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has been instructed to intimate to us that the Government only wants a finding of this Court correcting the erroneous view of the law taken by the learned Sessions Judge and that the Government is not anxious to punish the accused. This is a reasonable attitude taken by the Government. But it is difficult to extricate the anomalous position of the Government created by the circular issued under its authority letting the medical practitioners to believe that they would not be prosecuted for bonafide medical preparations containing alcohol and at the same time seeking the prosecution of the accused by filing this appeal and not withdrawing it inasmuch as the circular in question has not the force of law and the accused has technically committed the offence of which he has been charged, and we have no power but to inflict some punishment upon him. In the circumstances a technical punishment will meet the ends of justice and accordingly a fine of Re. 1 is imposed upon him.

JAMES, J.—I agree.

APPELLATE CIVIL.

Before Kulwant Sahay and Wort, JJ.

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Jan., 29 30, 31.
Feb., 1, 4.
March, 18.

MAHADEO MISSIR

v.

RAM PRASHAD.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 63, *suit under—onus on the plaintiff to prove the right he claims.*

In a suit under Order XXI, rule 63, Code of Civil Procedure, 1908, the plaintiff has to establish the right which he claims. Therefore, the onus is on the plaintiff, who relies

*First Appeal no. 128 of 1927, from a decision of Moulvi Ali Karim, Additional Subordinate Judge of Gaya, dated the 31st May, 1927.

on a deed of transfer, to prove not merely the valid execution of the document and the passing of consideration thereunder, but also the fact that the document is really what it purports to be and is not merely a colourable transaction.

Jamahar Kumari Bibi v. *Askaran Boid*(1) and *Nannhi Jan* v. *Karam Ali Khan*(2), followed.

V. E. A. R. M. Firm v. *Maung Ba Kyin*(3) and *Gilu Mal* v. *Firm Manohar Das*(4), distinguished.

Appeal by the plaintiff.

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

Sir Ali Imam (with him *G. P. Das*, *Pitambar Misra* and *Pandey Nawal Kishore Sahai*), for the appellant.

S. M. Mullick and *S. N. Ray*, for the respondent.

KULWANT SAHAY, J.—This appeal is by the plaintiff whose suit brought under the provisions of Order XXI, rule 63, of the Code of Civil Procedure has been dismissed by the Subordinate Judge. The facts are shortly these:— *18th March 1929.*

The defendants first party, a firm carrying on business in Calcutta, obtained two decrees for money against the defendants-second-party, who carry on business in Patna and also in Calcutta, from the Original Side of the Calcutta High Court on the 6th of February, 1922, and 4th of December, 1922, for the sum of Rs. 1,503-14-6 and Rs. 2,043-5-4 respectively. In 1925 these two decrees were transferred to Gaya for execution, and two execution cases, nos. 98 and 100 of 1925, were started in the Gaya Court. On the 23rd of June, 1925, a 3-annas 4-pies mukarrari interest of the defendants-second-party in mauza Naugarh Suknabigha, tauzi no. 1755 of the Gaya Collectorate, was attached in those execution cases. On the 17th of July, 1925, the plaintiff filed

(1) (1915) 22 Cal. L. J. 27, F. B.
(2) (1908) I. L. R. 30 All. 321.
(3) (1927-28) 32 Cal. W. N. 28.
(4) (1928) 9 Pat. L. T. 461.

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an objection under Order XXI rule 58, of the Code of Civil Procedure claiming the attached property as his, under a deed of sale dated the 29th of November, 1923, executed by the defendants-second-party in his favour for a consideration of Rs. 15,000. The learned Subordinate Judge by his order dated the 7th of November, 1925, disallowed the objection of the plaintiff. The present suit was thereupon instituted by the plaintiff on the 13th of February, 1926, for setting aside the order of the 7th of November, 1925, for a declaration of his title, and for permanent injunction restraining the defendants-first-party from proceeding with the sale of the property in dispute in the execution cases mentioned above.

The defendants-first-party filed a written statement in which they asserted that the property in dispute was still the property of their judgment-debtors, namely, the defendants-second-party and that the alleged purchase of the plaintiff was a collusive and colourable transaction without consideration. The learned Subordinate Judge has held that the plaintiff is a mere benamidar for the defendants-second-party and that the deed of sale of the 29th of November, 1923, was without any consideration, a farzi and fictitious transaction, executed with a view to defeat or delay the claim of the creditors of the defendants-second-party. He accordingly dismissed the suit.

