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and must be taken as the measure of the plaintiff's loss. The defendant attempted to show in the course of the case that the value of the 50,000 bundles of Kendu leaves was in the neighbourhood of Rs. 1,600. The plaintiff on the other hand has valued those bundles in his plaint at the rate of Rs. 500 and has sought to recover that sum only and to that sum he is entitled with costs throughout. It is clear that the learned Judge who decided this case was not aware of the finding of fact by the learned Subordinate Judge, for his attention was only directed to the concluding portion of the judgment which was an erroneous conclusion of law.

The result is that the appeal, in my opinion, should be allowed and the plaintiff's suit decreed for the sum of Rs. 500 with interest at 6 per cent. per annum from the date of suit till the date of realisation and costs throughout.

AGARWALA, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Luby, JJ.

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v.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 63 *and Order XXI, rules* 58 *and* 63—*claim under rule* 58 *rejected as not entertainable—order, whether comes within the purview of rule* 63—*sale by court which attached later but sold first, whether valid—section* 63.

Where a claim under Order XXI, rule 58, Code of Civil Procedure, 1908, was rejected as not entertainable on the

* Appeal from Appellate Decree no. 1293 of 1930, from a decision of Khan Bahadur Najabat Hussain, District Judge of Shahabad, dated the 28th of May, 1930, confirming a decision of Babu Saudagar Singh, Subordinate Judge of Shahabad, dated the 27th of May, 1929.

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ground that the claimant had no interest in the property on the date of the attachment,

Held, that the order did not come within the purview of rule 63 and that, therefore, it was not necessary for the claimant to institute a suit.

Lakshmi Ammal v. *Kadiresan Chettiar*(1), followed.

Subedar Singh v. *Ramprit Pande*(2), distinguished.

When a property under attachment has been sold in execution of another decree, the first attachment falls to the ground and the proceedings taken thereunder fall along with it.

Therefore, the sale by the court which attached later but sold first is valid (unless, as has been ruled in some cases, it was done with the knowledge of the prior attachment) and prevails against a subsequent sale following a prior attachment.

Moti Lal v. *Karrabuldin*(3) and *Harnandan Marwari* v. *Parashnath Ray*(4), followed.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

Parmeshwar Deyal and *Rai Indra Behari Saran*, for the appellants.

Khurshaid Husnain and *D. N. Varma*, for the respondents.

KHAJA MOHAMAD NOOR, J.—This is an appeal by the defendants 1st party against a decree of a Subordinate Judge of Shahabad, declaring the plaintiff's title to the properties involved in the suit and giving him possession of the same. The facts are these.

(1) (1921) 63 Ind. Cas. 431.

(2) (1929) 11 Pat. L. T. 28.

(3) (1897) I. L. R. 25 Cal. 179, P. C.

(4) (1920) 2 Pat. L. T. 240.

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The property in suit belonged to the defendants 2nd party. There were two decrees against them: one in favour of one Ramchandra and another in that of the defendants 1st party. The two decrees were executed almost at about the same time in two different courts. Attachment of the properties in suit was effected in Ramchandra's decree on 11th May, 1922, and that in the decree of defendants 1st party on 18th May, 1922. It so happened, however, that the properties were sold first in execution of the decree of defendants 1st party on 13th September, 1922, and purchased by them. Thereafter, one of them, defendant no. 1, filed an application purporting to be under Order XXI, rule 58, before the court where the other decree was under execution. The court held that as the interest of the claimant accrued after the attachment which was effected on 11th May, 1922, he is not a person who could come under Order XXI, rule 58, and therefore dismissed the application. In my opinion the court was perfectly correct in the view which it took. Order XXI, rule 58, read with rule 59, gives right of claim only to those who had interest in and possession of the property under attachment on the day when the attachment was effected. Rule 58 is no doubt general, but rule 59 makes it clear that the investigation is to be confined to possession on the date of the attachment. But it is unfortunate that the court, though informed that the properties had already been sold in execution of a decree of another man by another court on 13th September, 1922, proceeded to sell them again and did sell them on 18th November, 1922, when they were purchased by the plaintiff. This has led to a conflict between the two sales: one having been held on 13th September, 1922, by virtue of an attachment of 18th May, 1922, in execution of the decree of the defendants 1st party and another held on 18th November, 1922, by virtue of an attachment effected on 11th May, 1922, in execution of the decree of Ramchandra. It seems that the defendants 1st party obtained

