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clear, is relief to which the plaintiff is not in any circumstances entitled; but in my judgment he was entitled to a declaration that the imposition of the fees for the plaintiff's keeping the platform was *ultra vires* the Commissioners and that the plaintiff was entitled to a refund of the fees which, as I understand, were paid into the Court of the Munsif.

WORT, J.

The appeal of the Commissioners is dismissed and the judgment of the Court below set aside, the plaintiff being entitled to a decree for the relief indicated in this judgment.

HARRIES, C.J.—I agree.

Appeal dismissed.

Decree modified.

S. A. K.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

1940.

January, 9, 10, 23.

RAMRUP RAI

v.

FIRM MAHADEO LAL NATHMAL.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 58 and 63—objection to attachment under rule 58—question of benami, whether can be raised—claim allowed on decree-holder's admission—suit by decree-holder under rule 63, whether maintainable.

A party who realises the hopelessness of resisting a claim in summary proceedings and consents to the claim under Order XXI, rule 58, Code of Civil Procedure, 1908, being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under Order XXI, rule 63, Code of Civil Procedure, 1908. The fact that a

* Appeal from Original Decree no. 73 of 1937, from a decision of Babu Jadunath Sahay, Subordinate Judge of Bhagalpur, dated the 31st March, 1937.

party actually invites an order to be made against him does not render him any less a party against whom an order is made.

Venkatarama Aiyar v. *Narayana Aiyar*(1), followed.

Mulk Raj v. *Ralla Ram-Rao Mal*(2), not followed.

Unless the facts show that the decree-holder gave up his right to contest the matter under Order XXI, rule 63, Code of Civil Procedure, 1908, a consent order or an order passed without objection by the executing court in summary proceedings can be challenged, and a suit is maintainable.

Where, in execution of a money decree against the defendants second party, the plaintiffs attached their properties, and the defendant first party preferred an objection under Order XXI, rule 58, Code of Civil Procedure, alleging that those properties had been purchased by him, and the order in the claim case was

" .....opposite party..... asks the court to allow the claim petition and the claimant also does not press for costs. Claim..... is allowed without costs ",

and the plaintiffs then instituted the present suit under Order XXI, rule 63, claiming a declaration that the purchase by the defendant first party was a farzi and colourable transaction and the properties were liable to attachment and sale in execution of the decree, and no evidence was adduced as to what transpired in the execution case;

Held, that the plaintiffs could only resist the objection by inviting the executing Court to go into the question as to whether the purchase was benami, and this the executing Court could not do.

Ram Kishun Singh v. *Damodar Prasad*(3) and *Ganesh Lal Sarawagi* v. *Mahabir Sahu*(4), referred to.

Held, further, that the admission of the plaintiffs was merely an admission for the purposes of the summary proceedings under Order XXI, rule 58, and as there was nothing to show that the plaintiffs ever gave up their rights to question the decision of the claim case, they would be deemed to be

(1) (1915) 28 Ind. Cas. 536.
(2) (1926) I. L. R. 7 Lah. 235.
(3) (1923) 5 Pat. L. T. 107.
(4) (1929) A. I. R. (Pat.) 273.

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parties against whom the order in the claim case was made, and, therefore, that they could maintain the suit under Order. XXI, rule 63.

Venkatarama Aiyar v. *Narayana Aiyar*(1), followed.

Mulk Raj v. *Ralla Ram-Rao Mal*(2), not followed.

Per MANOHAR LALL, J.—It was the duty of the defendant who relied upon the order as a bar to the maintainability of the suit to show the circumstances under which that order was passed, and in particular he ought to have alleged and proved the agreement, if any, into which the plaintiffs entered with him, but that having not been done, the plaintiffs were not debarred from availing themselves of the statutory right and instituting the suit.

Sardhari Lall v. *Ambika Pershad*(3), referred to.

Appeal by the defendant first party.

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

S. M. Mullick and *Nawal Kishore Prasad II*, for the appellant.

Dr. D. N. Mitter (with him *G. C. Mukharji* and *Prem Lall*), for the respondents.

HARRIES, C.J.—This is an appeal by defendant no. 1 from a decree of the learned Subordinate Judge of Bhagalpur decreeing the plaintiffs' claim that certain property was liable to attachment and sale in execution of a decree held by the plaintiffs against defendants second party.

