1937.

GOVERNMENT ADVOCATE, BIHAR v. KUMAR SINGH.

prosecution to show that he had no such ground, and the onus was discharged by placing before the court what Mr. Fath had done in the pauper proceedings and why. What I am now dealing with is Kumar Singh's contention in opposing this appeal that he had reason to believe that Mr. Fath had acted corruptly, and I consider that the contention must be overruled.

DHAVLE, J.

The intent to cause injury to Mr. Fath is also clearly made out.

I would accordingly allow this appeal, set aside the appellate order of acquittal and restore the conviction and sentence passed by the trying Magistrate.

JAMES, J.—I agree.

J. K. *Appeal allowed.*

APPELLATE CIVIL.

Before Courtney Terrell, C. J. and Manohar Lal, J.

1937.

July, 22.

MOTI JHA

v.

JOWALA PRASAD MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 57 *and Order XXXVIII, rule* 11—"*attached in execution*", *whether covers* "*attachment before judgment*" —*attachment before judgment, whether comes to an end upon the dismissal of application for execution under rule* 57.

Order XXI, rule 57, Code of Civil Procedure, 1908, lays down :—

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

*Appeal from Original Order no. 195 of 1936, from an order of Babu Nirmal Chandra Ghosh, Subordinate Judge, Monghyr, dated the 29th of May, 1936.

1937.

MOTI JHA v. JOWALA PRASAD MARWARI.

Held, that the phrase " attached in execution " occurring in rule 57 does not cover an attachment before judgment, and the words " the attachment shall cease " refer to an attachment in execution of the decree.

Therefore, an attachment before judgment does not come to an end upon the dismissal of an application for execution under that rule.

Shibnath Singh v. *Shaikh Saberuddin*(1), followed.

Arunachalam Chetty v. *Periasami Servai*(2), *Meyyappa Chettiar* v. *Chidambaram Chettiar*(3) and *Hari Sabaji Kamat* v. *Shrinivas Vithal*(4), not followed.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of the Court.

A. P. Upadhaya and *K. P. Upadhaya*, for the appellant.

S. Mustafi, for the respondent.

COURTNEY TERRELL, C. J. AND MANOHAR LAL, J.—This is an appeal by the judgment-debtor against an order of the Subordinate Judge of Monghyr, dated the 29th of May, 1936, passed in Miscellaneous Case nos. 15 and 49 of 1936 in an execution matter. It appears that the property of the judgment-debtor has been sold for a sum of Rs. 10,000 for recovery of balance of a decree that was passed against him sometime ago. It also appears that during the pendency of the money suit which resulted in this decree under execution, the plaintiff applied for and obtained attachment before judgment against the defendant-judgment-debtor, but this attachment was raised on the objection that certain idol was involved whose shebait the defendant was. The plaintiff having lost his rights which he had secured by attachment before judgment, instituted a suit under Order XXI, rule 63 of the Code of Civil Procedure which was

(1) (1928) I. L. R. 56 Cal. 416.
(2) (1921) I. L. R. 44 Mad. 902, F. B.
(3) (1923) I. L. R. 47 Mad. 483, F. B.
(4) (1931) I. L. R. 55 Bom. 693.

decided in his favour with the result that the attachment before judgment was revived. After this revival the decree-holder proceeded to execute his decree in the year 1933 when the execution in that year proceeded on part satisfaction. For the remaining portion of the decree another execution was started by the decree-holder on the 30th November, 1934, but in this execution the decree-holder simply proceeded to realise his decree by asking for the arrest of the judgment-debtor and did not make any prayer for execution of the decree by selling any immoveable property of the judgment-debtor. This execution, we are told, was dismissed for default on the 22nd of November, 1935, and the present execution was then lodged on December the 6th in 1935 in the course of which the properties were sold for a certain sum which is said to be inadequate in consideration of the real value of those properties.

Mr. A. P. Upadhaya in presenting this appeal before us has argued that the sale must be held to be void inasmuch as there was no attachment in these execution proceedings of the properties which were actually sold. His argument further is that inasmuch as the decree-holder allowed his previous execution of 1934 to be dismissed for default in November, 1935, it must be held in law that the attachment before judgment which had once failed by reason of an adverse decision in the money suit and which was revived by a decision in a regular suit under Order XXI, rule 63, came to an end. He relies upon two cases of the Madras High Court—*Arunachalam Chetty* v. *Periasami Servai*(1) and *Meyyappa Chettiar* v. *Chidambaram Chettiar*(2)—and also on a decision of the Bombay High Court in *Hari Sabaji Kamat* v. *Shrinivas Vithal*(3). The decision of the Calcutta High Court in *Shibnath Singh Ray* v.

(1) (1921) I. L. R. 44 Mad. 902, F. B.

(2) (1923) I. L. R. 47 Mad. 483, F. B.

(3) (1931) I. L. R. 55 Bom. 693.

1937.

MOTI JHA v. JOWALA PRASAD MARWARI.

COURTNEY TERRELL, C.J. AND MONOHAR LAL, J.

Shaikh Saberuddin(1) has been brought to our notice. In that Calcutta case Sir George Rankin has clearly laid down after an examination of the very rulings relied upon by the learned Advocate before us, that "there is nothing, however, in rule 11, Order XXXVIII, to give colour to the view that for the purposes of rule 57, Order XXI, 'attached in execution' is a phrase that covers 'attachment before judgment'." We respectfully agree with this exposition of law. The very language of rule 57 of Order XXI is abundantly clear when it enacts

> "Where any property has been *attached in execution of a decree* but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution..... Upon the dismissal of such application the attachment shall cease".

It is to be noticed that the legislature has used the words "the attachment shall cease". In our opinion the words 'the attachment' must mean the attachment referred to above, that is to say, the attachment in execution of the decree.

Another argument presented to us was that there has been some prejudice by reason of the fact that the properties had been sold for a lesser sum than could reasonably have been realised by any kind of sale. We are satisfied upon a consideration of the evidence in the case that the appellant can have no real grievance upon this score.

The result is that the appeal fails on both points and is dismissed with costs.

S. A. K.

Appeal dismissed.

(1) (1928) I. L. R. 56 Cal. 416.