1929.

DEORAJ TEWARI v. INDRASAN TEWARI.

TERRELL, C.J.

to proportionate costs on the amount found due throughout. The decree of the Court below is modified accordingly.

COURTNEY TERRELL, C. J.: I agree, and I would only add that if there had been evidence that the account of the antecedent debts had been acknowledged by Indrasan and Ramphal in one and the same transaction as the adoption of liability for their deceased uncle's debt then it might have been held that such a settlement of account was effected with good consideration on both sides as to create a new contract which would have taken the place of all the separate items of debt, whether or not considered separately, they were statute barred. It is clear, however, that the adoption by the nephews of the uncle's debt with a reduction of interest was effected long before the adjustment of account. The adjustment therefore was not in the nature of a new contract, but a mere acknowledgment of a series of items each of which must be considered on its own merits.

S. A. K.

Decree modified.

REVISIONAL CIVIL.

Before Fazl Ali, J.

MUSAMMAT MADHO BIBI

v.

HAZARI MAL MARWARI.*

1929.

Jan., 10, 11, 18.

Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rule 58—suit dismissed against defendant, whether he remains a party to the suit—objection to attachment, whether maintainable under Order XXI, rule 58—objection under section 47 dealt with under Order XXI, rule 58—Order, whether operates as a decree—appeal.

*Civil Revision no. 302 of 1928, against an order of Babu Harihar Prasad, Subordinate Judge of Monghyr, dated the 9th June, 1928.

1929.

MUSAMMAT MADHO BIBI v. HAZARI MAL MARWARI.

A defendant against whom a suit is dismissed is a party to the suit within the meaning of section 47, Code of Civil Procedure, 1908, and, therefore, an objection filed by him to the attachment in execution of the decree passed in the suit will be treated as an objection under that section and not under Order XXI, rule 58.

Jamini Bala Devi v. *Kali Prasad Mukherjee* (1) and *Sheikh Kaloo* v. *Bholanath* (2), followed.

Churan Roy v. *Kali Prasad Singh* (3), distinguished.

Where the objector mis-described the objection to be one under Order XXI, rule 58, when really it was an objection under section 47, and the court, acting under a misconception, dealt with the case as one under Order XXI, rule 58,

Held, that the order nevertheless operated as a decree and, therefore, was appealable under section 47, Code of Civil Procedure, 1908.

S. Dayal and *Bindheshwari Prasad*, for the petitioner.

S. M. Mullick and *L. K. Jha*, for the opposite party.

18th Jan. 1929.

FAZL ALI, J.—This application arises out of a claim case preferred by the petitioner under Order XXI, rule 58, of the Code of Civil Procedure before the Subordinate Judge of Monghyr. The facts of the case are briefly these:

One Sakhichand had a son named Hit Prasad who married the petitioner Madho Bibi and had an adopted son named Brij Narain. It is said that owing to the immoral habits of Hit Prasad his father Sakhichand got a deed of release executed by him in respect of his interest in all the properties and subsequently executed a will in favour of the petitioner Madho Bibi. After the death of Sakhichand, Madho Bibi applied for probate of the will and letters of administration and obtained them. Subsequently Brij Narain brought a title suit against Hit Prasad as well as Madho Bibi for a declaration that the will

(1) (1921) 34 Cal. L. J. 477. (2) (1925) 6 Pat. L. T. 725.
(3) (1927) 8 Pat. L. T. 654.

