

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Bisheshwar Nath Srivastava.

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13.

RAM KISHAN AND ANOTHER (JUDGMENT-DEBTORS-APPELLANTS) *v.* BABU KUNDAN LAL (DECREE-HOLDER-RESPONDENTS).²³

Civil Procedure Code (Act V of 1908), order XXI, rules 58 and 63—Execution of decree for arrears of drug lease—Attachment and sale of property in execution by Assistant Collector—Objections under order XXI, rule 58 dismissed—Declaratory suit by objector decreed by Munsif—Release by Assistant Collector of attached property—Appellate court modifying Munsif's decree and dismissing suit in respect of a portion of the property attached—Order of Assistant Collector refusing to confirm sale of property about which objector's claim was dismissed by appellate court, whether justified.

In execution of a decree for arrears of a drug lease the Assistant Collector attached and sold certain property whereupon a third person filed objections under order XXI, rule 58 of the Code of Civil Procedure which were dismissed and he then filed a suit for declaration of his ownership in respect of the property in question which was decreed by the Munsif's court whereupon the Assistant Collector passed an order releasing the property from attachment. Subsequently on appeal the decree of the Munsif was modified and the objector's suit in respect of a portion of the attached property was dismissed.

Held, that the Assistant Collector was not justified in refusing to confirm the sale of the property with respect to which the suit was dismissed by the appellate court. According to order XXI, rule 63 of the Code of Civil Procedure the dismissal of the objection under order XXI, rule 58 was subject to the result of any suit which the objector might institute to establish the right which he claimed to the property under attachment and the words "the result of such suit" in that rule obviously mean the final result. Therefore in so far as the properties in respect of which the objector's suit was dismissed were concerned the order of the Assistant Collector releasing them from attachment could not be of any avail and could not

²³Execution of Decree Appeal No. 20 of 1929 against the order of K. (F. Harper, District Judge of Sitapur, dated the 15th of January, 1929, setting aside the order of M. Abdul Haq Khan, Assistant Collector, 1st Class of Khari, dated the 9th of June, 1928, rejecting the application.

be allowed to be set up as against the final result of the objector's declaratory suit. *Ram Chand v. Pitam Mal* (1), *Abdul Rahman v. Amin Sharif* (2), *Dildar Husain v. Sheo Narain* (3) and *Namuna Bibi v. Rosha Miah* (4), distinguished.

Mr. M. L. Saksena, for the appellants.

Messrs. *Ali Zaheer, Makund Behari Lal* and *P. L. Varma*, for the respondent.

HASAN and SRIVASTAVA, JJ. :—This is a judgment-debtors' appeal. The facts necessary to be stated are that on the 22nd of November, 1923, Babu Kundan Lal, the decree-holder respondent, obtained a decree from the court of the Assistant Collector for arrears of a drug lease under section 108, clause 2 of the Oudh Rent Act, read with section 7 of the Excise Act. On the 19th of August, 1926, the decree-holder respondent made an application for execution of the decree. Certain shops and houses were attached and sold on the 15th of February, 1927. One Har Dayal claimed the houses and shops, which formed the subject of attachment, as his own property and made an application under order XXI, rule 58 of the Code of Civil Procedure objecting to the attachment. His application was dismissed and he therefore instituted a suit in the civil court for a declaration of his ownership in respect of the property in question. This suit was decreed by the Munsif on the 8th of September, 1927. A few days later, on the 26th of September, 1927, the Assistant Collector relying upon the decree passed by the Munsif made an order releasing the property from attachment. The decree-holder appealed against the decision of the Munsif and on the 20th of March, 1928, the appellate court modified the Munsif's order and dismissed Har Dayal's claim for a portion of the property in suit, but upheld it in respect of the rest of the property. On the 12th of May, 1928, the decree-holder applied to the Assistant Collector for confirmation of the sale which had taken place on the 15th of February, 1927, in respect of

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(1) (1888) I.L.R., 10 All., 506.

(2) (1918) I.L.R., 45 Calc., 780.

(3) (1918) I.L.R., 41 All., 157.

(4) (1911) I.L.R., 38 Calc., 482.

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the properties regarding which Har Dayal's claim had been dismissed. The Assistant Collector rejected the application on the ground that he had already released the property from attachment. He was of opinion that the effect of his order was to put an end to the sale, and that he could not, by reason of the appellate court's order dated the 20th of March, 1928, revive the attachment or sale or make any order of confirmation in respect of it. The decree-holder went in appeal to the District Judge of Sitapur who has reversed the order of the Assistant Collector and confirmed the sale which took place on the 15th of February, 1927, except as regards the property with regard to which Har Dayal's claim has been upheld by the appellate court. The judgment-debtors' have come here in second appeal.

