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at all. The order which is passed by the Munsif and which is attacked here seems to me to be legally unassailable. I dismiss this application.

Application dismissed.

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh, and Mr. Justice Ashworth.

DEBI DAS (DEFENDANT) *v.* MAHARAJ RUP CHAND (PLAINTIFF).*

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April, 25.

Civil Procedure Code, order XXI, rules 58 to 63—Attachment —Application by alleged mortgagee to have his mortgage notified—Dismissal of application—Suit by mortgagee— —Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 11.

A person who claimed to be the holder of a mortgage on some property which was the subject of an attachment, applied to the executing court and asked that his mortgage might be notified. The court, largely because the applicant gave it no assistance by supplying the necessary information, found that no mortgage was proved to exist, and dismissed the application.

Held, that rule 63 of order XXI of the Code of Civil Procedure applied and it became necessary for the applicant to sue within one year to establish his right as mortgagee. *Durga Prasad* v. *Mansa Ram* (1) and *Ganesh Krishna* v. *Damoo* (2), dissented from. *Venkataratnam* v. *Ranganayakamma* (3) and *Lakshumanan Chettiar* v. *Parasivan Pillai* (4), referred to.

Held, further (by ASHWORTH, J.), that headings to chapters of groups of sections—unlike marginal notes—can be looked at as a guide to the interpretation of the sections to which they relate.

* Second Appeal No. 349 of 1925, from a decree of Aghore Nath Mukerji, Additional Subordinate Judge of Bareilly, dated the 22nd of November, 1924, reversing a decree of Lakshmi Narain Misra, Additional Munsif of Bareilly city, dated the 31st of May, 1924.

(1) (1904) 1 A.L.J., 531. (2) (1916) I.L.R., 41 Bom., 64.
(3) (1918) I.L.R., 41 Mad., 985. (4) (1919) 37 M.L.J., 159.

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THE facts of this case sufficiently appear from the judgement of WALSH, J.

Babu *Indu Bhushan Banerji*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondents.

WALSH, J. :—In my opinion this appeal must be allowed. I wish to make it clear that I am deciding this case and no other; but I find insuperable difficulty in getting over the terms of the order in this case of the 11th of August, 1917, and the reasoning in the Madras case to which I am about to refer and a subsequent Madras authority which took the same view.

We have not the application before us which was made by this mortgagee, but the facts are really not in dispute. There was a mortgage. The mortgagee, therefore, had a right and interest in the property attached. There had been an attachment and if the attachment was continued and the execution took its ordinary course, there would necessarily be a sale. That is by practice, by common experience, and by ordinary business considerations, the proper time for the mortgagee to draw the attention of the court to the existence of his right or claim. It may well be that he does not object to the attachment *per se*. It may be that he considers that he is adequately secured, but a finding after inquiry in favour of his mortgagee rights with a continuance of the attachment and an order for sale subject to the mortgage very much simplifies his position and his opportunity for enforcing his legal rights, and removes the risk of further litigation; in addition, an application for an order against the mortgagee, where the property is said to be of less value than the mortgage-deed, would probably result in the court holding its hand and refraining from the idle farce of selling what did not exist,

namely, the debtor's pecuniary interest or the market value of the equity of redemption. It seems to me, therefore, that the Code contemplated and did its best to provide the most convenient and expeditious way of dealing with the mortgagee rights where mortgaged property has been attached, and the necessary corollary to rule 58 of order XXI, which certainly treats the claim or objection as though it were made to the attachment *in toto*, are rules 62 and 63 which direct what the court shall do when a question is raised as to the existence of the mortgage; and although the mortgagee may not desire to object to the attachment *in toto*, or expect success if he does so, he must in order to raise his claim object to the attachment in some form or another, and what the legislature contemplated no doubt was in rule 62 something of this kind, —the court would say to the mortgagee "There is no real objection so long as your right is protected" and the mortgagee would reply "That is so. I have objected in order to obtain what I really want, namely, a direction from the court that the property be sold subject to my mortgage," and as a necessary consequence rule 63 provided what was to happen when the mortgagee failed to satisfy the court that there was any mortgagee right to be protected, and, therefore, directed 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 dispute, but subject to the result of such suit, if any, the order shall be conclusive. It is idle to say that this is either an unfair or a summary method of disposing of the mortgage. It is only summary in a provisional and temporary sense. The mortgagee's rights of suit are preserved. It is only conclusive if he does not choose to assert them. One of the evils of usufructuary mortgages

