1936.

JOTI LAL SAH v. SHEODHAYAN PRASAD SAH.

ROWLAND, J.

the successor in interest who has not got himself substituted is bound by the decision and has no remedy. No doubt Order XXII, rule 10, gives the Court a discretion in allowing or refusing such an application by the successor in interest but leave should not be unreasonably refused. It is not necessary for this Court to pass any order regarding Parmeshar's application under Order XXII, rule 10. The order that I propose is that the decisions of both the courts below be set aside and the suits remitted to the Munsif for disposal on the merits. It will be open to Parmeshar to make a fresh application under Order XXII, rule 10, to the Munsif. The costs of the appeal and second appeal will be borne by the defendants. The costs of the first court will abide the result.

AGARWALA, J.—I agree.

Appeals allowed.

Cases remanded.

REVISIONAL CIVIL.

1936.

March, 3, 24.

Before Agarwala and Rowland, JJ.

SURPAT SINGH

v.

SHITAL SINGH.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 170—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rule* 58—*decree for arrears of rent against the tenants recorded in the landlord's serishta—claim under Order XXI, rule* 58, *of the Code of Civil Procedure, if barred under section* 170 *of the Bihar Tenancy Act.*

The petitioners having obtained a decree for arrears of rent against the tenants recorded in their serishta put the decree in execution. Prior purchasers from the tenants applied under Order XXI, rule 58, for release of the holding

* Civil Revision no. 508 of 1935, against an order of Mr. Shiva Pujan Rai, Munsif of Madhipura, dated the 12th August, 1935.

and contended that the landlord's decree was only a money decree. The Munsif upheld the contention. *Held* in revision, that section 170 of the Bihar Tenancy Act was a bar to the application of Order XXI, rule 58, of the Code of Civil Procedure.

Amrita Lal Bose v. *Nemai Chand Mukhopadhya*(1), *Maharaja Sir Rameshwar Singh Bahadur* v. *Musammat Rajo Chowdhrain*(2), *Maharaja Sir Rameshwar Singh Bahadur* v. *Puran Chander Mansah*(3), *Dwarka Singh v. Nema Singh*(4), *Deonandan Prasad* v. *Pirthi Narayan*(5) and *Bipra Das Dey* v. *Rajaram Banerjee*(6), discussed.

Application in revision by the decree-holders.

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

The case was first heard by James, J. who referred it to a Division Bench.

J. C. Sinha, for the petitioners.

Ganesh Sharma, for the opposite party.

AGARWALA, J.—This application in revision arises out of proceedings taken by the petitioners who obtained a decree for arrears of rent against the tenants recorded in their serishta. The execution proceedings were opposed by the opposite party who claimed to be in possession under purchases from the tenants of the holding. A petition under Order XXI, rule 58, preferred by the opposite party, was upheld on the ground that in the record-of-rights other tenants besides the judgment-debtors are recorded in the landlord's serishta. The court below held that in

(1) (1901) I. L. R. 28 Cal. 382, F.B.
(2) (1924) 7 Pat. L. T. 625.
(3) (1925) 7 Pat. L. T. 717.
(4) (1929) 10 Pat. L. T. 118.
(5) (1932) I. L. R. 11 Pat. 790.
(6) (1909) I. L. R. 36 Cal. 765.

1936.

SURPAT SINGH v. SHITAL SINGH.

these circumstances the decree obtained by the petitioners must be held to be a money decree, and in that view of the matter decided that section 170 of the Bihar Tenancy Act does not bar the application of Order XXI, rule 58, of the Code of Civil Procedure.

AGARWALA, J.

