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Hamilton J.

judgment only. He held that Order 38, rule 10, does not apply. It is true that Order 38, rule 10 states that an attachment before judgment does not bar a person holding a decree from applying for the sale of the property under attachment and in the present case there is no question of sale of property because cash was attached, but I do not see why the principle should not be followed merely because the attached property is cash in one case and something else in the other. *Bisheshar Das v. Ambika Prasad* (1) and *Profulla Nath Tagore v. Asia Khatun* (2) refer to cases of sale of property to which Order 38, rule 10 applies but *S. Cassam v. K. S. M. M. Abdul Kader* (3) referred to a sum of money, and Order 38, rule 10 was referred to by way of analogy. I am satisfied, therefore, that the person who first obtains his attachment cannot claim priority if the attachment is one before judgment.

I, therefore, allow the application and set aside the order of the court below, with costs, and send the case back for further steps.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice A. H. deB. Hamilton

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BACHAN LAL (APPELLANT) v. GOBARDHAN AND OTHERS
(RESPONDENTS)*

Abadi—Sale of part of one's share in a village—Presumption that vendee buys corresponding share in vendor's house in the village, if can be raised.

Because when the whole share of a person in a village is sold it is presumed that a house on it is also sold it cannot be held that there is a presumption when a person buys part of another person's share in a village that he buys a corresponding share in the house of his vendor in the village.

*Second Civil Appeal No. 329 of 1937, against the order of Pundit Girja Shankar Misra, Additional Civil Judge of Unao, dated the 13th May, 1937.

(1) (1915) I.L.R. 87 All., 575. (2) (1934) A.I.R., Cal., 426.
(3) (1926) A.I.R., Ran., 85.

Balram Singh v. Ganga Singh (1) and *Krishna Kumari Debi v. Rajendra Bahadur Singh Deo* (2), distinguished.

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Mr. *Haidar Husain*, for the appellant.

Mr. *M. Wasim*, for respondents Nos. 1 to 3.

HAMILTON, J.:—This is a second appeal by a defendant against whom a decree was passed and whose appeal was dismissed by the Additional Civil Judge.

The facts as far as they affect this appeal are that one Badlu owned 32 pies in village Narharpur. In 1866 he sold a 16 pies share, that is to say half of what he owned, to the plaintiffs, but distinctly stated that he reserved his residential house. He made other sales of part of his share in which he did not mention the house, but eventually in 1891 he sold a two pies share, which was all that he had left, to the plaintiffs and in this deed he expressly declared that he was selling the entire residential house. The defendant urged that as in deeds in their favour there was no express mention of the house being excluded as had been done in the deed of 1886 they were entitled to a share in the house. This view found favour in the courts below, but the suit was nevertheless dismissed on the ground that the plaintiff had possession over the whole house. The learned Additional Civil Judge refers to *Balram Singh v. Ganga Singh* (1) and *Krishna Kumari Debi v. Rajendra Bahadur Singh Deo* (2) as supporting his view that when there is no mention in a deed that the sale of a share does not include the sale of a house standing on that share it must be held that the house goes with the share. These authorities hold good in a case where a complete share has been sold and nothing is reserved and, therefore, it is presumed that a house standing on this share is also sold. The same presumption does not arise when the whole share is not sold but only a part of it because when only a part of a share is sold much is reserved as for instance

(1) (1925) 13 O.L.J., 432.

(2) (1929) 6 O.W.N., 1150.

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the balance of the share which is not sold. I know of no authority to the effect that when a person buys part of another person's share in a village the presumption is that he buys a corresponding share in the house of his vendor in the village. I am not, therefore, prepared to hold that because, when a whole share is sold it is presumed that a house on it is sold, one should also hold that when part of a share is sold a similar share in a house in the share must be sold. This being so, there is no force in this appeal which is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice R. L. Yorke

1939
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MRS. VIOLET PETERSON (APPLICANT) v. MRS. ADELAIDE ELIZABETH FORBES, IN THE MATTER OF THE ESTATE OF THE LATE (OPPOSITE-PARTY)*

Succession Act (XXXIX of 1925), section 295—Civil Procedure Code (Act V of 1908), section 10—Probate application—Section 10, Civil Procedure Code, whether applicable to proceedings under section 295, Indian Succession Act—Date of probate application and not the date when proceedings become contentious to be regarded as date of institution under section 10, Civil Procedure Code.

Section 10 of the Code of Civil Procedure is not strictly applicable to proceedings under section 295 of the Indian Succession Act. But even assuming that it is applicable in principle then as between rival applications for probate it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious. The only date which can be regarded as the date of institution with a view to deciding which of the two rival "suits" is "previously instituted" must be the date on which the petition was filed.

Any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation for a suit, must be considered to date back as a plaint to the date on which it was filed as an application.

*Civil Miscellaneous Application No. 925 of 1939, in Testamentary Case No. 1 of 1939.