

1935.

SURENDRA
KUMAR
SINGH

is not a nullity in the sense of being beyond the jurisdiction of the executing court or void as between the judgment-debtor and the decree-holder or auction-purchaser, and

SRICHAND
NAHATA.

DHAVLE, J.

(b) the decree-holder, if he purchases the property, cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not in fact satisfied his decree to the extent of the sale-price, unless he has the sale set aside by applying under Order XXI, rule 91.

I would accordingly allow the appeal, reverse the order of the lower Courts and dismiss the application for execution with costs in all Courts.

COURTNEY TERRELL, C.J.—I agree.

AGARWALA, J.—I agree.

Appeal allowed.

REVISIONAL CIVIL.

Before Macpherson and Khaja Mohamad Noor, JJ.

JANG BAHADUR SINGH

1935.

November,
6, 7, 8, 11.

v.

CHHABILA KOIRI.*

Code of Civil Procedure, 1908 (Act V of 1908), section 94 and Order XXXIX, rules 1 and 2—Interim injunction—Penalty for disobeying—rule 2(3), whether governs both rules 1 and 2.

The plaintiff obtained an interim injunction restraining the defendants from cutting certain trees which the defendants disobeyed whereupon the Court directed them to be detained in the civil prison. In revision it was contended on their behalf that the Munsif had no jurisdiction to punish.

* Civil Revision no. 129 of 1935, from an order of K. P. Sinha, Esq., I.C.S., Additional District Judge, Arrah, dated the 8th December, 1934, affirming an order of Babu H. P. Sinha, Munsif, First Court, Arrah, dated the 15th February, 1934.

Held, that Order XXXIX, rule 2(3), Code of Civil Procedure, 1908, applies to disobedience generally if an injunction is granted by the Court and that the words "in case of disobedience" of that clause are wide enough to cover breaches of injunctions issued under Order XXXIX, rule 1.

Hakim Muhammad Naziruddin v. Raja Ram(1), *S. Adaikkala Thevan v. Imperial Bank, Madura*(2) and *Ramprasad Singh v. Benares Bank, Ltd.*(3), followed.

Balbhadar v. Balla(4), dissented from.

Permanand Das v. Natvarlal Tribhovandas(5), *Krishnapur Mutt v. The Vicar of Suratkal Church*(6) and *Eastern Trust Co. v. McKenzie Mann & Co.*(7), referred to.

It would appear desirable to redraft rule 2 perhaps by replacing rule 2(3), with such modifications as may be required, by a new rule 2A.

Application in revision by the defendant.

The facts of the case material to this report are set out in the following judgment of Macpherson, J., referring the case to a Division Bench :—

MACPHERSON, J.—The petitioner was one of the defendants to mortgage suit no. 135 of 1932, which was based upon a simple mortgage bond executed by petitioner and his father and the suit was for realisation of Rs. 1,690-2-0 by the sale of the mortgaged and other properties. The plaintiff applied for an injunction under Order XXXIX, rules 1 and 2, against waste of the security through the petitioner and his son cutting trees from the orchard representing the mortgaged property.

The Munsif granted ad interim injunction restraining the petitioner and two other defendants from cutting the trees and removing the timber of trees already cut. Eventually on the 3rd January, 1934, plaintiff represented to the Court that the petitioner and his father were cutting the trees of the orchard in spite of the injunction and asked that they be detained in the civil prison. The Munsif committed the petitioner and his father to the civil prison for four months or till they express their regret to the Court and compensate plaintiff for the

(1) (1935) 16 Pat. L. T. 309.

(2) (1926) A. I. R. (Mad.) 574.

(3) (1919) I. L. R. 42 All. 98.

(4) (1930) A. I. R. (All.) 387.

(5) (1931) A. I. R. (Bom.) 509.

(6) (1917) 44 Ind. Cas. 56.

(7) (1915) 20 Cal. W. N. 457, P. O.

1935.

JANG
BAHADUR
SINGH
v.
CHHABELA
KOIRI.

1935.

JANG
BAHADUR
SINGH

CHHABILA
KOIRI.