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possession of the properties, and the present suit was instituted by the plaintiff the purchaser at the sale held on 18th November, 1922, for recovering them. There was also a claim for redemption of some of the properties, which had been mortgaged to some of the defendants by the original holder of the properties, defendants 2nd party. We are, however, not concerned with this part of the case.

Both the courts below have decreed the plaintiff's suit on the ground that the defendants 1st party were bound by the order of the 18th November, 1922, rejecting their claim and they not having brought a regular suit for declaration of their title within one year of the order were precluded from setting up their title against the sale held in execution of Ramchandra's decree. They have decreed the suit. The defendants 1st party have preferred this appeal.

The first question to be decided is—is the order passed by the learned Munsif on 18th November, 1922, dismissing the claim of one of the defendants an order contemplated in Order XXI, rule 63, of the Civil Procedure Code. This rule must be read along with the context commencing from Order XXI, rule 58. That rule enjoins that when a claim is preferred or objection is made to the attachment the court is to investigate it. Rule 59 prescribes the nature of evidence to be adduced in the case, namely, that it must be confined to an interest on the date of attachment. Rule 60 prescribes that if the court is satisfied that somebody else other than the judgment-debtor was in possession of the property in his own right on the date of the attachment, the property is to be released. Rule 61 prescribes that if it is found that not any third person but the judgment-debtor himself was in possession of the property on the date of the attachment, the claim is to be disallowed. Rule 62 refers to another matter which need not be considered in connection with this case. Rule 63, which has been relied upon by the courts below and which

has been very elaborately discussed by the learned Advocate appearing on behalf of the respondents, runs thus:

"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."

In order to hold that the defendants 1st party lost their interest in the property by virtue of the sale in execution of Ramchandra's decree we will have to consider the nature of the order passed which this rule makes conclusive. Now the order does nothing more than to say, which was a fact, that the interest of the claimant accrued after the attachment and therefore he was not a competent person to apply. So far the order was unchallengeable, and was not a fit one to be questioned by a suit. This order is not only conclusive subject to a suit as the rule prescribes but is one which cannot be questioned in any court. In my opinion it was not necessary for the defendants 1st party to go to civil court to have their right in the property established. The learned Advocate for the appellants has drawn our attention to the changes made in the Civil Procedure Code when it was consolidated in the year 1908. Prior to that there were some decisions to the effect that the order, which was conclusive, was one of the two orders, either allowing the claim or disallowing it, and therefore some courts held that if the claim was dismissed for default the order did not come within the purview of the section, because the old section 283 clearly indicated the sections under which the order was to be passed. Since then the section has been made somewhat general, and it has been held that a dismissal for default is an order contemplated by the rule. The reason is obvious. A dismissal for default practically amounts to disallowance of the claim on adjudication, as when a suit is dismissed in the presence of the defendant on account of the default of the plaintiff a fresh suit is barred. In both the cases though in

