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MACPHERSON, J.

(e.g., by his own deposition, after he has been subjected to examination by the Court and questioned by creditors as to his conduct dealings and property), the Court *may* stop taking evidence on this point (an enabling provision) but unless and until the Court is so satisfied (and experience shows that little reliance is to be placed on the uncorroborated testimony or documents of many debtor-applicants) the Court is bound to hear further evidence on the point and if it is not forthcoming, to dismiss the petition. For instance it is for the Court to say whether a deed of sale produced by the petitioner and purporting to transfer his property is such proof as to satisfy it in the particular case that prima facie he has no property left and therefore is unable to pay his debts. Then it is easy to lay undue stress on the fact that enquiry into the bonafides of a transfer may be made at the time of discharge of the insolvent but one must not forget that a large proportion of insolvents never apply for discharge and the effect of adjudication is to give them protection for (as a rule) six months and facilities for putting further obstacles in the way of their creditors, a fact which it may be supposed was not unknown to the legislature.

Order set aside.

APPELLATE CIVIL.

Before Kulwant Sahay and Ross, JJ.

GILLU MAL

v.

FIRM MANOHAR DAS JAI NARAIN.*

1928.

April. 26.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rules* 58, 63—*claim petition, dismissal of for default—subsequent suit by claimant—onus probandi.*

The burden of proof in a suit under Order XXI, rule 63, is on the party seeking to establish his right to attach the

*Appeal from Original Decree no. 8 of 1925, from a decision of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge, First Court, Patna, dated the 21st of November, 1924.

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property in dispute even when his opponent's claim under rule 58 has been dismissed for non-prosecution.

V. E. A. R. M. Firm v. *Maung Ba Kyiu* (1), applied.

Jamahar Kumari Bibi v. *Askaran Boid* (2) and *Bibi Sairah* v. *Musammat Golab Kuer*(3), distinguished.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Ross, J.

Khurshaid Husnain and *S. Dayal*, for the appellants

H L. Nandkeolyar (with him Nooruddin), for the respondents.

Ross, J.—This is an appeal by the plaintiffs in a suit brought under Order XXI, rule 63. Puran Mal Ghansam Dass were a firm carrying on business in the city of Patna. The business was managed by Premsukh Dass, the father of defendants nos. 3 to 8 and grand-father of defendants nos. 14 to 16, and by Nathoram, defendant no. 2, father of defendants nos. 9 to 13. On the 21st of September, 1918, the firm borrowed Rs. 30,000 from Gillu Mal, plaintiff no. 1 and Chokh Raj, the father of plaintiffs nos. 1 and 2. The firm failed in February 1921. By various private sales and in other ways the defendants nos. 2 to 16 had paid off Rs. 16,500 out of this debt. On the 24th of April, 1923, a sum of Rs. 23,831 was still due and properties nos. 2 and 3 of the mortgage bond which are the subject-matter of the present suit, being a house in Mirchaiganj and a godown in Chamargalia in Patna City, were sold to the plaintiffs for Rs. 18,000 and the balance of the debt was remitted. It appears that on the 25th of December, 1920, the firm had obtained money on a hundi from the defendant no. 1 and a decree was passed on the basis of this hundi on the 23rd of February, 1922, and execution was taken out for satisfaction of the decretal amount of Rs. 3,006-2-6 and the property in suit

(1) (1928) 46 Cal. L. J. 349, P. C. (2) (1915) 22 Cal. L. J. 27.
(3) (1919) Cal. W. N. (Pat.) 409.

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was attached on the 31st of August 1923. The plaintiffs made a claim under Order XXI, rule 58, which was rejected without trial as the claimants did not appear. Therefore this suit was brought for a declaration of their title to the properties in suit and for a permanent injunction against the defendant no. 1 restraining him from proceeding against these properties in execution. The defence was that the plaintiffs are the brothers-in-law of Nathoram, defendant no. 2, and that the bond of the 21st of September, 1918, and the deed of sale of the 24th of April, 1923, were both fictitious instruments without consideration. The learned Subordinate Judge decided in favour of the defence on both their allegations and dismissed the suit.