The first point for consideration is as regards the burden of proof. The learned Subordinate Judge has held that the burden of proof is upon the plaintiff to prove in the first instance at least, that the conveyance is a valid and bonafide one and that consideration was really paid. It is contended on behalf of the appellant that the learned Subordinate Judge was wrong and the burden of proof was on the defendant to show that the transaction of sale evidenced by the deed of the 29th of November, 1923, was not a real but a benami transaction; and reliance is placed on the

recent decision of the Privy Council in *V. E. A. R. M. Firm* v. *Maung Ba Kyin*(1) and on a decision of this Court in *Gilu Mal* v. *Firm Manohar Das*(2).

Order XXI, rule 58, provides that where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection. The objection which the court proceeds to investigate is on the ground that the property is not liable to attachment. Rule 59 then prescribes that the claimant or objector must adduce evidence to show that at the date of attachment he had some interest in, or was possessed of, the property attached. Rule 60 then provides that upon the investigation prescribed by rule 58 if the court is satisfied that the property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly in his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment. The point, therefore, upon which the court is to be satisfied before it can order the release of the property from attachment is a question primarily one of possession but incidentally also as regards the nature of the possession. It has, for instance, to satisfy itself that although the judgment-debtor may be in possession of the property such possession was not on his own account or as his own property but on account of or in trust for some other person. Rule 61 then says that if the court is satisfied that the property was at the time of attachment in the possession of the judgment-debtor as his own property and not on

(1) (1927-28) 32 Cal. W. N. 28. (2) (1928) 9 P. L. T. 461.

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account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim. Here again the court is to be satisfied that if any person is in possession of the attached property he is in possession in trust for the judgment-debtor before he can disallow the claim. Rule 63 then says 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 thus follows that the party against whom an order is made under rule 60 or rule 61, that is an order allowing the claim and releasing the property from attachment or an order disallowing the claim may institute a suit *to establish the right which he claims*. On a consideration of these rules, it appears that the burden of proof is on the party against whom the order is made after investigation either under rule 60 or under rule 61 and who brings a suit under rule 63, to establish his right. If this be so, then the burden of proof in the present case was upon the plaintiff to prove the right which he claimed in the property attached by virtue of the deed of sale upon which he relied.

It has been consistently held by the courts in India that in a suit brought under rule 63 the burden of proof is on the plaintiff. In *Jamahar Kumari Bibi* v. *Askaran Boid*(1) a bench of three Judges of the Calcutta High Court consisting of Sir Lawrence Jenkins, C. J., and Woodroffe and Sir Asutosh Mookerjee, JJ., held that in a suit to set aside an order made adversely to the plaintiff on a claim to property preferred by her in execution proceedings, on the ground that the property belongs to her in her own right and not as a benamidar for the judgment-debtor, the onus is on her to show affirmatively that not only the ostensible but the real title also is in her.

(1) (1915) 22 Cal. L. J. 27.

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Sir Lawrence Jenkins in delivering the judgment of the Court observed: "The plaintiff, in the circumstances of this case, cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims: she must show that they are as good as they look. If specific authority for this is needed, it is furnished by many cases, among which are the decisions of Sir Richard Couch in *Roop Ram Doss* v. *Saseeram Nath Kumokar*(1) and of Sir Charles Sargent in *Govind Atmaram* v. *Santai* (2)." The same view was taken in this Court by Sir Dawson Miller, C. J. and Foster, J. in *Bibi Sairah* v. *Golab Kuar*(3) where the learned Chief Justice observed as follows: "Although in ordinary cases I think it may be accepted that when once a transfer is proved and the passing of consideration shown, the onus then lies upon the person impugning the document to prove that it is not a valid and bonafide transaction, still, in the present case, the suit is one brought under Order XXI, rule 63, of the Civil Procedure Code, which is in effect, as pointed out in *Jamahar Kumari Bibi* v. *Askaran Boid*(4), a suit to set aside an order passed under Order XXI, rule 58, and, therefore, the onus lies upon the person relying upon the deed of transfer, not merely to prove that it was properly executed and that consideration passed, but that the document is really what it purports to be and is not merely a colourable transaction." In the Allahabad High Court Sir John Stanley, C.J. and Karamat Husein, J. also took the same view in *Nannhi Jan* v. *Karam Ali Khan*(5) and their Lordships observed: "It appears to us well settled, so far at all events as this Court is concerned, that a plaintiff coming into Court under such circumstances is bound to lay before the Court some evidence to satisfy the Court that the document under which she claims represents a bona-fide and genuine transaction, and that the burden does

