

cannot affect the land and he is not entitled to take any steps against the land in execution of his decree.

The plaintiff in this case is in actual possession of the land by virtue of his character as a usufructuary mortgagee. That being so, he is entitled to the declaration prayed for. I therefore set aside the decree of the lower Appellate Court and pass a decree in favour of the plaintiff in terms of the prayer in his plaint. The appellant will get his costs throughout.

1927

MAUNG SHAN
HPYUv.
U PO THAW

DAS, J.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

MAUNG PO PE

v.

MAUNG KWA AND ONE.*

1927

July 28

Civil Procedure Code (Act V of 1908), O. 21, rr. 58 and 60—Application for removal of attachment must be made prior to sale in execution.

Held, that an application for removal of attachment under Order 21, Rule 58 of the Civil Procedure Code, should be made before the property attached has been sold. A Court acts in excess of jurisdiction if it entertains such application after sale.

Gopal Chandra Mukerjee v. Notary Kundu, 16 C.W.N. 1029; *Punjab Doo Euer v. Ram Charitar Bathi*, 74 I.C. 87—*referred to*.

Chatterjee—for Applicant.

Mitter—for Respondent.

PRATT, J — This is an application under section 115, Civil Procedure Code, to revise the order of the Township Judge, Myaing, in Civil Miscellaneous Case No. 1 of 1927, ordering the removal of attachment attached in execution case No. 31 of 1927.

It is contended that the order of attachment was *ultra vires* as the property has been sold before the application.

* Civil Revision No. 32 of 1927

1927

MAUNG PO
PE
IN
MAUNG KWA
AND ONE.

PRATT, J.

A reference to the execution proceedings shows that the land in question was sold on the 17th December 1926, and the application for removal of attachment was not made till the 4th of January following.

It is true the sale had not been confirmed, but I am of opinion that the contention that the attachment was no longer subsisting is correct.

I have been unable to find any officially reported cases on the subject, possibly the rulings on the point have not been recorded as it was considered too obvious.

Mr. Chatterjee for applicant relies on the Calcutta Bench case of *Gopal Chandra Mukerjee v. Notobar Kundu* (1).

It was there held that an order under Rule 60 of Order XXI must be made before the sale has taken place. It was also pointed out that sub-rule (2) of Rule 58, which provides for the adjournment of a sale pending the investigation of a claim preferred under sub-rule (1) makes it clear that the application for removal of attachment and order under Rule 60 must be prior to the sale in execution.

The Bench held that the subordinate Court had acted clearly in excess of jurisdiction and violation of an express provision of the Code, and that it was a case in which it ought to interfere on revision.

This case was followed by a Bench of the Patna High Court recently in *Puhup Deo Kuer v. Ram Charitar Barhi* (2).

In the Patna case the sale of land in execution took place after the application under Order XXI, Rule 58 had been filed.

Mullick, J., in giving judgment remarked :—
"It is obvious that after the sale was held, the

(1) 16 C.W.N. 1029.

(2) 74 I.C. 87.

attachment was *ipso facto* determined and the Court had no longer any jurisdiction to try the claim case."

I have no doubt that this is sound law.

It is obvious that respondent has a remedy under Rule 100, if dispossessed, or that he may resist the auction-purchasers taking possession under Rule 97, if he has no cause of action under Rule 90.

I hold that the order of the Township Court was without jurisdiction and set it aside accordingly. Applicant will be allowed costs. Advocate's fees two gold mohurs.

1927

MAUNG PO

PE

v.

MAUNG KWA
AND ONE.

PRATT, J.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

MAGANLAL PARBHURAM

v.

N. A. AZIZ HAJI KARIM AND SIX.*

1927

July 28.

Civil Procedure Code (Act V of 1908), s. 73, O. 38—Deposit of money into Court by defendant to avoid attachment before judgment, effect of—Right of plaintiff to such money on obtaining decree—Claims of other creditors before judgment.

Held, that where money is deposited by the defendant in Court in order to avoid attachment before judgment and he does not contest the suit, the money may be taken as paid towards the satisfaction of the plaintiff's claim who has a lien on it and is entitled to withdraw the money in full and has priority over other creditors who attached the money in Court before plaintiff obtained his decree. Such money was not liable to rateable distribution.

Ramiah v. Gopallier, 41 Mad. 1053; *Sorabji v. Kala*, 36 Bom. 156—*followed*.

A. C. Mukerjee—for Appellant.

S. Mukerjee—for Respondents.

PRATT, J.—In Civil Regular Suit No. 313 of 1926 of the Subdivisional Court, Mandalay, Maganlal Parbhuram sued Maung San Lon for Rs. 1,593-12 principal and interest on a promissory note.

* Civil Second Appeal No. 81 of 1927 (Mandalay).