The first question that arises is as to the burden of proof. It was contended on behalf of the appellants that inasmuch as the claim under Order XXI, rule 58, was dismissed without decision on the merits, it was for the defence to show that the deeds in question were fictitious and not what they appeared to be. The respondent relied on the decisions in *Jamahar Kumari Bibi* v. *Askarar Boid* (1) and *Bibi Sairah* v. *Musammat Golab Kuer*(2) and contended that the plaintiffs must show affirmatively that not only the ostensible but the real title was in them and that the burden was not discharged by merely pointing to the innocent appearance of the instruments under which they claimed, but they must show that they were as good as they looked; and that the defendant was not to make out that they were colourable. It is not clear from either of the reports whether the claims under Order XXI, rule 58, in these cases had been dismissed after trial or not. In the first case it is indeed stated that an adverse decision of the Court had been given and the second case states that the objection was rejected on the ground that the transfer was fabricated in order to defraud the creditors of the judgment-debtor. These observations

(1) (1915) 22 Cal. L. J. 27. (2) (1919) Cal. W. N. (Pat.) 409.

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would seem to indicate that there had been a trial of the claim; and prima facie it does not appear reasonable that the plaintiff should be in a worse position than he would otherwise have occupied merely because he preferred a claim under Order XXI, rule 58, but did not prosecute it to a decision. There is, however, a recent decision of the Judicial Committee in *V. E. A. R. M. Firm* v. *Maung Ba Kyiu*(1) a case in which a claim under Order XXI, rule 58, had failed and a suit was brought under Order XXI, rule 63. Their Lordships observed, "Now they (that is, the plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebodyelse's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one." On the authority of this decision it would appear that the burden of proof was on the defence.

The execution of the mortgage has been proved by plaintiffs' witness no. 1 Abdul Gani, a Mukhtear, and Ashraf Husain his clerk who were both attesting witnesses and the former of whom drafted the bond. They both deposed to the payment of Rs. 30,000 in their presence. Evidence was also given by Umrao Lal, plaintiffs' gomashta, in corroboration of this evidence. He states that after the deed was registered the mortgagors gave him the registration receipt and he gave them the money. The learned Subordinate Judge in dealing with this evidence has laid great stress on certain discrepancies about the date of execution and the date of registration; but these are wholly immaterial because there is no doubt about the facts that the deed was executed and was registered and the fact that the witnesses made discrepant statements on this point in speaking to a transaction which took place six years before seems to me rather to lend credibility to their statements than otherwise. The learned Subordinate Judge has

(1) (1928) 46 Cal. L. J. 349 P. C.

also given great weight to a statement made by Abdul Gani that Umrao Lal received the sum of Rs. 30,000 on behalf of the debtors and considers it incredible that the creditor's gomashta should receive the money on behalf of the debtors. This, however, cannot possibly be what the witness meant. There is no suggestion that the money was paid to Umrao Lal and Umrao Lal's own evidence was that it was he who made the payment. The meaning attributed by the learned Subordinate Judge to the statement of the witness Abdul Gani cannot possibly have been intended by the witness; and this interpretation does not seem to have been placed upon it by the parties themselves, because no question suggesting such a state of facts was put to Umrao Lal. Another point which was taken about the payment of consideration was that, according to the witnesses, the money was paid by Rs. 1,500 in Indian currency notes and Rs. 1,000 sovereigns and it was contended that the market value of sovereigns at that time was more than Rs. 15. If the witnesses were speaking to a fictitious transaction, this is not a point which was likely to have escaped their notice. The transaction was between relations and it is quite possible that they did not regard the strict rate of exchange. Nor is it to my mind an important consideration that the money was not paid in the presence of the Registrar. If the transaction had been fictitious it is more likely that a show of payment before the Registrar would have been made; but as the parties were relations, if they were in fact lending and borrowing this money, there is no reason why the payment should have taken place before the Registrar. It is not suggested that the plaintiffs were not in a position to advance Rs. 30,000 or to produce the same before the Registrar.

