

FULL BENCH.

1936.

Before Courtney Terrell, C.J., Fazl Ali and James, JJ.

October, 12.

SUNDER PRASAD SINGH

v.

DEODHARI SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 58, 63 and 100—claim under rule 58 by usufructuary mortgagee dismissed for default—claim not maintainable—failure to bring suit under rule 63, whether bars application under rule 100.

It is not necessary for a usufructuary mortgagee in possession to object, under Order XXI, rule 58, Code of Civil Procedure, 1908, to an attachment of the mortgaged property (which means an attachment of the equity of redemption, being the right, title and interest of the judgment-debtor) at the instance of a person who holds a money decree against the mortgagor, and, therefore, when such an objection is made and dismissed for default, and the mortgagee does not thereupon bring a suit, rule 63 of Order XXI does not debar the objector from subsequently making an application under rule 100.

Biswanath Patra v. Lingaraj Patra(1), approved.

Abdul Kadir Sahib v. U. T. M. Somasundaram Chettiar(2), referred to.

Application in revision by the decree-holder.

The facts of the case material to this report are set out in the following judgment of Agarwala and Rowland, JJ. referring the case to a Full Bench:—

AGARWALA AND ROWLAND, JJ.—In 1932 the petitioner instituted a suit for the recovery of money. On the 3rd April, 1933, the defendant in that suit executed in favour of the opposite party no. 1 a zarpeshgi of a certain property. On the 19th June, a decree was passed in the money suit, and the property which had been given in

* Civil Revision no. 350 of 1935, against an order of Babu Anjani Kumar Sinha, Subordinate Judge of Motihari, dated the 5th July, 1935.

(1) (1921) I. L. R. 1 Pat. 159.

(2) (1922) I. L. R. 45 Mad. 827, F. B.

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mortgage by the defendant was thereafter attached by the decree-holder. The zarfeshgidar then applied under Order XXI, rule 58, for release of the mortgaged property from attachment. This application was dismissed for default on the 27th of April, 1934. Eventually, on the 1st October, 1934, the property attached was purchased by the decree-holder in execution of his decree and possession was delivered to him on the 3rd March, 1935. The zarfeshgidar then made an application under Order XXI, Rule 100, complaining of his dispossession. This application has been allowed. The present application in revision is preferred by the decree-holder against the order allowing the application of the zarfeshgidar. It was first placed for hearing before James, J. who directed it to be laid before a Division Bench.

In *Biswanath Patra v. Lingaraj Patra*(¹) a Division Bench of this Court held that a person in possession of property under an usufructuary mortgage is not entitled to object under rule 58, Order XXI, of the Code of Civil Procedure, to the attachment of the property at the instance of a person who holds a decree against the mortgagor, and, therefore, when such an objection has been made and disallowed, rule 63 does not debar the objector from making an application under rule 100. This decision is in conflict with the view taken in other High Courts. In this High Court Kulwant Sahay, J. distinguished it in the case of *Radhey Kishan Lal v. Rameshwar Prasad*(²). Rule 63 provides 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”.

The view taken by Das, J. in *Biswanath Patra v. Lingaraj Patra*(¹) apparently was that if an application is made under rule 58 by a person who is under no obligation to make it, an order passed against him is not final. Rule 63, however, appears to us to be quite clear that if an objection is in fact made under rule 58 the necessary consequence is that the order is final as regards the person against whom it is passed unless it is set aside by a suit. This is the view that has been taken in other Courts. As we disagree with the view taken in *Biswanath Patra v. Lingaraj Patra*(¹), we refer this case to a Full Bench for final decision under Chapter V, Rule 4, of the High Court Rules. The questions to be decided are: (1) When a mortgagee in possession has filed an objection under rule 58, Order XXI, of the Code of Civil Procedure, against the attachment of immovable property, and has allowed the objection to be dismissed for default, is a subsequent application under Order XXI, rule 100, complaining of dispossession, after the property has been sold and possession delivered to the auction purchaser, barred by Order XXI, rule 63; (2) Was *Biswanath Patra v. Lingaraj Patra*(¹) rightly decided?

On this reference:

S. N. Ray (with him *Thakur A. D. Singh*), for the petitioner: Where a usufructuary mortgagee

(1) (1921) I. L. R. 1 Pat. 159.

(2) (1927) A. I. R. (Pat.) 51.

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prefers a claim under Order XXI, rule 58, Code of Civil Procedure, and the same is dismissed for default, he is not entitled subsequently to maintain an application under rule 100, if he has failed to avail himself of the remedy provided by Order XXI, rule 63. It makes no difference whether the claimant is a usufructuary mortgagee or fills any other character. It is the dismissal of the application that attracts the operation of rule 63 and the bar imposed by that rule does not depend upon the status of the person applying.

[FAZL ALI, J.—In the present case only the right, title and interest of the mortgagor could be attached. Therefore, the mortgagee had no locus standi to apply.]

It may be; but once he applies and the application is rejected, rule 63 comes into operation. The attaching decree-holder could have shown in that proceeding that the mortgage was a nominal one and that the mortgagee was in possession, not on his own account, but one behalf of the judgment-debtor. [Reliance was placed on *Debi Das v. Maharaj Rup Chand*(¹).]