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in these provinces is that the mortgagees sleep on their rights until the property is eaten up by interest and the ancestral property of the mortgagor leaves the family for ever, and it is obvious, and the Privy Council have, I think, emphasized the point, that by these provisions the legislature intended to accelerate decision in execution cases and to encourage mortgagees to assert their rights and not to go to sleep. In this particular case the mortgagee failed to satisfy the court. What happened is sufficiently shown by the order which runs as follows :—

> " The process-fee has been paid (but) the mortgage-deed has not been filed in spite of the time that was given twice. The applicant is also absent today. There is no such incumbrance given in the report of the Sub-Registrar. The application be disallowed in default of the applicant."

The application was that of the mortgagee. He chose to stay away, to give the court no further assistance, although the court appears to have been patient with him, and he seems to have deliberately refrained from providing the materials upon which alone the court could make an order in his favour which he desired for protecting his mortgage. It may be that he was badly advised. The court seems to think, if one may read between the lines, that the mortgage had no real existence even if the mortgagee had, but whether the mortgagee was blameworthy or foolish did not much matter, because by the article of the Limitation Act with which we are now concerned he had twelve months in which to bring his suit.

I am unable to hold that that is not an order against the mortgagee. I am unable to hold that he was not claiming property in the suit dealt with in the order. Article 11 says that a suit contemplated by order XXI, rule 63, must be brought within twelve

months of the date of the order, when it is brought "by a person against whom any of the following orders has been made", and the orders referred to include orders under the Code of Civil Procedure on a claim preferred to, or an objection made to, the attachment of property attached in execution. I think this was a mortgagee's claim preferred to the property and an objection made to the sale under the attachment without reference to the mortgagee rights, and that, therefore, the ordinary mortgagee's time for suing of twelve years is cut down to one year.

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There seems to be a tendency between the High Courts to differ on this question. I say a tendency, because in Bombay and Allahabad the other view was taken under the old Act. No authority has been mentioned to us under the new Act. In the case of *Durga Prasad* v. *Mansa Ram* (1) I do not understand why the court did not refer to the subsequent provision as to what is to happen if the order is made against the applicant. I prefer the view taken in Madras, and although it is desirable, particularly in matters of procedure, that one should be consistent if possible, because no principle is at stake, if compelled to select between the two views in this case, I find it difficult to accept the reasons given in the Bombay case, namely *Ganesh Krishna* v. *Damoo* (2). The Madras case—*Venkataratnam* v. *Ranganâyakamma* (3)—is not on all fours as regards the facts, but the reasoning is certainly applicable to this case. Sir JOHN WALLIS, the Chief Justice, says that the general policy of these provisions of the Code, as explained by the Judicial Committee in *Sardhari Lal* v. *Ambika Pershad* (4), is to secure a speedy settlement of questions of title raised at execution sales. Further on he says: "Where a claim or objection is

(1) (1904) 1 A.L.J., 531. (2) (1916) I.L.R., 41 Bom., 64.
(3) (1918) I.L.R., 41 Mad., 985. (4) (1888) I.L.R., 15 Calc., 521.