The mortgage bond does not stand alone. There were eight properties mortgaged. The first of these is mauza Sartha. This village was sold in execution of a decree and purchased by Harnandan Prasad

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Singh. The judgment-debtors brought a suit to have the sale set aside and the suit was compromised. That compromise recited the present mortgage and the terms were that Harnandan Prasad Singh the auction purchaser should pay Rs. 4,000 to the mortgagees and get a registered deed of release and that the suit should be dismissed on these terms. The compromise decree is Exhibit 7 and Exhibit 2 is the deed of release executed by the mortgagees in favour of Harnandan Prasad Singh. The deed recites the receipt of Rs. 4,000. This was not the only transaction with Harnandan Prasad Singh. He also purchased another village belonging to the mortgagors, Chak Sakina. This deed (Exhibit 5) which was executed on the same day as Exhibit 2 also recites the mortgage and refers to the mortgagor's efforts to raise money to pay off the debt. Chak Sakina was sold with this object for Rs. 1,500. The deed recites that the consideration was received and was paid through the vendee to the mortgagees. Evidence has been given by Gobind Prasad witness no. 3 for the plaintiffs who is the clerk of a Vakil and looks after the cases of Harnandan Prasad Singh, in support of both these transactions and no reason was shown in cross-examination of this witness for disbelieving him.

Another property mortgaged was a Gola, property no. 6. This was purchased by one Jagarnath Singh by a deed (Exhibit 3) executed on the 26th of August, 1921, in consideration of Rs. 3,000. This deed also recites the mortgage and says that Rs. 1,000 was paid to the vendors and Rs. 2,000 was to be paid to the mortgagees. Exhibit 4 is the deed of release executed by the attorney of the mortgagees in favour of Jagarnath Singh on the 12th of April, 1923, acknowledging the receipt of Rs. 2,000. This transaction was deposed to by Jagarnath Singh himself. A doubt has been thrown upon it because of the delay in making the payment to the mortgagees and because of his readiness to pay Rs. 1,000 for a property which was in mortgage on the mere assurance

of the vendor that a release would be given; but there can be no doubt about the sale and there is no reason why Jagarnath Singh should lend himself to any fraud in connection with the sale. I see no reason why he should have accepted a deed of sale containing false recitals.

ROES, J.

The respondents laid stress on the fact that the plaintiffs' account books were not produced and that neither the plaintiffs nor the defendants nos. 2 to 16 nor Harnandan Prasad Singh had come to the witness-box. The explanation of the non-production of the account books given by Umrao Lal was that the money was paid by Gillu Mal out of his separate funds and as this was apart from the business, it was not shown in the accounts. The absence of the plaintiff no. 1 was explained on the ground of his illness. The explanation may not be very convincing; but on the other hand this is not a case of any great importance, because the amount of the decree is only Rs. 3,000 and the plaintiffs do business in Cawnpur. These considerations do not in my judgment outweigh the actual evidence that has been given. As to the absence of Harnandan Prasad Singh, he is not interested in the matter and there is no reason why he should have come to depose.

Another point of importance is whether it has been shown that in 1918 the firm was in debt or was so embarrassed as to be likely to enter into a fictitious mortgage in order to protect their property. The evidence of Umrao Lal is that this money was borrowed for the business and that the family was in a flourishing condition at that time. Witness no. 3 for the defence states that the firm was in debt even in 1918, but he admits that he cannot recollect the name of any one who lent to the firm and was not paid in 1918, 1919 or 1920. Witness no. 6 for the defence also says that in 1918 the firm was heavily involved, but he admits that he cannot say who the creditors in 1918 and 1919 were.

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In this state of the evidence it seems to me that it must be taken to be proved that the mortgage of 1918 was a genuine mortgage for consideration.

I now turn to the sale of 1923. It is true that the property had been under attachment shortly before the sale and that the execution case was dismissed only on the 19th of April, 1923. Evidence was given on behalf of the defence to show that the defendants nos. 2 to 16 were in possession of the house until five or six months before the witnesses deposed and that the rent for the godown was paid by its lessee to the nominee of these defendants. At all events it was admitted by the defence witnesses that the defendants were no longer in possession of the house and evidence was given on behalf of the plaintiffs by one Ram Chandra that he was now its tenant and a tenant under the plaintiffs. It was admitted by the defendants' witness no. 1 who deposed to the payment of rent of the godown that he had received notice from the plaintiffs in July, 1924, demanding that the rent should be paid to them. The parties being relations, the plaintiffs' delay in taking advantage of the purchase does not necessarily show that it was not a real transaction.

