

will pay their own costs in the appeal of the Bank.

A. N. C.

*Appeal accepted.*

**APPELLATE CIVIL.**

*Before Mr. Justice Campbell and Mr. Justice Zafar Ali.*

MULK RAJ AND ANOTHER (DEFENDANTS) Appellants

*versus*

RALLA RAM-RAO MAL & OTHERS  
(PLAINTIFF) AND BUTA AND ANOTHER } Respondents.  
(DEFENDANTS)

1926

Feb. 12.

Civil Appeal No. 2398 of 1922.

*Civil Procedure Code, Act V of 1908, Order XXI, rule 63—Decree-holder himself withdrawing attachment of property before any decision is arrived at by the executing Court on objections made to the attachment and then instituting a suit—whether such a suit is competent under the rule or any other provision of the law.*

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 brought the present suit accordingly.

*Held*, that when an objection is made under Order XXI, rule 58 it is not open to the decree-holder to refrain from contesting the objection, to withdraw the attachment and then to bring a suit under Order XXI, rule 63 of the 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 is made who may institute a suit to establish the right he claims to the property.

*Held also*, that the rule precludes all suits except the one allowed by the rule itself and therefore the suit is not competent either under any other provision of the law.

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RAO MAL.

*Second Appeal from the decree of Lala Shibbu Mal, District Judge, Gurdaspur, dated the 5th July 1922, affirming that of Chaudhri Nadir Khan, Sub-ordinate Judge, 2nd class, Gurdaspur, dated the 19th August 1921.*

MEHR CHAND, MAHAJAN, for Appellant.

JAGAN NATH, AGGARWAL, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—This second appeal arises out of a suit by two sets of judgment-creditors for a declaration that the property in dispute belongs to their judgment-debtor Buta and is liable to attachment and sale in execution of their decrees against him. The property had originally been attached by the executing Court, and the attachment was objected to by Buta's brothers who claimed to be the owners thereof by purchase from him. But before the executing Court could give its decision on the objection one of decree-holders himself applied for the release of the property from attachment, stating that he would bring a regular suit to have it declared liable to attachment and sale. The defendants, therefore, pleaded that as the property was released at the instance of one of the plaintiffs (decree-holders) the present suit was not competent.

Buta had applied to be adjudged insolvent, and the sale of the property by him to his brothers could not be questioned in the Insolvency Court on account of bar of time. The plaintiffs' explanation of the course adopted by them, as stated by the District Judge, was that "they resorted to the expedient of getting the execution proceedings filed and getting an order of release against their interest in order to be

able to launch a declaratory suit as allowed by Order XXI, rule 63, Civil Procedure Code."

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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.

Next it is contended that the suit is not one under rule 63 as that rule is nowhere referred to in the plaint, but is a suit covered by section 53 of the Transfer of Property Act or section 42 of the Specific Relief Act. But rule 63 precludes all suits but the one under the rule itself, and therefore no suit under any other provision of law is competent.

We may note here a preliminary objection taken by the respondents' counsel that the receiver appointed by the Insolvency Court was a necessary party and that the appeal must fail because he was not added as a respondent within the time prescribed for the appeal. But the receiver was appointed after the institution of the suit and was no party to it. He was, therefore, not a necessary party in the appeal.

We accept the appeal and reversing the decree of the District Judge dismiss the plaintiffs' suit with costs throughout.

A N. C.

*Appeal accepted.*