The plaintiffs obtained a decree against the defendants second party on the Original Side of the Calcutta High Court, and the decree was transferred to the Court at Bhagalpur for execution. The plaintiffs then filed Execution Case no. 173 of 1933 in the Court at Bhagalpur against the defendants second

(1) (1915) 28 Ind. Cas. 536.
(2) (1926) I. L. R. 7 Lah. 235.
(3) (1888) I. L. R. 15 Cal. 521, P. C.

party for realisation of Rs. 24,004 odd and attached the properties now in suit. After the attachment defendant first party filed a claim case no. 63 of 1934 alleging that the said property had been purchased by him, and on the 14th July, 1934, this claim of defendant first party was allowed. There appears to have been no contest, and the present plaintiffs agreed that the claim should be allowed apparently without any investigation. The plaintiffs then instituted the present suit under the provisions of Order XXI, rule 63, Code of Civil Procedure, claiming a declaration that the purchase by defendant first party was a farzi, fraudulent and colourable transaction and that the property really belonged throughout to defendants second party and as such was liable to attachment and sale in execution of the decree held by the plaintiffs against defendants second party.

The learned Subordinate Judge came to the conclusion that the properties in suit really belonged to defendants second party and decreed the plaintiffs' claim with costs.

The facts of the case can be shortly stated as follows :—

The defendants second party were persons of substance owning considerable properties. They defaulted in payment of road-cess, and on the 7th of March, 1932, an eight-annas share in tauzi no. 3074 in mauza Gobindpur Kosli was put up for sale and purchased by defendant first party. On the 7th of May, 1932, this sale was confirmed, and on the 13th of February, 1933, defendant no. 1 obtained delivery of possession.

On the 24th of February, 1932, a twelve-annas share of tauzi no. 3495 of mauza Gobindpur Kosli was also put up for sale for default by the defendants second party in payment of the road-cess, and this share was also purchased by defendant no. 1. On the

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25th of April, 1932, the sale was confirmed, and on the 13th of February, 1933, defendant no. 1 obtained delivery of possession of the same.

In 1933 the plaintiff obtained his money decree against the defendants second party and attached the two shares which had been the subject-matter of the road-cess sales. As I have stated, defendant first party preferred a claim under Order XXI, rule 58, Code of Civil Procedure, alleging that he was the owner in possession of the shares in question, and his claim was allowed on the 14th of July, 1934.

It has been contended by the appellants that this suit is not maintainable. It is urged that as the claim of the defendant under Order XXI, rule 58, Code of Civil Procedure, was allowed by consent the plaintiff cannot maintain a suit under Order XXI, rule 63. The actual order allowing the claim of the defendant first party is in these terms:—

"The opposite party in case no. 63/34 asks the court to allow the claim petition and the claimant also does not press for costs. Claim case no. 63 is allowed without costs."

There can be no doubt that the present plaintiff who was the opposite party in the claim case did not contest the claimant's claim and in fact invited the Court to allow it, and for that reason the claimant gave up his right to costs. It has been argued that a suit under Order XXI, rule 63, Code of Civil Procedure, is in the nature of an appeal to set aside the summary order passed in the proceedings under Order XXI, rule 58, Code of Civil Procedure. As the summary order was passed by consent, it has been strenuously contended that no proceedings in the nature of an appeal to reverse such an order can be entertained.

It is important to consider the position of the parties in the summary proceedings under Order XXI, rule 58, Code of Civil Procedure. The present plaintiffs had attached certain properties which undoubtedly stood in the name of defendant no. 1. They

could only maintain their right to attach and sell those properties if they could show that defendant no. 1 was merely a benamidar for defendants second party. It has, however, been laid down rightly or wrongly by this Court that an executing Court cannot go into the question as to whether a transaction is benami or not in summary proceedings under Order XXI, rule 58. In *Ram Kishun Singh* v. *Damodar Prasad*(1) Das, J. held that a court was not entitled to go into a question of benami in a case arising under Order XXI, rule 58 or rule 100. At page 108 the learned Judge observes :—

" The question raised in Civil Revision no. 219 of 1923 is, whether the learned Subordinate Judge was entitled to consider the question of benami in an application under Order XXI, rule 100. It has been held in a series of cases that in a claim case arising under Order XXI, rule 58, the Court is not entitled to go into a question of benami. The finding of the learned Subordinate Judge in this case that the applicant was the benamidar of Kali Prashad is based on reasons which are entirely speculative. In my opinion, the learned Subordinate Judge was not entitled to go into a question of benami in order to determine whether the applicant was in possession of the disputed property in his own right."