was not binding on him and the suit was ultimately compromised between the parties with the result that Madho Bibi got 8 annas interest in the residential house which will be referred to in this case as property no. 1 and 4 annas in another house which will be referred to as property no. 2. Meanwhile, in 1915, the opposite party brought a money suit in the Court of the Subordinate Judge of Monghyr on the basis of certain hand-notes and hatchittas impleading the petitioner as well as her husband Hit Prasad and the adopted son Brij Narain. The suit was decreed against Hit Prasad and Brij Narain but it was dismissed as against the petitioner on the ground that she had not been benefited by the loans. The decree-holder then proceeded to execute the decree and in the execution of the decree the two houses which have been described as property no. 1 and property no. 2 were attached. The petitioner thereupon filed an application under Order XXI, rule 58, alleging that she was in possession in her own rights of the 8 annas share in the residential house (property no. 1) and 4 annas share in the other house (property no. 2). The order-sheet shows that the petitioner's claim was registered as a claim under Order XXI, rule 58. It also appears that a similar claim was preferred before the Subordinate Judge by Brij Narain and this was treated as an objection under section 47 of the Code of Civil Procedure. There were two other claim cases filed before the Subordinate Judge in the course of the same proceeding, but it is unnecessary to refer to their details as we are not concerned with them. The learned Subordinate Judge proceeded to decide the claims preferred, by the petitioner as well as Brij Narain and other persons, and ultimately rejected them on 9th June 1928. The petitioner then came up to this Court against the order of the Subordinate Judge rejecting the claim made by her and obtained a rule.

Now, the preliminary point that arises in the case is as to whether an application in revision lies against

1929.

MUSAMMAT FAZL ALI, J. MADHO BIBI v. HAZARI MAL MARWARI.

the order of the Subordinate Judge. The petitioner as we have seen was a defendant in the suit out of which the execution proceedings had arisen and although the suit was dismissed against her, it was dismissed after contest. That being so, it is contended on behalf of the opposite party that the application filed by her before the Subordinate Judge should be treated as an application under section 47 of the Code of Civil Procedure though it was wrongly described as an application under Order XXI, rule 58. Now, there can be no doubt that when an objection to attachment is made by a party to the suit or his representative, the objection should be treated as one falling under section 47, Code of Civil Procedure, whereas if the objection to attachment is made by a third party, his objection will be governed by the provisions of Order XXI, rule 58. This result is arrived at by reading together section 47 and Order XXI, rule 58. It will appear that although the language of rule 58 is somewhat general and would prima facie cover the case of a party to the suit or his representative also, yet section 47 clearly says that

> "All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit."

Under the old Code there was a difference of opinion as to whether section 47 would govern the party against whom the suit had been dismissed. The *Explanation*, however, which has now been added to the section clearly provides that

> "for the purpose of this section a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit."

The practical difference then which will arise between a case which falls under section 47 and a case which is governed by Order XXI, rule 58, will be this that an order passed under section 47 allowing or disallowing an objection to attachment will be treated as a decree and the party against whom it is passed will

have a right of appeal and also the party will have no right to bring a separate suit; whereas, if the objection falls under Order XXI, rule 58, the party against whom the final order is passed in such a proceeding will have no right of appeal from that order but will have a right to proceed by a separate suit.

If therefore we are to treat the application made by the petitioner before the Subordinate Judge as being in effect an application under section 47 of the Civil Procedure Code, it is clear that no revision will lie from the order under the provisions of section 115 of the Civil Procedure Code because the order passed by the Subordinate Judge will be treated as a decree under section 2 of the Code and will therefore be appealable. I have no doubt in my mind that the petitioner being a party to the suit could not have proceeded under Order XXI, rule 58, and both the petitioner as well as the Court below entirely misconceived the position of the petitioner by treating her application as one falling under Order XXI, rule 58. If any authority is needed on the point I may refer to *Jamini Bala Devi* v. *Kali Prasad Mukherjee* (1) where it was held that a widow who had been impleaded in a suit as a defendant and against whom the suit had been dismissed would still be treated as a party to the suit even though an opinion had been expressed by the trial Court that she was not a proper party and the suit had been dismissed against her. It was further held in that case that an objection filed by her to the attachment of certain property in execution of the decree passed in the suit in which she had been impleaded as a defendant, would be treated as an objection under section 47 and not under Order XXI, rule 58. The same view was held in *Sheikh Kaloo* v. *Bholanath* (2) in which a Division Bench of this Court decided that as section 47 of the new Code of Civil Procedure had expressly enacted that the parties to the suit would include

(1) (1921) 34 Cal. L. J. 477. (2) (1925) 6 Pat. L. T. 725.

1929.

