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think it is a case in which the defendant ought to be allowed costs. The claim of the plaintiffs was just. We would, therefore, set aside the order of payment of costs passed by the learned Judge in the Court below, and with this modification reject the application.

Parties will bear their own costs in this Court.

Rule discharged.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Madan, JJ.

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September, 10, 18.

RANI CHHATER KUMARI DEBI

v.

BHAGWATI PRASAD.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 170 *—decree for arrears of rent in respect of a tenure—attachment —Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rule* 58, *claim under, whether barred.*

Section 170 of the Bihar Tenancy Act, 1885, operates as a bar to the maintainability of a claim under Order XXI, rule 58, Code of Civil Procedure, 1908, if it is not disputed that the decree-holder is the landlord of the tenure or holding and that the decree is for the rent due in respect thereof.

A claimant cannot be allowed to plead that the decree has been obtained against a wrong person.

Amrita Lal Bose v. *Nemai Chandra Mukhopadhaya*(1), *Deonandan Prasad* v. *Pirthi Narayan*(2), *Dwarka Singh* v. *Nema Singh*(3) and *Surpat Singh* v. *Shital Singh*(4), followed.

Jitendra Nath Ghose v. *Monmohon Ghose*(5), explained.

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* Civil Revision no. 156 of 1936, from an order of Maulavi Nasiruddin Khan, Munsif of Bettiah, dated the 13th of January, 1936.

(1) (1901) I. L. R. 28 Cal. 382.
(2) (1932) I. L. R. 11 Pat. 790.
(3) (1929) 10 Pat. L. T. 118.
(4) (1936) A. I. R. Pat. 480.
(5) (1930) 34 Cal. W. N. 821.

Application in revision by the decree-holder.

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

The case was in the first instance heard by Varma, J. who referred it to a Division Bench.

D. N. Varma and *B. B. Sahay*, for the petitioner.

S. N. Sahay and *Jaleshwar Prasad*, for the opposite party.

KHAJA MOHAMAD NOOR, J.—This application in revision is directed against an order of the Munsif of Bettiah allowing the claim of the opposite party which purported to be under Order XXI, rule 58, of the Code of Civil Procedure and was preferred in execution of a decree which is claimed by the decree-holder petitioner to be a decree for the rent of a tenure. The decree is against one Subasni Kuer whose husband, Bir Bharthi, was admittedly entitled to half of the tenure which he is said to have transferred to the respondent, the remaining half belonging to one Musammat Nanhuka Kuer and Ram Chandra Prasad. The rent suit was originally instituted against all these three persons, namely, Subasni, Nanhuka Kuer and Ram Chandra, but later the plaintiff obtained leave to amend the plaint by excluding Nanhuka Kuer and Ram Chandra and the claim against them on the allegation that the tenure was split up and a separate tenure consisting of half of the original tenure was created for the share of Subasni. A decree was passed on this basis. It was in execution of this decree that a claim was preferred on behalf of the opposite party Bhagwati Prasad and others. They claimed that they were purchasers of the tenure from the husband of Subasni and that the decree had been wrongly obtained against her and was, therefore, not a rent decree and they were entitled to come in under Order XXI, rule 58. The learned Munsif held that the decree was not a rent decree for the reasons stated

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above, namely, that it was against a person who was no longer a tenure-holder, her husband having already transferred it to the claimant. He, therefore, allowed the claim. The decree-holder has come up in revision.