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preferred under rule 58 (formerly section 278) and the court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector, in my opinion, clearly comes within the words 'the party against whom the order is made,' " and that, I think, must be held to apply to anyone in respect of whom an order has been made under order XXI, rule 63. The later case in Madras, *Lakshumanan Chettiar* v. *Parasivan Pillai* (1), is clearly in point. A petition by a simple mortgagee of the properties belonging to the judgement-debtor and attached in execution by the decree-holder, praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in favour of the petitioner and sold subject to such mortgage, is a petition falling within the provisions of order XXI, rule 58, of the Code of Civil Procedure. If it is dismissed after investigation or otherwise, the mortgagee is barred from suing after one year from the date of the order. In this case, whatever may be said about other cases, the absence of investigation was entirely due to the absence, or what the Subordinate Judge calls the default, of the mortgagee. I think, therefore, that this appeal must be allowed and that the suit must be held to be barred by article 11.

ASHWORTH, J. :—It is contended by the appellant in this appeal that a decision by a court, that property is not subject to a mortgage, is to be deemed, under order XXI, rule 63, of the Code of Civil Procedure, conclusive against a person who has asked the court either not to sell certain property attached in execution of a decree against another person or only to sell the property as subject to his mortgage, on the

(1) (1919) 37 M.L.J., 159.

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ground that such property is encumbered by a mortgage in his (the applicant's) favour. The question has to be decided by interpreting rules 58 to 63, inclusive, of order XXI. Under the Civil Procedure Code of 1882, it had to be decided by interpreting sections 278 to 283, inclusive, of that Code (hereinafter called old sections).

Rules 62 and 63 of order XXI which, in my opinion, for all purposes relevant to the present question, are identical with old sections 282 and 283, run as follows :—

"62. Where the court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so subject to such mortgage or charge.

63. 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 dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

There is a decision of this Court in 1904 reported in *Durga Prasad* v. *Mansa Ram* (1) which decided against the contention set up. This decision was based on the language of old section 282. Sir JOHN STANLEY and Sir WILLIAM BURKITT held that an order under that section was merely an order to continue the attachment subject to the mortgage and not an adjudication that the mortgage existed, which adjudication they held to be a condition precedent for the use of the section and not an order under the section that could attract the provisions of old section 283 (rule 63 of the present Code). In my opinion this reasoning is open to objection. The expression "where the court is satisfied" appears to me to require, and to confer jurisdiction on, the court to

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come to a finding of fact as to the existence of the mortgage. Without such finding of fact it can never be satisfied. Section 282, therefore, in effect provides for two alternative and mutually exclusive orders. One is an order that, as the mortgage exists, the attachment shall be continued subject to it, and the other is that *no mortgage shall be deemed to exist*. The latter order, no less than the former, is an order contemplated by rule 63 or old section 283. The question of the existence of a mortgage on the property attached may be raised before the court in two ways and at two stages. One stage is when the court has to prepare the order for sale by public auction. This is provided for in rule 66 of order XXI which was formerly section 287 of the Code. There it is stated that the sale proclamation shall specify *as fairly and accurately as possible* any encumbrance to which the property is liable, after giving notice to the decree-holder and the judgement-debtor. This plainly means that the court shall give effect to any inquiry made from these persons, and, if that inquiry leads it to believe that the property is subject to an encumbrance, it must notify the same. It seems to me the words " as fairly and accurately as possible " clearly indicate that this entry of an encumbrance in the sale proclamation cannot prejudice the rights of a third person. There is another stage when the matter of property being encumbered can be raised, that is to say, during the " investigation of claims and objections." Provision for such an objection is contained in rule 62 of order XXI (section 282 of the old Code of Civil Procedure).

An objection that attached property is subject to a mortgage is in effect an objection that, inasmuch as the whole bundle of rights inherent in or attached to the property are not liable to attachment or sale in execution of the decree against the judgement-debtor, the property should *either* be released from attachment *or*

the attachment of the property should only be continued subject to the mortgage. It is not necessary that the objector should ask for release of the property. It is sufficient that he should ask for the continuation of the attachment being made subject to the mortgage.

