

**APPELLATE CIVIL.**

---

*Before Addison and Din Mohammad JJ.*

SANT LAL AND OTHERS (PLAINTIFFS) Appellants,

1938

*versus*

April 4.

UDHO RAM-WALAIT RAM AND OTHERS (DEFENDANTS) RAM SARAN DASS AND ANOTHER (PLAINTIFFS)	}	Respondents.
--	---	--------------

**Regular First Appeal No. 372 of 1937.**

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63, 100, 103 — Objection under O. XXI, r. 58, put in after sale in execution — Suit under O. XXI, r. 63, whether competent.*

The plaintiff (a Pathshala) instituted a suit under O. XXI, r. 63, of the Code of Civil Procedure for a declaration that the property attached and sold in execution of the decree of defendant No.1 against defendant No.2 was liable to a previous mortgage in its favour. The objection by the plaintiff was put in under O. XXI, r. 58, after the sale in execution had taken place but before its confirmation.

*Held*, that the suit must be dismissed whether on the ground that the Court had no jurisdiction to entertain a claim or objection under O. XXI, r. 58, after the sale in execution had taken place and thus no declaratory suit under O. XXI, r. 63, was competent or whether on the ground that, the plaintiff being a mortgagee in possession, his proper remedy was to wait and take action under O. XXI, rr. 100 and 103 at the proper time provided he did not in the meantime bring a suit to have the property sold.

*Held also*, that it makes no difference whether the objections under O. XXI, r. 58, are made before or after the confirmation of the sale for when the sale is confirmed the title passes to the auction-purchaser from the date of the sale.

*Bishwanath Patra v. Lingaraj Patra* (1), followed.

Other case law discussed.

1938

SANT LAL  
v.  
UDHO RAM-  
WALAIT RAM.

*First appeal from the decree of Lala Raghunath Lall Batra, Senior Subordinate Judge, Ludhiana, dated 23rd August, 1937, rejecting the plaint.*

SHAMAIR CHAND and PARKASH CHANDRA, for Appellants,

ACHHRU RAM, for (Defendants) Respondents.

The Judgment of the Court was delivered by—

ADDISON J.—This was a suit by the Jain Kanya Pathshala under Order 21, rule 63, of the Civil Procedure Code, for a declaration that the property attached and sold in execution of the decree of defendant No.1 against defendant No.2 was liable to a previous mortgage in its favour. The mortgage deed is dated the 21st July, 1927, and was executed by defendant No.2 in favour of defendant No.6, who gifted the mortgage rights to the plaintiff Pathshala. Defendants 3 to 5 were the purchasers of the property at the Court auction. The suit was dismissed on the ground that the Court had no jurisdiction to entertain a claim or objection under Order 21, rule 58, after the sale in execution had taken place, and thus no declaratory suit under Order 21, rule 63, Code of Civil Procedure, lay. The suit for a declaration, therefore, could only fall under section 42 of the Specific Relief Act and as further relief was possible, the suit being in reality one to enforce a mortgage deed, the trial Court called upon the plaintiff to amend the plaint. This was not done and it was accordingly rejected under Order 7, rule 11, Code of Civil Procedure. Against this decision this appeal has been preferred.

The objection was put in by the Pathshala under Order 21, rule 58, after the sale in execution had taken place but before confirmation of the sale. This, however, makes no difference as the sale was confirmed later

and title, therefore, passed to the auction-purchasers from the date of the sale.

In favour of the appellant there is a Single Bench judgment of the Madras High Court, *Chitturu Jaganadham v. Bura Pydayya* (1), to the effect that a Court has jurisdiction to consider a claim even when it is made after the sale. The same view has been taken in *Bhagchand v. Mst. Jhunia* (2) by the Additional Judicial Commissioner of Nagpur, while a Division Bench of the Sind Judicial Commissioners came to the same conclusion in *Mukhi Narumal Tilokchand v. Allahbux Bahadur* (3).

On the other hand, a Division Bench of the Calcutta High Court in *Gopal Chandra Mukerji v. Notobar Kundu* (4) held that it was not competent for an executing Court to proceed with a claim application under rule 58 of Order 21 of the Civil Procedure Code after the execution sale had actually taken place, and a Single Judge of that Court came to the same conclusion in *Kali Charan Ghose v. Sarajini Debi* (5).

Similarly, a Division Bench of the Patna High Court in *Mussamat Puhupdei Kuar v. Ramcharitar Barhi* (6), held that after the sale had taken place the attachment was *ipso facto* determined and the Court had no longer any jurisdiction to try the claim case under Order 21, rule 58. A Single Judge of the Rangoon High Court followed the Calcutta decisions in *Maung Po Pe v. Maung Kwa* (7).

Further, the arrangement of the Civil Procedure Code shows that a claim under Order 21, rule 58, should precede the sale. It is true that by sub-rule

1938

SANT LAL

v.  
UDHO RAM-  
WALAIT RAM.

(1) I. L. R. (1932) 55 Mad. 251.

(4) (1912) 15 I. C. 53.

(2) (1904) 1 Nag. L. R. 167.

(5) 1926 A. I. R. (Cal.) 468.

(3) 1933 A. I. R. (Sind.) 198.

(6) 1924 A. I. R. (Pat.) 76.

(7) I. L. R. (1927) 5 Rang. 751.

1938

SANT LAL  
v.  
UDHO RAM-  
WALAIT RAM.

(2) of that rule a Court is not bound to postpone the sale pending the investigation of the claim but usually it should do so except where it is of opinion that the claim is frivolous or vexatious or meant to delay the execution proceedings. After the sale has taken place the only objection that can be taken to it is provided in Order 21, rule 90, on the ground of a material irregularity or fraud in publishing or conducting the sale. In these circumstances, we are of opinion that the view of the Calcutta, Patna and Rangoon High Courts is to be preferred.

A case decided by a Division Bench of the Patna High Court in *Biswanath Patra v. Lingaraj Patra* (1) is particularly relevant. It was held there that a person in possession of property under an usufructuary mortgage is not entitled to object under Order 21, rule 58, Code of Civil Procedure, to the attachment of the property at the instance of a person who holds a decree against the mortgagor, and, therefore, when such an objection has been made and disallowed rule 63 does not debar the objector from making an application under rule 100. It was said there that his position as a mortgagee did not entitle him to come to Court and argue that the property was not liable to attachment. This case was followed by a Full Bench in *Sunder Prasad Singh v. Deodhari Singh* (2). It was there laid down that an attachment of the mortgaged property could mean only an attachment of the equity of redemption, being the right, title and interest of the judgment-debtor and that the mortgagee, therefore, had no right to object to such an attachment, his interest being paramount and unaffected by the auction sale.

---

(1) I. L. R. (1922) 1 Pat. 159. (2) I. L. R. (1937) 16 Pat. 54 (F. B.).

The case before us is that of a mortgagee in possession and it is clear, therefore, that he can take the necessary steps under rules 100 and 103 of Order 21 at the proper stage, and of course, the mortgagee is always at liberty to bring the usual suit for the sale of the property under mortgage.

. The decision of the trial Court was, therefore, correct, whether we merely take the view that the objection was incompetent, having been lodged after the sale which was subsequently confirmed or whether we hold that the plaintiff being mortgagee in possession, his proper remedy is to wait and take action under rules 100 and 103 of Order 21 at the proper time, provided always that he does not in the meantime bring a suit to have the property sold.

For the reasons given above, we dismiss this appeal but make no order as to costs.

A. K. C.

*Appeal dismissed.*

---

1938

SANT LAL

v.

UDHO RAM-  
WALATT RAM.