A similar view was expressed by Fazl Ali, J. in *Ganesh Lal Sarawagi* v. *Mahabir Sahu*(2). At page 274 the learned Judge observes :—

" Now it is contended by the learned advocate for the petitioner that it was necessary for the learned Subordinate Judge to have gone into the question as to whether the sale-deed was genuine or collusive, because without going into the question he could not have properly decided as to whether the claimant was in possession of the property on his own account or in

(1) (1923) 5 Pat. L. T. 107.
(2) (1929) A. I. R. (Pat.) 273.

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trust for the judgment-debtor. The contention of the learned Advocate is not without some force, but at the same time it must be remembered that it has been repeatedly held that in a claim case arising under Order XXI, rule 58, the Court is not entitled to go into the question of benami."

It has been argued by Counsel for the respondents that these cases and others preceding them are wrongly decided, but it is unnecessary for me to express any opinion in this case. One thing, however, is clear and that is that this Court has laid down that in proceedings under Order XXI, rule 58, of the Code the executing Court is not entitled to go into the question as to whether a transaction is or not benami. These cases are binding on the lower Courts and are well-known to all the practitioners and judges of those Courts. That being so, it is clear that the plaintiffs in the present case could not hope successfully to resist the claim of defendant no. 1 in the claim case. He could only resist that claim by inviting the Court to go into the question as to whether the purchases were benami, and this the Court could not do by reason of the law as laid down by this Court. In such circumstances, the plaintiffs might well have asked the Court to allow the claim in order to enable him to contest the correctness of the decision in a suit instituted under Order XXI, rule 63, Code of Civil Procedure. No evidence was adduced in this case as to what transpired in the execution Court; but the form of the order strongly suggests that all that happened was that the plaintiffs, realising the impossibility of contesting the claim in those proceedings asked the Court to pass the order which it would be bound to pass to enable them to bring proceedings under Order XXI, rule 63, Code of Civil Procedure, without delay. There is nothing in the form of the order passed to suggest that the plaintiffs ever gave up their right to contest the matter by means of a suit. The admission of the plaintiffs appears to me to be

merely an admission for the purposes of the summary proceedings under Order XXI, rule 58, Code of Civil Procedure. He was anxious that the claim should be allowed in that Court so that he could bring appropriate proceedings to challenge the nature of the transactions. Such a course is frequently followed in appellate Courts where an appellant knows that he cannot succeed in a particular Court by reason of a decision binding on that Court. He frequently mentions his point and informs the Court that it is useless arguing and invites the Court to dismiss his appeal in order that he can appeal to a higher Court to challenge the correctness of the decision binding on the lower Court. In my view a party, who makes an admission for certain purposes in summary proceedings, does not necessarily admit the correctness of the claim of the other party. He may be compelled in summary proceedings to admit the claim, but that does not mean that he admits it for all purposes. In my view the admission in this case must be confined to the proceedings in which such admission was made, and as there is nothing to show that the plaintiffs ever gave up their rights to question the decision of the claim case, they can maintain the present suit under Order XXI, rule 63.

Counsel for the respondents strongly relied upon the case of *Mulk Raj* v. *Ralla Ram-Rao Mal*(1). In that case the property in dispute was attached in execution of a decree, and the attachment was objected to by the judgment-debtor's brothers. Before the executing Court could give its decision on the objection decree-holder applied for release of the property, stating that he would bring a regular suit to have it declared liable to attachment and sale and then brought the suit. It was held that when an objection was made under Order XXI, rule 58, it was not open to the decree-holder to refrain from contesting the objection, to withdraw the attachment and then to

(1) (1926) I. L. R. 7 Lah. 235.