The question of law which arises for decision, therefore, is whether section 170 bars the application of Order XXI, rule 58, in a case where the decree obtained by a landlord is not what is generally known as a " rent decree " but a money decree. In 1901 in the case of *Amrita Lal Bose* v. *Nemai Chand Mukhopadhya*(1) a Full Bench of the Calcutta High Court held that section 170 of the Bengal Tenancy Act bars a claim under the present Order XXI, rule 58, in all cases where it is shown that the decree was one for arrears of rent. The matter has been agitated in this Court in a number of cases, some of which are reported. In *Maharaja Sir Rameshwar Singh Bahadur* v. *Musammat Rajo Chowdrain*(2) Jwala Prasad, A. C. J., and Macpherson, J. held that rule 58 has no application to proceedings in execution of a rent decree and that the landlord is not bound to go beyond his own record when enforcing a claim for arrears of rent. This decision was followed by Sen, J. in *Maharaja Sir Rameshwar Singh Bahadur* v. *Puran Chander Mansah*(3) and by Fazl Ali, J. in *Dwarka Singh* v. *Nema Singh*(4). In the last mentioned case, Fazl Ali, J. cited an extract from the decision of Banerji, J. in the Full Bench case of the Calcutta High Court already referred to, namely, that a claim petition on behalf of the purchaser of a holding, who does not deny that the decree-holder is the landlord or that there were actually arrears due on the holding for the years in suit in respect of which the rent

(1) (1901) I. L. R. 28 Cal. 382, F.B.

(2) (1924) 7 Pat. L. T. 625.

(3) (1925) 7 Pat. L. T. 717.

(4) (1929) 10 Pat. L. T. 118.

decree was passed, but who attacks the decree on the ground that it has been wrongly obtained against the original tenant who has sold the holding to the claimant, is barred under section 170 of the Bengal Tenancy Act. In *Deonandan Prasad* v. *Pirthi Narayan*(1) Fazl Ali, J. referred the case then before him to a Division Bench. The learned Judge observed in his order of reference that the point raised on behalf of the opposite party in the petition before him was that it was always open to a claimant under rule 58 to show that the decree sought to be executed was not a rent decree. In that case the claimant contended that the decree had been obtained not against the recorded tenant but against the shikmidar or under-tenant. The Division Bench before which the case was eventually laid consisted of Khaja Mohamad Noor, J. and Dhavle, J. In the course of his judgment, Dhavle, J. said, " It has been contended that he (that is to say, the claimant) was entitled to show that the decree under execution was not a rent decree, but it is plain that he was not entitled to show this by establishing that the decree was obtained against a wrong party. That would really be establishing that the decree is a nullity, and establishing it under Order XXI, rule 58, which is excluded by section 170 of the Bengal Tenancy Act ". The decision of the Full Bench of the Calcutta High Court already referred to was cited with approval. It appears, therefore, that from 1901 down to the decision last referred to, it has been held that in circumstances such as we have in the present case, a claimant is not entitled to prefer a claim under Order XXI, rule 58.

I would, therefore, set aside the order of the court below and allow the decree-holder petitioner his costs. Hearing fee two gold mohurs.

ROWLAND, J.—I agree and would like to add some observations with reference to the decision in *Bipra*

(1) (1932) I. L. R. 11 Pat. 790.

1936.

SURPAT SINGH v. SHITAL SINGH.

ROWLAND, J.

Das Dey v. *Rajaram Banerjee*(1) a case in which a claim under the provisions of the old Code corresponding to Order XXI, rule 58, was in fact allowed. The circumstances of that case were peculiar. The suit was for arrears of rent not of one holding only but of two, and it was in pursuance of this decree so obtained and for the rent of both the holdings that the attachment was made. It could not, therefore, be said strictly and within the meaning of the words of section 170 that the holding had been attached in execution " for arrears due thereon ", so as to bar a claim under Order XXI, rule 58. The fact that the suit was for two holdings also had the effect that the decree was only a money decree, and the decision is sometimes used in argument to support the contention that where the decree is only a money decree, a claim under rule 58 is not barred. But I am quite clear in my opinion that it does not support that contention. Where the decree is only a money decree, it has been settled by several decisions that on a sale in execution only the right, title and interest of the judgment-debtor will pass; and it is to be noted that section 170 does not exclude a claim by any person interested in the land under Order XXI, rule 100. A person claiming the land adversely to the judgment-debtor can also sue for a declaration that the decree is not binding on him or that the interest has not passed by the sale. But the remedy by claim under rule 58 is intended to be barred in all cases where the holding is put to sale for its own arrears; the only way of preventing the sale from taking place is payment of the decretal amount.

Rule made absolute.

(1) (1909) I. L. R. 36 Cal. 765.