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A strong argument in favour of this view is also to be derived from the context of rule 62. The rule comes in the middle of a block of rules, which are commenced by a heading prefixed to rule 58, namely, "Investigation of claims and objections." It is now settled law that headings prefixed in the Bill passed by the legislature have the force of words used in the preamble of an Act and may be used as "a key to open the minds of the makers of the Act," and in this respect are unlike marginal headings, which have no force for the purpose of interpretation. A preamble cannot be used to control the enactment itself when it is expressed in clear and unambiguous terms (see page 92 of Maxwell on Statutes, 6th Edition). In the present case, however, we must hold that there is some ambiguity owing to the fact that there have been divergent decisions on this matter by different High Courts in India. Once we give effect to the heading prefixed to rule 58 and to the heading suffixed to rule 63, it is clear that a matter adjudicated upon under the intermediate rule 62 is a matter involved in the investigation of claims and obections. An adjudication of such claim or objection must be given effect to by an order and that order must be one contemplated by rule 63. It is common ground that if it is such an order, it will be absolute, unless a suit is brought within one year to contest it as provided by article 11 of the Limitation Act. The decision in *Durga Prasad* v. *Mansa Ram* (1) was given under the Code of 1882. That

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Code did not prefix section 278 (equivalent to rule 58) with any special heading as the present Code does. Moreover, it did not terminate this block of sections dealing with claims and objections by insertion of a fresh heading after section 283 (equivalent to rule 63). The consequence is that the argument based on the separation by headings of this block of sections was not available to the Judges who decided that case under the old Code. For this reason I should be prepared to hold that that decision, even if correct, was no longer applicable. I have already held that it was not correct, because it failed to construe the opening words of section 282 as conferring by implication a duty on the court to settle the question, when raised, of the existence of a mortgage. For these two reasons I am not disposed to follow that decision.

On the other hand, I consider that the decision in *Venkataratnam* v. *Ranganayakamma* (1) contains cogent reasons for the view taken in that decision. It is true that that decision did not consider the argument arising from the fact that under rule 58 a claim must be made to the property *on the ground that such property was not liable to attachment*, but I have already considered this argument. Indeed the words in rule 58 " on the ground that such property is not liable to attachment " must, in my opinion, have reference merely to a case where " an objection is made to an attachment " and not reference to a claim preferred to the property. In this view, any claim preferred to the property under rule 58 would be an objection liable to adjudication by the court if such claim were inconsistent with the continuation of an unqualified attachment, although consistent with a qualified attachment.

(1) (1918) I.L.R., 41 Mad., 985.

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For the above reasons I concur that this appeal should be allowed with costs.

BY THE COURT.—This appeal is allowed and the suit dismissed with costs.

Appeal allowed.

Ashworth, J.

REVISIONAL CRIMINAL.

Before Mr. Justice Sulaiman.

EMPEROR *v.* BABU RAM AND OTHERS.*

1927 *April*, 25.

Act No. III of 1867 (*Public Gambling Act*), *section* 13—*Gambling*—"*Public place.*"

Held on a construction of section 13 of the Public Gambling Act, 1867, that a particular place, though private, may become a public place on a particular occasion, for instance, when the members of the public are really present there. But unless such is the case, a private place cannot be called a public place merely because if some member of the public were to pass close by, he might have an opportunity of seeing what was going on there. It must be a place either open to the public or actually used by the public, the mere publicity of the situation not being sufficient.

Queen-Empress v. *Sri Lal* (1), followed. *King-Emperor* v. *Ajudhia Prasad* (2) and *Ahmad Ali* v. *King-Emperor* (3), referred to. *Emperor* v. *Sukhnandan Singh* (4), distinguished.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

The applicants were not represented.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

SULAIMAN, J.:—The only point in this case is whether gambling took place in a public place within the meaning of section 13 of the Public Gambling Act.

* Criminal Reference No. 124 of 1927.

(1) (1895) I.L.R., 17 All., 166.
(2) Weekly Notes, 1904, p. 92.
(3) (1904) 1 A.L.J., 129.
(4) (1921) I.L.R., 44 All., 265.