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bring a suit under Order XXI, rule 63, Code of Civil Procedure. The rule contemplates that the objector's claim is accepted or disallowed by the executing Court and it is only the party against whom the order was made who may institute a suit to establish the right he claims to the property. It was further held that the rule precluded all suits except the one allowed by the rule and, therefore, the suit was not competent under any other provision of the law. At page 237 Zafar Ali, J. observes:—

"The question, therefore, is whether it is open to a decree-holder to withdraw the attachment and then to bring a suit under rule 63. We are of opinion that it is not. Rule 63 contemplates that the attachment was objected to and that the objector's claim was accepted or disallowed by the executing Court. If the claim is once accepted by the decree-holder himself he is evidently precluded from bringing a suit to contest it because the suit should be brought by the party against whom the order is made and not by the party who himself sought that order and obtained it."

In my view a party who realises the hopelessness of resisting a claim in summary proceedings and consents to the claim being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under Order XXI, rule 63. The fact that a party actually invites an order to be made against him does not render him any less a party against whom an order is made.

A contrary view was taken by a Bench of the Madras High Court in *Venkatarama Aiyar* v. *Narayana Aiyar*(1). In that case the decree-holder agreed that the claim petition of the claimant should be allowed but without costs, and an order was made accordingly. Nevertheless, the Court held that the decree-holder was entitled to maintain a suit under

(1) (1915) 28 Ind. Cas. 586.

Order XXI, rule 63, Code of Civil Procedure, to contest the order of the executing Court. Some of the reasons given by the learned Judges for coming to this conclusion have been criticised by Counsel for the respondents; but in my view the Madras decision is to be preferred to that of the Lahore High Court. Unless the facts show that the decree-holder gave up his right to contest the matter under Order XXI, rule 63, a consent order or an order passed without objection by the executing Court in summary proceedings can be challenged and a suit is maintainable.

Upon the merits I am satisfied that the learned Subordinate Judge was right in holding that defendants second party were the real owners of the properties attached. The plaintiffs called a number of witnesses to prove that throughout the defendants second party had been in possession of this property and the evidence called by the plaintiffs is strongly corroborated by the circumstances of the case and documents adduced in evidence. The defendant's description of how he came to purchase these two properties is extraordinary. In his evidence at page 32 he stated:

"I had no information prior to the sales that the shares are going to be sold but I had gone to D. B. office to take Rs. 35 which had been sanctioned for the repair of the Hariho School of which I am Secretary and while going there heard the Collectorate peon calling out bid for T. no. 3495 in the Certificate Office. I deposited the earnest money on the date of the sale and the balance within 29 days. On the day I came to deposit the balance of the purchase money I learnt in the office that T. no. 374 was also going to be sold and so I purchased it also. I did not engage any pleader or Mokhtear for purchasing these shares. I did not make any inquiry regarding this village before bidding at these sales."

If the defendant no. 1 is to be believed, he accidentally heard of these two sales and immediately decided to purchase. It was indeed a most fortunate purchase for him, because he bought properties valued at Rs. 10,000 for under Rs. 200. The defendant's version as to how he came to purchase these properties cannot, in my view, be possibly accepted *

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The learned Subordinate Judge who saw and heard the witnesses in this case came to the conclusion that Ramrup had never been in possession of the properties alleged to have been purchased by him and that he had acted throughout as benamidar of defendants second party.

In my judgment it is impossible to say that the learned Judge was wrong in so holding and accordingly I would dismiss this appeal with costs.

MANOHAR LALL, J.—I entirely agree and wish to make only a few observations with regard to the argument advanced by the appellant that the present suit is not maintainable because of the effect of the order passed in the claim case at the suggestion of the respondent. That order is exhibit J at page 35 of Part III of the paperbook. The order has been quoted in extenso in the judgment delivered by my Lord the Chief Justice. The order, as I pointed out in the course of argument, is equivocal. It may mean that the plaintiff agreed that the claimant was a benamidar or that the plaintiff asked the Court to allow the claim petition because he thought that the question of benami could not be properly gone into by the executing Court in summary proceedings. In these circumstances it was the duty of the defendant who relied upon the order as a bar to the maintainability of the suit to show the circumstances under which that order was passed and in particular he ought to have alleged and proved the agreement, if any, into which the plaintiff entered with him. Strange as it may seem the pleadings and the evidence are entirely silent upon this point. The plaintiff merely stated in paragraph 6 of the plaint that