MUSAMMAT MADHO BIBI v. HAZARI MAL MARWARI.

FAZL ALI, J.

the parties against whom a suit had been dismissed, an objection to attachment of property by a defendant against whom the suit had been dismissed would come under section 47 and not under Order XXI, rule 58. Mullick, J., who delivered the judgment in that case observed in the course of the judgment that even if the Court below had treated the objection as one under Order XXI, rule 58, it would still be treated as an objection under section 47 of the Code. In my opinion therefore in view of the language used in section 47 of the Code and of the decisions referred to by me, it must be held that the petitioner was not competent to prefer an objection before the Subordinate Judge under Order XXI, rule 58, and that the objection preferred by her must be treated as one falling under section 47. Mr. Siveshwar Dayal who appears for the petitioner contends in the first instance that the application of the petitioner before the Subordinate Judge has been rightly treated as an application under Order XXI, rule 58, and refers me to *Ghuran Roy v. Kali Prasad Singh* (1). In this case it was held that certain co-sharer landlords of the village who had been made pro forma defendants to a rent suit brought by the other landlords ought not under the circumstances to be regarded as judgment-debtors in the rent suit and that they were therefore entitled to bring a separate suit and were not bound to have the question disposed of in a proceeding under Order XXI, rule 58, arising in the execution of the rent suit. It is said that on the same principle the petitioner who was hardly more than a pro forma defendant in the suit should not be treated as a party to the suit in the sense in which the term has been used in section 47 of the Civil Procedure Code. It appears, however, that in the suit brought by the present decree-holders the petitioner was not merely a pro forma defendant and the suit against her was dismissed after contest on the finding that she had not been benefited by the loans. This will be clear

(1) (1927) 8 Pat. L. T. 654.

1929.

MUSAMMAT MADHO BIBI v. HAZARI MAL MARWARI.

FAZL ALI, J.

from the following observations made by the learned Subordinate Judge while dismissing the case against her:

"From all these facts and circumstances I feel quite sure in my mind that this unworthy husband, to say the least of it, has not spent a single penny over his wife and it will be very hard and unjust if I make the defendant no. 2 also liable in this case."

The question then arises as to what order should be passed on the present application. It is urged by Mr. Siveshwar Dayal that as the proceeding was initiated by the petitioner under a misconception of law and her own legal position, and the Court below was also proceeding under the assumption that she was competent to file an application under Order XXI, rule 58, the proper course in such a case would be to vacate the order of the lower Court, declare the entire proceeding as being without jurisdiction and direct the petitioner to file a fresh application under section 47 of the Code of Civil Procedure if she chooses to do so.

It is urged by Mr. Siveshwar Dayal that an order passed by a Civil Court cannot be treated as a decree unless it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It is said that the scope of an enquiry under Order XXI, rule 58, is generally speaking much more restricted than the scope of an enquiry under section 47 and as the learned Subordinate Judge proceeded to pass the order in question without framing any issues and without going into the question of title which is open to be gone into in a proceeding under section 47, the order cannot be treated as having conclusively determined the rights of the parties. Mr. Siveshwar Dayal further supports his argument by placing before me the analogy of a case in which a Small Cause Court Judge tries a suit as a Small Cause Court Judge although the subject-matter of the suit is found to be one not triable in a Small Cause Court. It is urged by him that if in such a case this Court can vacate the whole proceeding before the Small Cause Court Judge, there seems to be no reason why a

1929.

MUSAMMAT MADHO BIBI v. HAZARI MAL MARWARI.