The conclusion therefore at which I have arrived is that there was a real mortgage transaction and that as regards the sale, while the defence has been able to raise some grounds for suspicion they have given no evidence to establish that it was a fraudulent transaction. In my opinion therefore the appeal should be decreed with costs and the suit decreed with costs.

KULWANT SAHAY, J.—I agree. It was contended that when a suit is instituted under Order XXI, rule 63, by a party against whom an order is made in a claim case, it is for him to establish the right which he claims to the property in dispute and therefore in every case the onus is upon him to prove the real nature of the conveyance under which he claims

irrespective of the fact whether the claim was dismissed after investigation or without investigation on the merits. In my opinion this is not a correct view of the law. Order XXI, rule 63 merely empowers the party against whom an order is made to institute a suit to establish his right. It does not deal with the question as regards the burden of proof and this question has to be decided according to the law of evidence. When there has been an investigation of the claim and it has been dismissed on the merits, it may be contended that the onus is on the party who seeks to establish his right, inasmuch as his claim has been dismissed on the merits; but the recent decision of the Privy Council in *V. E. A. R. M. Firm* v. *Maung Ba Kyiu* (1) seems to take a different view. When, however, a claim is dismissed for default without investigation on the merits, I fail to see why the plaintiff should be in a worse position than that in which he would have been if no claim case had been brought at all. He was under no obligation to bring a claim case, he might have ignored the attachment and resisted the purchaser in execution of the decree from taking possession and driven him to bring a suit to establish his title under his purchase and in that case the onus would clearly be upon the purchaser to prove the benami nature of the conveyance. I think the position is the same when a suit is instituted by a party whose claim is dismissed for default without trial on merits. There are cases in the books which lay it down that even in the case of dismissal of a claim for default, the suit contemplated by Order XXI, rule 63, has to be brought within one year of the order, but this is based on the provisions of Article 11 of the Schedule to the Limitation Act where special provision is made for such suits. This, however, in no way affects the rules of evidence and of the burden of proof and I am of opinion that the onus in the present case was upon the defendant no. 1 to prove that the apparent state of things was not the

(1) (1928) 46 Cal. L. J. 849, P. C.

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real state and that the conveyance of the 24th of April, 1923, was fictitious and without consideration. I agree that he has failed to discharge the onus, and that the suit should be decreed with costs.

Appeal decreed.

APPELLATE CIVIL.

Before Terrell, C. J., and Mullick, J.

RAM NARAYAN SINGH

v.

SUKHDEO TELI.*

1928.

April, 18.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 106 *and* 109—*suit for correction of record-of-rights—suit withdrawn—subsequent suit against the plaintiff—defence that entry is wrong.*

Section 109 of the Bengal Tenancy Act, 1885, does not debar a defendant from taking as a defence grounds which were the subject-matter of an application which was made by him before the Settlement Officer in a proceeding under section 106, but on which no decision having the force of a decree was made by the Settlement Officer.

Where, therefore, a suit under section 106 by the purchaser of a holding, for substitution of his name in the record-of-rights in place of that of the vendor, is withdrawn without leave to institute a fresh suit, the purchaser is not debarred by section 109, in a suit for declaration of title and possession by the reversioners of the vendor from pleading that the holding is his by purchase.

Purna Chandra Chatterjee v. *Narendra Nath Chowdhury*(1), distinguished.

Aswini Kumar Aich v. *Saroda Charan Basu* (2), approved.

* *Second Appeal no. 1116 of 1925, from a decision of Babu Pramatha Nath, Subordinate Judge of Saran, dated the 8th June, 1925, reversing a decision of Babu Charu Chandra Coari, Munsif of Chapra, dated the 5th March 1924.*

(1) (1925) I. L. R. 52 Cal. 804, F. B. (2) (1916) 24 Cal. L. J. 79.