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fact no trial has been held, the plaintiff by his default has impliedly obtained an order against him. This has got no application to the circumstances of the present case, in which the only decision is (and which, as I have said, cannot be questioned) that on the date of the attachment the claimants had no interest in the property, and it would have been ridiculous if the defendants 1st party would have gone to the civil court to have that order reversed which no court would have done. The learned lower appellate court has relied upon the case of *Subedar Singh* v. *Ramprit Pandey*(1). The decision of this case rested upon its own facts. A rent decree was under execution. The claimant, who had purchased the right and interest of the tenant, preferred a claim. Obviously if the decree was a rent decree, Order XXI, rule 58, did not apply. But the claimant's case was that the decree was not a rent decree and, therefore, he was entitled to come and claim. The court decided, as a matter of fact, that the decree was a rent decree and therefore held that the claim was not admissible. The claimant afterwards instituted a suit more than a year after the order, and the question was whether the suit was barred by limitation. It was held by this Court that it was so barred on the ground that there was a decision against him. In that particular case certainly there was a decision that the decree was a rent decree and as long as the decision lasted, the plaintiff of that suit was out of court. But while deciding that case, Kulwant Sahay, J., who delivered the judgment of this Court, made some observations, which would go to show that holding the application to be not maintainable is an order which comes within Order XXI, rule 63. However, as those observations were not strictly necessary for the purpose of the case, it is not necessary to discuss them further. So far as the facts of that particular case are concerned, if I may be permitted to say so, the view taken was perfectly correct. On the other hand, there is

(1) (1929) 11 Pat. L. T. 28.

a decision of the Madras High Court in *Lakshmi Ammal* v. *Kadiresan Chettiar*(1) where the *ratio decidendi* seems to be that if the application is not entertainable by the court at all the order does not come within the purview of Order XXI, rule 63. I am, therefore, clearly of opinion that on the facts of the present case it was not necessary for the defendants 1st party to institute any suit, as the order, which is conclusive against them, does not in any way affect their title. The order was perfectly correct and still stands good, namely, that they had no interest on the date of the attachment.

Having disposed of this question, the next question will be which of the two sales is to prevail. The learned Advocate for the respondents has strenuously argued that the sale, which took place later under a prior attachment, must prevail. He has drawn our attention to the provisions of section 63 of the Civil Procedure Code, which prescribes that if different courts attach the same property, the court which is to sell it or dispose of objections regarding attachment of that property, should be the court which first attached it. If the matter would have rested there, some complications would have arisen, but the second clause of section 63 makes the position clear, that is, if some action is taken by a court other than the court contemplated in sub-clause (*1*), the proceedings will not be vitiated. The result is this that the sale by the court which attached later but sold first is valid unless, of course, as has been ruled in some cases, it was done with the knowledge of the prior attachment. This knowledge has not been established in this case. In fact, we find in paragraph 12 of the written statement of the principal defendants that they categorically denied that they had any knowledge of any prior attachment. Rather it is obvious that the second sale relied upon by the plaintiff was held after the court was informed that the property had already been sold by another court.

(1) (1921) 63 Ind. Cas. 431.

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The learned Advocate has relied upon the case of *Ramdhari Lal* v. *Nathu Ram*(1). It was decided in that case that section 63, clause (2), did not confer any power on a court to sell property which has already been attached in execution of a prior decree by another court. The object of that clause is merely to protect such sale when it has taken place in ignorance of a prior right. As I have said, there is nothing to show that the court knew of the prior attachment, and, therefore, the sale is good.

When a property has been sold by a court having jurisdiction to do so, there is nothing left, which can be sold again by another court. As I have said, it was very unfortunate that this was done. What the court ought to have done was to stop the sale and proceed to take steps for rateable distribution of the money realised by the first sale. Once the property is sold, it cannot be resold. If any authority is needed for this proposition, I would refer to the decision of their Lordships of the Judicial Committee in *Moti Lal* v. *Karrabuldin*(2). The same view has been held by this Court in *Harnandan Marwari* v. *Parannath Ray*(3). It was laid down that when a property under attachment has been sold in execution of another decree, the first attachment falls to the ground and the proceedings taken thereunder fall along with it. The fact is that when the property was sold first, the second attachment ceased to exist. In these circumstances I think the plaintiff, who was a second purchaser, had absolutely no title to the property. He being the plaintiff and not being able to establish his title, his suit fails.

The appeal is, therefore, allowed, the decrees of the courts below are set aside, and the plaintiff's suit is dismissed with costs throughout.

LUBY, J.—I agree.

Appeal allowed.

(1) (1921) 6 Pat. L. J. 332.
(2) (1897) I. L. R. 25 Cal. 179, P. C.
(3) (1920) 2 Pat. L. T. 240.