

passed an order either under rule 99 or rule 100 of Order XXI, and that would have given a right to the plaintiff to sue the party successfully obstructing him. So far as the defendant No. 2 is concerned the learned Judge in the Court below has recorded a finding that the plaintiff has not established his title as against him.

This appeal must be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL

Before Das and Adami, J.J.

BISWANATH PATRA

1921

Sovani Jena

vs.

Bhima Rai.

Das, J.

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December, 1

LINGARAJ PATRA.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 58, 63 and 100—usufructuary mortgagee in possession, objection to attachment by, at instance of judgment creditor of mortgagor—objection dismissed—property sold under the decree and mortgagee dispossessed—whether mortgagee entitled to apply under rule 100.

A person in possession of property under an usufructuary mortgage is not entitled to object, under Order XXI, rule 58, of the Code of Civil Procedure, 1908, to the attachment of the property at the instance of a person who holds a decree against the mortgagor, and, therefore, when such an objection has been made and disallowed rule 63 does not debar the objector from making an application under rule 100.

The facts of the case material to this report were as follows:—

The petitioner was in possession of certain property under an usufructuary mortgage executed by opposite party No. 3. Opposite parties Nos. 1 and 2 obtained a money decree against the latter and attached

* Circuit Court, Cuttack. Civil Revision No. 8 of 1921 from an order of Balm Lakshmi Narain Patnaik, Munsif of Puri dated the 19th February, 1921.

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the property of which the petitioner was in possession. The petitioner filed an objection under Order XXI, rule 58, of the Code of Civil Procedure, 1908, which was rejected on the ground that it was unnecessary for him to apply under rule 58 and also on the ground that his objection was too late. The holder of the money decree subsequently purchased the property in execution of the decree and obtained possession through the court. The petitioner then made an application under rule 100. The court held that the application was barred by rule 63.

The objector petitioned the High Court.

Brajraj Chowdhury, for the petitioner.

Subodh Chandra Chatterjee, for the opposite party.

DAS, J.—This application must succeed. The opposite-party No. 3 executed an usufructuary mortgage so far back as the 17th August, 1916, in favour of the petitioner. On the 19th February, 1917, the opposite-party No. 3 borrowed another sum and executed another bond for the consolidated sum of Rs. 1,000. The opposite-party 1 and 2 obtained a money decree against opposite-party No. 3 and in execution of that money decree attached the properties which were in the possession of the petitioner. On the 5th July, 1919, the petitioner made an application under Order XXI, rule 58. The court rejected that application on two grounds: *first*, on the ground that there was no necessity for him to apply under Order XXI, rule 58, and, *secondly*, on the ground that his application was too late.

It appears that the properties have now been purchased by the decree-holder and he has now obtained possession of the properties through court. The application out of which the present proceedings have arisen was an application by the petitioner under Order XXI, rule 100, of the Code. The learned Munsif has taken the view that Order XXI, rule 63, is a complete answer to the case of the petitioner. I am wholly unable to accept this view. Order XXI, rule 63, provides 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, the order shall be conclusive". Now the question arises whether it was at all necessary for the petitioner to apply under Order XXI, rule 53. The learned Munsif says that the applicant "could come" under Order XXI, rule 58, and as he "did come" he cannot now apply under Order XXI, rule 100. Now this view is quite erroneous. He could only apply under Order XXI, rule 58, on the ground that the property was not liable to attachment. But then his position as a mortgagee did not entitle him to come to court and argue that the property was not liable to attachment. The order passed by the court in no way touched the interest of the mortgagee. He is now prejudiced because he has been dispossessed by the order of the Civil Court and in my opinion it was obligatory on the learned munsif to dispose of the application in accordance with law. I hold that Order XXI, rule 63, does not bar the application of the petitioner.

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I must allow the application, set aside the order of the learned Munsif and remand the case to him for disposal according to law.

ADAMI, J.—I agree.

Application allowed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

KANDURI SAHU

v.

ARJUN SAHU.*

1921

December, 1.

*Orissa Tenancy Act, 1913 (B. S. O. Act II of 1913), section 236—
 under-tenant of homestead land, whether liable to ejection on
 notice to quit.*

*Circuit Court, Cuttack. Appeal from Appellate Decree No. 7 of 1921 from a decision of D. H. Kingsford, Esqr., District Judge of Cuttack, dated the 5th January, 1921, reversing a decision of Babu Baidya Nath Das, Additional Munsiff of Jaipur, dated the 24th February, 1920.