for Rs. 910 was passed against him. He came here in revision, and the applicant Chokhe Lal was made a party respondent to the application.

When the application was heard on the 13th of April, 1926, this Bench was of opinion that the Commissioner ought to appear before it and show cause why directions should not be given to him to make good the loss suffered by Chokhe Lal. To-day it was argued on behalf of the Commissioner that this Bench had no jurisdiction to bring the Commissioner on the record as a party. There is no necessity to bring him on the record. He is already an officer of the court, and as such within the jurisdiction of this Court, which appointed him. Under order XXI, rule 43, the attaching officer is bound to keep the property in his own custody, and is held to be responsible for the due custody of that property. He is responsible just as much to this Court as to the court

of trial. [We are, therefore, of opinion that we have authority to pass any order we think appropriate against him under the circumstances of the present case.

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Under additional rules made by this Court under order XXI (see Book of Rules framed by this Court under section 122 of the Code of Civil Procedure), in rule 123 directions are given as to what is to be done by the attaching officer when the movable property is such as could not be immediately removed from the place where it is attached. In that case under rule 123 the attaching officer shall, subject to the approval of the court, make such arrangements as would be most convenient and economical. In the next rule it is stated that one of the arrangements may be to put one or more persons in special charge of such property, but for that purpose the attaching officer must obtain the permission of the court. In the present case the attaching officer presumably acted under rule 124 when he placed Badri Prasad in special charge of the property, and to make Badri Prasad liable to the jurisdiction of the court, it was necessary for the Commissioner to obtain the permission of the court. No such permission was obtained. As already pointed out, in the report which the Commissioner submitted to the court as to the action he had taken with regard to the commission issued to him, he made no request that permission may be granted to him to place the property in special charge of Badri Prasad. The Commissioner's learned counsel pointed out that when the defendant applied to the court that the custodian had died and some fresh orders should be passed for the safe custody of the property, the court directed the Commissioner to appoint another custodian. The learned counsel desired us to draw

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the conclusion from this order that the court had granted permission to the Commissioner to appoint Badri Prasad in special charge of the property. We cannot agree with this view of the facts of the case. The permission ought to be obtained at the proper time before or immediately after the custodian is appointed, and the presiding officer of the court must bring his mind to bear on the facts of the case and determine whether the person was a proper person or not to remain in charge of the property. In the present case no permission having been obtained, Badri Prasad was not an officer of the court, and the court had no jurisdiction to direct him to refund to the defendant the price of the attached property, which is not forthcoming.

I have purposely refrained from making any observation on the legal relations between the Commissioner and Badri Prasad. These will have to be determined when the Commissioner brings a suit, if any, for the recovery of the property or of its price against Badri Prasad.

In my opinion the Commissioner is, under the circumstances of the present case, the only person liable to the court to produce the attached property, or to pay its price.

I am, therefore, of opinion that the order against Badri Prasad should be discharged, and an order passed against the Commissioner for payment into court of Rs. 910 to reimburse Chokhe Lal for the loss suffered by him by the disappearance of the property.

WALSH, J.—I entirely agree. I am satisfied that on the facts proved before us, it is the only just order which we can make. Where there is a wrong, it has been said, there is always some remedy, and if the defendant in this case had had no remedy, an irreparable injury would have been inflicted upon

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him, for no cause whatever, for which he was either legally or morally responsible. But the mere fact that the acts of the court itself have created an irreparable injury upon one of the litigants, is not a sufficient ground for relieving that litigant by inflicting an injury upon another innocent person. So far as I can see, except that Badri Prasad has perhaps done a foolish thing out of either good nature or indolence, he has done nothing in relation to these goods in any way suggesting a shadow of legal or moral responsibility for their loss. And although one is bound to feel sympathy for the vakil who undertook this duty at the invitation of the court below, and although he found himself in a difficult situation, nonetheless he is the person undoubtedly legally responsible.

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I am compelled to draw the attention of the learned Judge in the court below to the fact that it is really his conduct which is responsible for the whole of this unfortunate case. From some untoward combination of circumstances it has gone on for four years, a thing in itself suggesting a grave reflection upon the administration of justice, because the whole controversy merely relates to the temporary custody of some cloth, which was not difficult either to identify or to take charge of during the short period of six months which was necessary for dismissing an unsuccessful suit. It is necessary to draw the attention of judges in subordinate courts to certain general principles which the Civil Justice Committee has recently emphasized, and to certain matters of practice and procedure which might be improved upon. There is nothing about which they have spoken so strongly as the reckless issue of *ex parte* orders. Cases in which either an attachment or an injunction ought to be issued before judgement are