> "the Court was pleased to allow the said claim case by its order dated 14th July, 1934, without recording any evidence in the case"—

the whole of this allegation is true. It was next asserted in paragraph 11 of the plaint that the

order passed was wrong. The defendant merely stated in paragraph 7 of the written statement that because the defendants were in possession and occupation of the land which had been illegally attached the plaintiffs got the costs remitted thinking it unnecessary to contest the case. The parties did not adduce any evidence at all as to the circumstances under which the court came to allow the claim petition. The result is that this Court is exactly in the same position as in the case of *Sardhari Lal* v. *Ambika Pershad*(1) where it was pointed out, in answer to the argument that section 280 of the Act of 1877 (which corresponds to the provision which we are now considering) did not contemplate that any order should be made until after an investigation which is directed by section 278, that " in the first place we do not know what took place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion offhand. But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him."

I, therefore, agree that when it has not been proved in this case that the plaintiff has contracted himself out of his statutory rights which are given to him in clear terms under Order XXI, rule 63, he cannot be debarred from instituting a suit like the present to obtain the appropriate relief.

But reliance was placed upon the case of *Mulk Raj* v. *Ralla Ram-Rao Mal*(2). In that case the

(1) (1888) I. L. R. 15 Cal. 521, P. C.
(2) (1926) I. L. R. 7 Lah. 235.

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decree-holder himself applied for release of the property from attachment before the executing Court, after the objectors had put forward their claim to be the owners in their own right, stating that he would bring a regular suit to have it declared liable to attachment and sale. The learned Judges of the Lahore High Court held that in these circumstances the decree-holder was precluded from instituting a declaratory suit under Order XXI, rule 63, because "if the claim is once accepted by the decree-holder himself he is evidently precluded from bringing a suit to contest it because the suit should be brought by the party against whom the order is made and not by the party who himself sought that order and obtained it". With great respect I am unable to agree with the proposition which is thus broadly stated. If an investigation of the circumstances under which the decree-holder applied for the release of the property from attachment discloses that the decree-holder has accepted the claim of the claimant, he is obviously debarred from instituting another suit; but if the claim is accepted only for the purposes of the summary enquiry as appears to have been the position in the Lahore case, I am of opinion that the decree-holder was not precluded from bringing a suit. There can be no estoppel against a statute. Again the order passed by the executing Court is none the less an order passed against the decree-holder even though he asked that such an order should be passed. I find that the view which I have expressed is supported by the decision of the Madras High Court in *Venkatarama Aiyar* v. *Narayana Aiyar*(1) where the facts were almost similar. In that case it was argued that there was an agreement between the parties that the claim petition should be allowed with costs and that the plaintiff should, in consideration of the defendant giving up his costs, refrain from instituting such a suit as the present. The agreement

(1) (1915) 28 Ind Cas. 536.

which was relied upon as a bar was held to be not proved upon the facts and the learned Judges took the view that the indications of the agreement were that the claim petition was allowed to succeed on the understanding that the plaintiff was to institute a suit under Order XXI, rule 63. I respectfully adopt the following observations of the learned Judges to be found at page 537: "In the present case, it is because the order on the claim petition is binding on the plaintiff that he can institute a suit to get rid of the effects of the order (Order XXI, rule 63, of the Code of Civil Procedure). This is also an answer to the objection that there was no order against the plaintiff, an objection which we have some difficulty in understanding. It is quite clear that when it was decided that the plaintiff was not entitled to attach the property which he had purported to attach, there was an order against him. The fallacy of the argument is caused by assuming that because a party does not object to an order being passed against him, therefore, the order that is passed is not against him". In the case before us the agreement is not only not proved but is not even alleged in the pleadings.

For these reasons I agree that the appeal fails and should be dismissed with costs.

Appeal dismissed.

K. D.

APPELLATE CIVIL.

Before Agarwala and Rowland, JJ.

1940,

Jan. 23, 24.

MAKSUDAN LAL SAHU

v.

NIRANJAN NATH DAS.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 46 *and* 47—*mortgage in contravention of section* 46—

* Appeal from Appellate Decree no. 745 of 1938, from a decision of Mr. Kshetra Mohan Kunar, Additional Judicial Commissioner of Chota Nagpur, dated the 1st June, 1938, confirming a decision of Babu Shib Chandra Prashad, Munsif at Ranchi, dated the 30th March, 1937.