The rule does not make any distinction in the case of a usufructuary mortgagee. In *Radhey Kishan Lal v. Rameshwar Prasad*(²) it was, however, held that an application under Order XXI, rule 58 is maintainable at the instance of a mortgagee in possession. The case of *Bishwanath Patra v. Lingaraj Patra*(³) is wrongly decided.

Where, generally, an application under rule 58 is dismissed for default, rule 63 operates as a bar—*Sankar Nath Pandit v. Madan Mohan Das*(⁴).

[CHIEF JUSTICE.—This point is not disputed for the purposes of this case.]

(1) (1927) I. L. R. 49 All. 903.

(2) (1927) A. I. R. (Pat.) 51.

(3) (1921) I. L. R. 1 Pat. 153.

(4) (1909) 11 Cal. L. J. 61.

[*B. C. De*, for the respondent, at this stage drew their Lordships' attention to *Mukhram Pandey v. Arjun Missir*(1).]

The case of *Mukhram Pandey v. Arjun Missir*(1) is distinguishable, as in that case the claimant was found to have no interest in the property at the date of attachment.

B. C. De (with him *D. L. Nandkeolyar* and *A. D. Sinha*), for the respondent, not called upon.

S. A. K.

COURTNEY TERRELL, C.J.—This case comes before the Full Bench on a reference by two learned Judges of this Court to whom as a Bench the case had been referred when the matter first came before a single Judge of this Court sitting in civil revision. The facts which have given rise to the discussion which has come before us for solution are simple.

In 1932 the petitioner brought a money suit against defendants 2 to 7. Before a decree was granted, that is to say, on the 3rd April, 1933, the defendants mortgaged certain property of theirs to the opposite party no. 1. On the 19th June, 1933, the petitioner got his money decree and proceeded to execute it by the sale of the property which had been mortgaged. The opposite party no. 1 under Order XXI, rule 58, of the Code of Civil Procedure instituted a claim case. That claim case was on the 27th April dismissed for default; but it is obvious that the claim case even if it had been heard on the merits must necessarily have been dismissed because in the circumstances Order XXI, rule 58, had no application whatever to the facts. Under a money decree the judgment-creditor could merely sell the right, title and interest of the judgment-debtor in the property to be sold, that is to say, all he could do would be to put up for sale the equity of redemption. The rights of the mortgagee, if any, could

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merely be asserted by virtue of his mortgagee's rights and the threatened sale by the judgment-creditor could not affect his rights even if he were the mortgagee in possession, because if Order XXI, rule 54, be examined it will be seen that the effect of the attachment was merely to prohibit the judgment-debtor from transferring or charging the property in any way and the only thing which could be transferred or charged was the equity of redemption in the mortgage. Accordingly Order XXI, rule 58, being inapplicable to the circumstances of the case, Order XXI, rule 63, has also no application and could not be used by the mortgagee. Order XXI, rule 63, enables a person whose claim has been dismissed under Order XXI, rule 58, to sue in order that he may have his rights determined, that is to say, if the claimant and the judgment-creditor are in conflict as to the rights in a certain property and if a decision has been given on the merits in the claim case, should the party who loses the claim case desire to push his claim further, he must have resort to a suit for that purpose. In this case the mortgagee was merely claiming in respect of his mortgage rights which were not threatened and the judgment-creditor could merely claim in respect of the right to put up for sale the equity of redemption, that is to say, they were not fighting about the same property at all and there could in the circumstances be no decision which could be made the subject of litigation under Order XXI, rule 63.

The next stage in the proceedings was that on the 1st October, 1934, the property, that is to say, the equity of redemption, being the right, title and interest of the judgment-debtor was put up for sale and purchased by the decree-holder himself and on the 3rd March, 1935, the decree-holder obtained delivery of possession. The mortgagee then had resort to Order XXI, rule 100, that is to say, he said, "I being dispossessed by the decree-holder, am entitled to have the merits of my claim heard under that

rule". The objection was taken by the decree-holder purchaser that whereas the mortgagee had already taken proceedings under Order XXI, rule 58, and whereas the claim by the mortgagee had been dismissed for default, the mortgagee not having had recourse to Order XXI, rule 63, that is to say, not having brought a suit as contemplated by that rule, he could not now be heard to press his claim for possession under Order XXI, rule 100. To put it at its best, this is but an exceedingly technical plea and moreover it is wrong on the merits. Order XXI, rule 58, had no application. Order XXI, rule 63, had therefore no application whatever and in that case the only remedy properly left to the mortgagee was to press his claim under Order XXI, rule 100. This has always been the view of this Court and it was so decided in the case of *Biswanath Patra v. Lingraj Patra*(¹). The learned Judges who referred this case had some doubt as to whether the reasoning of the decision in that case was correct; but, in my view, it was correct and the Full Bench decision of the Madras High Court in *Abdul Kadir Sahib v. U. T. M. Somasundaram Chettiar*(²) indirectly supports this view.

It is sufficient to say that the abortive proceedings under Order XXI, rule 58, did not bar the subsequent proceedings by the mortgagee, under Order XXI, rule 63, and that the case I have referred to in *Biswanath Patra v. Lingraj Patra*(¹) was correctly decided.

The judgment-creditor must, therefore, pay the costs throughout.

FAZL ALI, J.—I agree.

JAMES, J.—I agree.

S. A. K.

Rule discharged.

(1) (1921) I, L. R. 1 Pat. 159.

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