It was held by the Full Bench of the Calcutta High Court in *Amrita Lal Bose* v. *Nemai Chandra Mukhopadhaya*(1) that a claim under section 278 of the Code of Civil Procedure (now Order XXI, rule 58) was barred under section 170 of the Bengal Tenancy Act if it is not disputed that the decree-holder is the landlord of the tenure or holding and that the decree is for the rent due in respect of it. A claimant cannot be allowed to plead that the decree has been obtained against a wrong person. This decision has been uniformly followed in this Court [*see Deonandan Prasad* v. *Pirthi Narayan*(2), *Dwarka Singh* v. *Nema Singh*(3) and *Surpat Singh* v. *Shital Singh*(4)]. It was held in these cases that if a claimant does not deny that the holding (or in this case the tenure) was held under the decree-holder and that rent was due thereon but contends that the decree has been passed against a wrong person, he cannot maintain the claim case. Generally speaking the position is this: If it can be shown that the decree was not a rent decree a third party can file objections under Order XXI, rule 58; for instance, if it appears that the plaintiff is not the 16 annas landlord of the tenure or holding, or that suit was in respect of a portion of a holding or tenure or that rents for two or more holdings or tenures had been claimed in one and the same suit, the claim is entertainable, but if the decree is a rent decree but against a wrong person the claim is barred. Though sometimes it may be difficult to distinguish between cases in which Order XXI, rule 58, is applicable and where it is not, the distinction is there and can be found out for all practical purposes.

(1) (1901) I. L. R. 28 Cal. 382, F. B.
(2) (1932) I. L. R. 11 Pat. 790.
(3) (1929) 10 Pat. L. T. 118.
(4) (1936) A. I. R. (Pat.) 480.

The learned Advocate for the opposite party contended that these cases are no longer good law in view of the decision of their Lordships of the Privy Council in *Jitendra Nath Ghose* v. *Monmohon Ghose*(1). In my opinion the Privy Council decision does not in the least affect the decisions which I have already cited. The question came before their Lordships in a substantive suit instituted for a declaration that the decree was not binding as it was not a rent decree. It was contended that the suit itself was barred under section 170 of the Bengal Tenancy Act. Their Lordships referring to section 170 observed that that section bars the investigation of the claim in the course of the execution proceeding but not the suit. In my opinion this decision instead of helping the opposite party is against them. Their Lordships say :—

" Reliance has been placed by Counsel for the appellants upon section 170 of the Tenancy Act which makes sections 278 to 283 of the Code of Civil Procedure of 1882 (now Order XXI, rules 58 to 63, of the Code of 1908) inapplicable to a tenure attached in execution of a decree for arrears of rent. The effect of this provision is that there can be no investigation in execution proceedings held under Chapter XIV of the Tenancy Act of claims by third parties to an interest in the tenure; but it does not in their Lordships' opinion bar a substantive suit such as that filed by the respondents."

The learned Advocate relied on the word " object " which occurs later in the judgment of their Lordships. The passage in which the word occurs runs thus :—

" If a landlord seeks to use the machinery for recovery of something that is not the rent to the prejudice of a third party on whom the decree is not binding, it would be a manifest injustice to deny him

(1) (1936) 34 Cal. W. N. 821, P. C.

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the right to object. It would require very clear words in the Act to induce their Lordships to impose this penalty upon him."

This passage occurs in the same paragraph which begins with the sentence I have quoted before. It is obvious that their Lordships were referring to the right to bring a suit and not to the right to file objection under Order XXI, rule 58. The word "object" in their Lordships' decision clearly means objecting to the sale by means of a separate suit. In my opinion, therefore, as I have said, the Privy Council decision does not in the least take away the binding nature of the decisions of this Court.

The next contention of the learned Advocate was that the decree was not a rent decree on account of the fact that it is in respect of half of the holding. No doubt as the suit was originally instituted only half of the tenure was said to belong to Subasni, the other half being that of Musammat Nanhuka Kuer and Ram Chandra. But the plaint was amended and the suit became a suit for the tenure held by Subasni alone, that is to say, the half of the original tenure became a complete tenure by splitting up of the tenure into two distinct and separate tenures. It was on the basis of this amended plaint that the decree was based. In my opinion it cannot be held to be a simple money decree on this ground. Under these circumstances I think the order of the learned Munsif maintaining the claim of the opposite party under Order XXI, rule 58, which was clearly barred under section 170 of the Bihar Tenancy Act was without jurisdiction. I would therefore allow this application and set aside the order. The petitioner will be entitled to costs from the opposite party. Hearing fee one gold mohur.

MADAN, J.—I agree.

Rule made absolute.