FAZL ALI, J.

similar order cannot be passed in a case like the present. The arguments are no doubt plausible and the analogy is somewhat catching but when we proceed to analyse the question it appears that on a proper view of the law it is difficult to arrive at the result at which the learned Advocate wants me to arrive in this case. It must be remembered that though it may happen, as in the majority of cases it does happen, that the same Judge has the power to try a Small Cause Court suit as well as a title or a money suit, yet the Judge is discharging two totally different functions and acting in two totally different capacities when he is trying the Small Cause Court suit and a title suit which is not within the cognizance of the Small Cause Court respectively. The analogy therefore will not apply to a case like the present in which an objection under section 47 as well as one under Order XXI, rule 58, can be preferred before and disposed of by the same Court, namely, the Court which is in seizin of the execution proceedings. The rule in such cases will be that if the party happens to be a party to the suit, his objection will be treated as an objection under section 47, whereas if he is a stranger to the suit, his objection will be treated as one under Order XXI, rule 58. Thus there is no question here of two different Courts having two entirely different jurisdiction and having to deal with two different kinds of matters, but the same Court has jurisdiction to decide an objection under section 47 as well as a claim under Order XXI, rule 58. The question therefore which arises in the present case is whether the Subordinate Judge had really assumed jurisdiction in a case which was beyond his jurisdiction or he had the jurisdiction to decide the claim put forward by the petitioner even if it were found that it was really a claim under section 47. In my opinion the Subordinate Judge having had jurisdiction to deal with claims preferred by the parties to the suit as well as the stranger, the nature of the claim preferred will be determined by the character of the claimant and not

by the label used by the party and his jurisdiction to try the claim cannot also be affected by a mere misdescription of the character of the claim. I hold therefore that the order passed by the Subordinate Judge in this case will have the effect of a final order under section 47 and therefore will have the force of a decree. If then it is found that in fact the learned Subordinate Judge did not go into the question as fully as he should have done, and that he unduly restricted the scope of the enquiry by acting under the misconception that he was holding an enquiry under Order XXI, rule 58, the order passed by him will be nonetheless an order conclusively determining the rights of the parties and therefore having the force of a decree although the party aggrieved will have the right of appeal to a superior Court and the superior Court can always rectify the errors committed by the Subordinate Court by holding that the enquiry had not been conducted in a proper manner and by ordering a remand of the case if necessary. Thus the question as to whether the order is to be treated as a decree conclusively determining the rights of the parties, will in the majority of cases be decided on a consideration of the true nature of the proceedings in which the order was passed and on the question as to whether the Court before whom the proceedings were held was competent to pass a final order conclusively determining the rights of the parties or not. It is true that every order passed by such a Court will not be a decree because the Court can pass a number of interlocutory orders as well as the final orders. Thus it was rightly held in *Surendra Nath Mitra* v. *Mirtunjay Banerjee* (1) that where a petition of objection to the valuation in the sale proclamation was dismissed, no appeal lay against it because it was merely an interlocutory order although the Court had acted judicially in coming to the conclusion about valuation.

The conclusion which I have arrived at after a consideration of the elaborate arguments addressed

(1) (1920) 1 Pat. L. T. 645.

1929.

MUSAMMAT MADHO BIBI v. HAZARI MAL MARWARI.

FAZL ALI, J.

to me by both sides in this case is that although the petitioner as well as the Subordinate Judge proceeded under the misapprehension that the objection of the petitioner was one governed by Order XXI, rule 58, yet in the light of the authorities on the point, I must hold that the objection filed by the petitioner was one under section 47 of the Code of Civil Procedure and the order being appealable the petitioner was incompetent to prefer an application by way of revision before this Court.

The application must therefore be dismissed, but in the circumstances without costs.

It will be open to the petitioner to prefer an appeal against the order and it will be for the Court before whom the appeal is preferred to consider whether having regard to the special circumstances of the case, this is not a fit case in which time should be extended if the appeal is found to be time-barred. This matter, however, must be left entirely to the discretion of that Court, which I have no doubt, will be exercised with due regard to the equities of the case and which I do not wish to fetter in any way.

S. A. K.

Application dismissed.

APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

1929.

Jan., 14, 18.

SINGHASAN MISSER

v.

JADUNANDAN MISSER.*

Compromise decree—mortgage suit—compromise—commissioners appointed to carry agreement into effect—agreement partially given effect to—final decree not representing the agreement of the parties—suit to set aside decree, whether maintainable.

*Appeal from Original Decree no. 123 of 1926, from a decision of M. Wali Mohammad, Subordinate Judge of Motihari, dated the 30th of November, 1925.