The contention of the judgment-debtors appellants is that the property having once been released from attachment and the execution case having been struck off, the attachment cannot be revived and the sale cannot be confirmed. The argument urged on their behalf is that as the decree-holder has allowed the order passed by the Assistant Collector on the 26th of September, 1927, to become final, the only remedy available to him now is to make an attachment again of the property and to take fresh proceedings for sale. We find ourselves unable to accede to the appellants' contention. The learned counsel for the appellants has relied on *Ram Chand v. Pitam Mal* (1), *Abdul Rahman v. Amin Sharif* (2), *Dildar Husain v. Sheo Narain* (3) and *Namuna Bibi v. Rosha Miah* (4), in support of his contention. None of the authorities cited seem to us to have any application to the present case. *Ram Chand v. Pitam* (5) and *Abdul Rahman v. Amni Sharif* (6) are both cases of attachment before judgment. They lay down that on the dismissal

(1) (1888) I.L.R., 10 All., 506.

(3) (1918) I.L.R., 41 All., 157.

(5) (1888) I.L.R., 10 All., 503

(2) (1918) I.L.R., 45 Calc., 780.

(4) (1911) I.L.R., 38 Calc., 482.

(6) (1918) I.L.R., 45 Calc., 780.

of the suit pending which the attachment has been made, the attachment before judgment falls to the ground. The other two cases, namely, *Dildar Husain v. Sheo Narain* (1) and *Namuna Bibi v. Rosha Miah* (2) are cases in which the applications for execution had been struck off, but the court had expressly ordered that the attachment should remain. It was held that the word "default" in order XXI, rule 57, is not restricted to default of appearance or matters of that description and that the attachment must be deemed to have come to an end when the applications for execution were dismissed. The learned counsel for the decree-holder-respondent has also been unable to cite to us any decided case which might throw any direct light on the question under consideration. Order XXI, rule 63, provides that "where a claim or objection is preferred, the part against whom the 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 follows from this that when Har Dayal's objection was dismissed on the 8th of January, 1927, the order of dismissal was subject to the result of any suit which Har Dayal might institute to establish the right which he claimed to the property under attachment. The words "the result of such suit" obviously mean the final result. So the dismissal of Har Dayal's objection must be considered to be subject to the order finally passed on the 20th of March, 1928, by the appellate court. In so far as the appellate court dismissed Har Dayal's claim for part of the property in suit, the order dated the 8th of January, 1927, must, in the terms of order XXI, rule 63, be deemed to be conclusive. The result, therefore, is that in so far as these properties are concerned, the order of the Assistant Collector releasing them from attachment cannot be of any avail and cannot be allowed to be set up as against the final result of Har Dayal's declaratory suit. On general principles also we think that we must arrive

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at the same conclusion. The order of the Assistant Collector, dated the 26th of September, 1927, is founded on the decree passed by the Munsif. This decree was subsequently modified by the Court of Appeal. In so far as the foundation of the Assistant Collector's order had been removed by the appellate court, there remains nothing to support it. The order of the Assistant Collector must, therefore, be deemed to be subject to the order of the appellate court.

For the above reasons we are of opinion that the decision arrived at by the learned District Judge is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

1929
December,
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RAGGHU SINGH AND OTHERS (PLAINTIFFS-APPELLANTS)
v. DEPUTY COMMISSIONER, SITAPUR,
MANAGER, COURT OF WARDS KATESAR
ESTATE, (DEFENDANT-RESPONDENT).*

Limitation Act (IX of 1908), article 148—Mortgage of Nawabi times—Mortgagee agreeing that if he did not pay up by a certain date he would lose all his rights and would hand over possession—Default in payment—Possession actually handed over long after the time fixed—Mortgagee in possession ever since—Redemption suit when barred by limitation—Oudh Estates Act (I of 1869), section 6—Section 6 of Act (I of 1869), applicability of.

A mortgage without possession of certain villages was executed in January, 1846, and the mortgagor agreed that if he did not pay the amount due in 1848 he would lose all his rights and would hand over possession to the mortgagees and admittedly nothing was paid and the villages were handed over to the mortgagee in 1852 and the mortgagee remained in possession of them ever since.

Held, that the suit for redemption brought in 1928 was barred by limitation under article 148 of the first schedule of

*Second Civil Appeal No. 74 of 1929, against the decree of Mr. Gokul Prasad, Subordinate Judge of Sitapur, dated the 15th of November, 1928, confirming the decree of Pandit Pradyumn Kishen Kaul, Munsif of Sitapur, dated the 21st of May, 1928.