MACPHER-
SON, J.

loss incurred by him. The learned Munsif does not specify the provision under which his order was passed; but the District Judge on appeal which was dismissed mentions Order XXXIX, rule 2, clause (3), of the Code of Civil Procedure.

I issued the rule to show cause why the order of the Munsif should not be set aside on the basis of Mr. Justice Dalal's decision in *Balbhaddar v. Balla*(1) where he observed:—"Through some inadvertence no penalty appears to be provided in Order XXXIX for the breach of an injunction. It seems likely that the provisions of rule 2(3) of Order XXXIX were intended to be applied to a breach of an injunction under rule 1 also, but as clause 3 is included under rule 2 it would follow that the provisions of that clause will not apply to rule 1." The learned Judge suggested an amendment of the rules prescribed. This is substantially the view of the law which is pressed at the hearing by Mr. Mahabir Prasad; but I have not been referred to any other decision in support.

On the other hand, Mr. Hareshwar Prasad Sinha relies upon the decisions of the Madras High Court in *Krishnapur Mutt v. The Vicar of Swatkal Church*(2) and *S. Adaikala Thevan v. Imperial Bank, Madura Branch*(3). The former is the decision of a single Judge who was unable to accept the contention that the provision in Order XXXIX, rule 2(3), only applies to suits of the nature contemplated by rule 2(1). (It is clear that in the present circumstances the injunction was issued under rule 1.) The learned Judge observes:—"Section 94, clause (c), of the Code is general and empowers the Court to grant a temporary injunction and, in case of disobedience, to commit the person guilty thereof to the civil prison and order that his property be attached and sold. Order XXXIX must be read with section 94. I would be sorry to hold that a person who wilfully disobeys an injunction of Court could escape with impunity, unless there is anything in the Code which compels me to do so."

The difficulty, however, would seem to be that section 94(c) is dependent upon the words "if so prescribed" which means "if so prescribed by rules under the Act." Rule 1 certainly empowers the Court to grant a temporary injunction; but the power to commit to the civil prison in case of disobedience is not accorded in that rule and unless it can be implied in Order XXXIX, rule 2(3), it is not prescribed at all. Order XXXIX, rule 2(1), deals with cases of a special class and under the ordinary rules of drafting all the sub-rules of rule 2 would ordinarily be understood to refer to sub-rule (1) unless otherwise stated.

The second case *S. Adaikala Thevan v. Imperial Bank, Madura*(3), which was decided by a Division Bench, may be summarised as follows:—"The drafting of rule 2(3) of Order XXXIX is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. It applies not only to disobedience of an order issued under clauses (1) and (2) of that rule but

(1) (1930) A. I. R. (All.) 387.

(2) (1917) 44 Ind. Cas. 58.

(3) (1926) A. I. R. (Mad.) 574.

has a more general application: it applies alike to disobedience of all the injunctions issued under section 94." The learned Judges also refer to *Ramprasad Singh v. Benares Bank, Ltd.* (1) where the following appears:—"It has been suggested that, in any case, no procedure is provided for punishing any breach of the condition so imposed. This argument turns in part on the interpretation to be put on Order XXXIX, rule 2, clause (3), of the Code of Civil Procedure. The drafting of the rule is a little clumsy, because it has followed mechanically the arrangement of sections in the Code of Civil Procedure of 1882; but we are satisfied that the words "in case of disobedience" are wide enough to cover breaches of injunctions issued under Order XXXIX, rule (1), for which breaches no penalty is elsewhere provided. In any case this Court has unquestionably the power to punish contempt of its own orders." The last sentence shows that this Allahabad decision is not a direct authority since in the present case the injunction was not issued by the High Court.

1935.

JANG
BAHADUR
SINGH
v.
CILLABILA
KOIRI.

The question is whether it is a case of omission, accidental or otherwise, so that in fact the Court is not empowered by rules prescribed in case of disobedience of a temporary injunction granted under Order XXXIX, rule 1, to commit the person guilty thereof to the civil prison, or whether Order XXXIX, rule 2(3), directly or by necessary implication does prescribe such power of commitment.

I may say that Mr. Hareshwar Prasad Sinha has referred to the decision of their Lordships of the Judicial Committee in the *Eastern Trust Co. v. McKenzie Mann & Co., Ltd.* (2). But it does not appear to be very much in point.

