

**THE
INDIAN LAW REPORTS
PATNA SERIES.**

APPELLATE CIVIL.

Before Agarwala and Saunders, JJ.

KEDARNATH HIMATSINGHKA

v.

TEJPAL MARWARI.*

1934.

*August, 10,
1934.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXVIII, rules 5 and 6 and Order XLIII, rule 1(q)—order rejecting application for attachment before judgment, whether appealable, when no conditional order of attachment made.

An order rejecting an application for attachment before judgment, in a case where there has been no conditional order of attachment under rule 5(3) of Order XXXVIII, Code of Civil Procedure, 1908, is not such an order as is made appealable under Order XLIII, rule 1(q), of the Code.

Om Prakash v. Muhammad Ishaq(1) and *Mahendra Narain Saha v. Gurudas Bairagi*(2), followed.

Chokhey Lal v. Sri Kishen(3), distinguished.

Appeal by the plaintiffs.

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

S. C. Bose and *S. M. Mullick*, for the appellants.

S. N. Bose and *S. R. Sen Gupta*, for the respondents.

* Appeal from Original Order no. 139 of 1933, from an order of Rai Bahadur Basanta Kumar Ray, Magistrate-Subordinate Judge of Dumka, dated the 19th June, 1933.

(1) (1933) 31 All. L. J. 1269.

(2) (1916) 23 Cal. L. J. 392.

(3) (1931) 30 All. L. J. 228.

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AGARWALA, J.—This is an appeal by the plaintiffs from an order of the Subordinate Judge of Dumka in the Santal Parganas rejecting an application for attachment before judgment in a suit which was pending in his court. The suit was instituted on the 17th of April, 1931. The defendants filed their written statement on the 14th of April of the same year. The application for attachment before judgment was made on the 22nd August of the same year. The application was taken up for hearing on the 25th of August, 1931, but was not finally disposed of till 19th June, 1933, nearly two years later. Plaintiffs' first witness was examined on the 9th of September, 1931, the next witness on the 2nd of December, 1931, and the third witness on the 8th of December, 1932. Defendants' first witness was examined on the 20th of February, 1933. In the meantime the case had been adjourned on various occasions at the request of the parties and on three occasions the order-sheet shows that for the convenience of the court the case was adjourned for periods amounting in all to seven months. A preliminary objection was taken as to the competence of the present appeal. Order XLIII, rule 1(g), provides that an appeal lies from an order under rule 2, 3 or 6 of Order XXXVIII. In the present appeal we are not concerned either with rule 2 or 3, or with the first part of rule 6 of Order XXXVIII. The appeal, if competent, must come within clause (3) of rule 6 of Order XXXVIII which provides that where the defendant shows cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit. It is pointed out by the learned Advocate for the respondents that in this case there was no conditional order of attachment under rule 5, clause (3), of Order XXXVIII. He contends, therefore, that the order eventually passed rejecting the application for attachment before judgment was not such an order as is

made appealable by Order XLIII, rule 1(q). The view contended for by the learned Advocate is supported by the decision of a Division Bench of the Allahabad High Court in *Om Prakash v. Muhammad Ishaq*(¹). Mr. Bose on behalf of the appellants refers to a passage in a judgment of another Division Bench of the Allahabad High Court in *Chokhey Lal v. Sri Kishen*(²) where Sen, J. in his judgment said that "where in response to a notice issued to the defendant under Order XXXVIII, rule 5, the defendant appears in court and shows cause why no order for furnishing security should be passed against him and why no order should be passed directing the attachment of the property, the order of the court accepting the contention of the defendant is an order which falls within Order XXXVIII, rule 5(2). From such an order an appeal lies under Order XLIII, rule 1(q)." The judgment of Sen, J., must be read in connection with the facts of the case, in which it appears that the court below had in fact made a conditional order for attachment of the property. In *Mahendra Narain Saha v. Gurudas Bairagi*(³), a case decided by Mookerjee and Chatterjee, JJ., an application for attachment before judgment was made and the court ordered notices to be issued upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the property in any way. No formal order of attachment was, however, made. Eventually the application for attachment was rejected and it was held that no appeal lay against the order of dismissal inasmuch as there had been no conditional attachment under clause (3) of rule 5. These two decisions in *Om Prakash v. Muhammad Ishaq*(¹) and *Mahendra Narain Saha v. Gurudas Bairagi*(³) therefore support the preliminary objection. The appeal must, therefore, be held

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(1) (1933) 31 All. L. J. 1260.

(2) (1931) 30 All. L. J. 228.

(3) (1916) 23 Cal. L. J. 392.

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to be incompetent. Mr. Bose does not contend that the circumstances of the case justify any interference in revision. The appeal is, therefore, dismissed. The respondents are entitled to their costs throughout.

We understand that the witnesses for the plaintiffs have now all been examined and the plaintiffs' case has been closed. There has already been inordinate delay in the disposal of the suit and it is desirable that it should be brought to a conclusion as soon as possible.

SAUNDERS, J.—I agree.

Appeal dismissed.

FULL BENCH.

Before Khaja Mohamad Noor, James and Varma, JJ.

THAKAN CHAUDHURI.

v.

LACHMI NARAIN.*

1934.

August, 7,
16.

Court-fees Act, 1870 (Act VLI of 1870), section 11—holder of mortgage decree paying court-fee on the amount due at the date of institution of suit, whether can execute the decree without paying additional court-fee on higher amount on account of interest pendente lite.

The holder of a mortgage decree who has paid court-fee on the amount due at the date of the institution of the suit can execute his decree for a higher amount on account of interest *pendente lite* without being liable to pay additional court-fee calculated on the higher sum.

Rai Sahib Raghunath Prasad Sahu v. Rai Bahadur Harihar Prasad Singh(1), *Ram Bhujawan Prasad Singh v. Natho Ram*(2) and *Debi Lal Sahu v. Gossain Koleshwar Gir*(3), followed.

* Appeal from Original Order no. 47 of 1933, from an order of Babu Manindra Nath Mitra, Subordinate Judge of Muzaffarpur, dated the 17th November, 1932.

(1) (1926) F. A. 28 of 1924 (unreported).

(2) (1922) 3 Pat. L. T. 146.

(3) (1926) 8 Pat. L. T. 331.