(1) (1875) 23 W. R. 141.
(2) (1888) I. L. R. 12 Bom. 270.
(3) (1919) 53 Ind. Cas. 892.
(4) (1915) 22 Cal. L. J. 27.
(5) (1908) I. L. R. 30 All. 321.

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not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document." It is not necessary to multiply authorities and it is sufficient to state that it seems to be settled law in this country that the plaintiff in a suit under Order XXI, rule 63, of the Civil Procedure Code, has to establish the right which he claims.

I now come to the recent decision of the Privy Council upon which reliance has been placed by the learned Counsel for the appellant. The facts of that case (*V. E. A. R. M. Firm* v. *Maung Ba Kyin*)(1) appear to be as follows:

One Po Hla executed a mortgage of his properties to one Upe for a sum of Rs. 10,000 in September 1920, and on the same day he took a loan of Rs. 5,000 from Upe on a promissory note. On the 31st July, 1922, the loan on the mortgage as well as that on the promissory note had, principal with interest, accumulated to Rs. 17,000. On this date, viz., the 31st of July, 1922, Po Hla sold to Maung Ba Kyin the son of Upe and to Ma Sein the wife of Ba Kyin the property which he had mortgaged to Upe in September 1920 for a sum of Rs. 20,000 out of which Rs. 17,000 was set off on account of the dues under the mortgage and the promissory note in favour of Upe and Rs. 3,000 was alleged to have been paid in cash. Now, Po Hla had borrowed a sum of Rs. 12,000 from a Chetty Firm who were the appellants before the Privy Council on the basis of a promissory note dated the 8th of October, 1921. They instituted a suit on the basis of the promissory note on the 20th of January, 1923, obtained an exparte decree and in execution thereof attached the property which had been sold to Maung Ba Kyin and to his wife Ma Sein. The purchasers preferred a claim under Order XXI, rule 58, of the Code of Civil Procedure which was disallowed by the Court executing the decree and then they instituted the suit which

(1) (1927-28) 32 Cal. W. N. 28.

went up to the Privy Council. The trial court dismissed the suit on the ground that the sale to the plaintiffs was not a genuine one and was made to defraud the creditors of the judgment-debtor. On appeal the High Court at Rangoon took the contrary view and decreed the plaintiffs' suit. Their Lordships of the Rangoon High Court in the course of their judgment observed as follows: "The burden of proving want of consideration is on the defendants. The land was sold before the attachment and they had to prove that the sale was not a genuine one and that there was no consideration for it. The defendants have produced no evidence to show want of consideration or anything to affect the bonafides of the sale. They have not attempted to show that the land was worth more than Rs. 20,000 the consideration paid for the land. On the other hand, the plaintiffs have produced evidence to show that Rs. 3,000 was paid at the time of the sale and that Rs. 17,000 was due on the original loan at that time. As already stated the trial Judge has held that Rs. 15,000 has been loaned to Po Hla by Upe. Under these circumstances we are of opinion that the burden of proof lay very heavily on the defendants to show that the deed of sale was not a genuine one." Therefore, the circumstances upon which their Lordships of the High Court of Rangoon placed the onus upon the defendant were set out in the judgment, namely, the fact that the plaintiff had proved the passing of the consideration. When the matter went before their Lordships of the Judicial Committee they observed as follows: "Now they (meaning 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 somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration." In other words, their Lordships cast the burden upon the defendant in that case to shew that

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the sale was fraudulent because the plaintiff had succeeded in proving the passing of consideration. Their Lordships then proceeded to observe: "So far as the Rs. 17,000 was concerned, there was adequacy of consideration. Therefore, there only remains the Rs. 3,000." Their Lordships agreed with the view of the High Court that the plaintiff had succeeded in establishing the passing of consideration at least to the extent of Rs. 17,000 and that the only question was as regards the balance of Rs. 3,000, and it appears that what was urged before their Lordships was that as the evidence as regards the passing of this portion of the consideration was unsatisfactory the sale was a fraudulent sale. Their Lordships refused to accede to this argument in view of the fact that Rs. 17,000 out of the consideration of Rs. 20,000 was an absolutely good consideration and that the remaining Rs. 3,000 was not enough to allow them to draw the conclusion that it was a fraudulent sale. Their Lordships do not lay it down as a proposition of law that in a suit brought under the provisions of Order XXI, rule 63, of the Code of Civil Procedure, where the plaintiff relies on a deed of sale alleged to have been executed by the judgment-debtor, the onus lies on the defendant to prove that the sale is not a real sale.