In my opinion this is a case which should be decided by a Division Bench and I accordingly refer it so that a decision may be available to the Courts of the province, and that if necessary an amendment in the rules prescribed may be made.

On this reference

Mahabir Prasad and Turkeshwar Nath, for the petitioner.

Hareshwar Prasad Sinha, for the opposite party.

MACPHERSON, J.—The facts and also the points at issue are set out in the observations made by me in referring the case to a Division Bench and need not be repeated as they will form a part of this judgment.

At the hearing two recent decisions have been referred to, the first being that of Dhavle, J. in

(1) (1919) I. L. R. 42 All. 98, 108.

(2) (1915) 20 Cal. W. N. 457, P. C.

1935.

JANG
BAHADUR
SINGH
v.
CHHABILA
KOIRI.

MACPHER-
SON, J.

Hakim Muhammad Naziruddin v. Raja Ram⁽¹⁾ and the other that of Baker, J. in *Chaturbhujdas Parmanand Das v. Natvarlal Tribhovandas*⁽²⁾. In the former the learned Judge after dissenting from *Balbhaddar v. Balla*⁽³⁾ and making reference to *Ramprasad Singh v. The Benares Bank, Ltd.*⁽⁴⁾ and *S. Adakkala Thevan v. Imperial Bank, Madura*⁽⁵⁾ held that Order XXXIX, rule 2(3) applies to disobedience generally of an injunction granted by the Court, and that the words "in case of disobedience" of that clause are wide enough to cover breaches of injunctions issued under Order XXXIX, rule 1, for which breaches no penalty is elsewhere provided. In the latter it was held that an undertaking by a defendant to the court was equivalent to an injunction to which Order XXXIX, rule 2, is applicable. Another point which may be mentioned is that though the decision in *Ramprasad Singh v. The Benares Bank, Ltd.*⁽⁴⁾ related to contempt of the orders of the High Court which the High Court had unquestionably the power to punish, the High Court possesses now under the provisions of the Contempt of Courts Act, 1926, the same power in respect of contempt of the orders of subordinate courts.

Apart from the consideration that the Legislature was unlikely to omit provision for a penalty for a breach of an injunction under Order XXXIX, rule 1, the intention of the Legislature to make rule 2(3) govern both rule 1 and the earlier part of rule 2 may be inferred from a comparison of rules 1 and 2 with the provisions of sections 492 and 493 of the Code of Civil Procedure, 1882, which they very largely reproduce. Rule 1 is substantially section 492 and

(1) (1935) 16 Pat. L. T. 509.

(2) (1931) A. I. R. (Bom.) 509.

(3) (1930) A. I. R. (All.) 387.

(4) (1919) I. L. R. 42 All. 98.

(5) (1926) A. I. R. (Mad.) 574.

rule 2 is substantially section 493 with its four paragraphs numbered. Rule 2(3) which reads—

“ In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release,”

is thus based upon the third paragraph of section 493 which runs :—

“ In case of disobedience, an injunction granted under this section or section 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both ”.

The words “ or of breach of any such terms ” has reference to the second paragraph of section 493 and rule 2(2). It seems clear that the words “ In case of disobedience the Court granting an injunction may order ” were intended to reproduce “ In case of disobedience an injunction granted under this section or section 492 may be enforced.....”, dropping the reference to the sections, and to cover all temporary injunctions as before whether granted under rule 1 or rule 2(1); and though, as has been frequently observed, the drafting is not lucid, it sufficiently implies that intention. At the same time it would appear desirable to redraft rule 2 perhaps by replacing rule 2(3), with such modifications as may be required. by a new rule 2A.

Mr. Mahabir Prasad asks us to accept an apology from his client and direct his release from bail, but the materials before us for a decision are inadequate and such an order, if made, ought to come from the Court of the Munsif which has to see that, in the words of the order, the petitioner also compensates the plaintiff for the loss incurred by him.

The application is without merit and I would discharge the rule with costs.

KHAJA MOHAMAD NOOR, J.—I agree.

Rule discharged.

1935.

JANG
BAHADUR
SINGH
v.
CHHABILA
KOURI.

MACPHER-
SON, J.