In *Gilu Mal* v. *Firm Manohar Das Jainarain*(1) the facts were somewhat different. The claim there was preferred under Order XXI, rule 58, but the claimant did not prosecute it and it was dismissed for default and it was held that, where a claim is preferred under Order XXI, rule 58, which is rejected without trial on the merits, and the claimant brings a suit under Order XXI, rule 63, his position is the same as if he had brought no claim at all, and, therefore, the burden to prove the real nature of the conveyance, set up by him, was not upon him, but upon the party who alleged that the conveyance was not what it appeared to be on the face of it. The

(1) (1928) 9 P. L. T. 461.

contention in that case was that in every suit under Order XXI, rule 63, the onus lay upon the plaintiff to prove the real nature of the conveyance upon which he relied, and what was held was that this was not so when the claim was dismissed for default without trial on merits and the opinion was expressed that when an investigation had been made and the claim dismissed on merits, the onus would be on the plaintiff to establish his right. Reference in that case was made to the decision of the Privy Council in *V. E. A. R. M. Firm* v. *Maung Ba Kyin*(1); but it was not necessary to consider whether their Lordships of the Privy Council had laid down a proposition of law which was different from that laid down by the courts in this country. As regards the burden of proof it was observed in the course of the judgment both by Ross, J. and by myself that their Lordships *seem* to take a different view; but on an examination of the facts of the case, which went up to the Privy Council, it is clear that their Lordships did not intend to lay down a proposition of law different from that laid down by the courts in this country.

I am, therefore, of opinion that the Subordinate Judge was right in throwing the burden of proof upon the plaintiff to establish the right which he claimed in the property in dispute.

As regards the merits, I may mention that the learned Subordinate Judge has made rather sweeping assertions as regards some of the evidence and the facts appearing from the evidence; but on a careful consideration of the entire evidence in the case I am satisfied that the conclusion arrived at by him is correct.

* * * *

Although, therefore, I do not agree with all the observations made by the learned Subordinate Judge, I am satisfied on a careful consideration of the entire evidence in the case that the plaintiff is not a real

(1) (1927-28) 32 Cal. W. N. 28.

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purchaser of the property and has failed to establish the right which he claims in the present suit. The suit was accordingly rightly dismissed by the learned Subordinate Judge and I would dismiss this appeal with costs.

WORT, J.—I agree.

S. A. K.

Appeal dismissed.

REVISIONAL CIVIL.

Before Jwala Prasad, J.

RUDRA NATH TEWARI

v.

BHUJANGA PRASAD SINGH.*

1924.

April 2.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rule* 10,—*scope of—usufructuary mortgagee purchasing holding in execution of rent decree—application to set aside sale—mortgage, redemption of, during the pendency of proceeding—mortgagee, whether ceases to have interest—devolution of interest, whether there is—mortgagor, whether can be impleaded as a party in place of mortgagee.*

If a mortgagee, being a party to a suit or proceeding, ceases to have any interest in the mortgaged property, the mortgagor in whose favour the property is released may apply under Order XXII, rule 10, Code of Civil Procedure, 1908, to be made a party to the proceeding in place of the mortgagee.

Sourindra Mohan Tagore v. *Siromoni Debi*(1) and *N. C. Macleod* v. *Kissan Vithal Singh*(2), followed.

Where, however, an usufructuary mortgagee obtained a decree for rent during the currency of the mortgage, and purchased the raiyati holding in execution thereof, and the

*Civil Revision no. 452 of 1923, from an order of Babu J. C. Bose, Subordinate Judge of Purnea, dated the 10th September, 1923.

(1) (1901) I. L. R. 28 Cal. 171. (2) (1906) I. L. R. 30 Bom. 250.