

1917.

KHEMRAJ
SHRI-
KRISHNADAS
v.
KISANLALA
SURAJMAL.

security no longer operated. In my opinion we ought to follow the ruling of the appeal Court in England (*Wille v. St. John*⁽¹⁾), and accordingly this application should be dismissed with costs.

BEAMAN, J. :—I entirely concur.

Application dismissed.

J. G. R.

⁽¹⁾ [1910] 1 Ch. 701.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

1917.

July 20.

ZIPRU VALAD TALHOO AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS
v. HARI SUPDUSHET VANI AND ANOTHER (ORIGINAL PLAINTIFF),
RESPONDENT.*

*Civil Procedure Code (Act V of 1908), Order XXI, Rules 100, 101 and 103—
Application made under Rule 100—Order dismissing the application under
Rule 101—Whether such an order is an order “made under Rule 101”
within the meaning of those words in Rule 103—Conclusive nature of
the order.*

An order made against an applicant refusing him relief under Rule 101 of Order XXI of the Civil Procedure Code, 1908, is as much an order under that Rule, as an order granting him relief would be and the order would be conclusive under Rule 103 subject to the result of a separate suit.

SECOND appeal against the decision of S. J. Murphy, District Judge of Khandesh confirming the decree passed by D. R. Dalal, Subordinate Judge of Chalisgon.

Execution-proceedings.

The suit out of which these proceedings arose was originally filed by one Taniram against some members of a joint family for specific performance of a contract to sell certain lands to him. Three of the joint defendants admitted the contract and the other three disclaimed all part in it. The first three defendants were

* Second Appeal No. 1223 of 1916.

ordered to execute the required deed of sale and did so. The suit against the remaining three defendants was dismissed, the Court declaring it did not determine whether the sale was binding on them or not. The plaintiff in that suit got possession under his sale deed. Thereupon the three defendants whose rights had not been determined made an application to the Subordinate Judge under Rule 100 of Order XXI of the Civil Procedure Code, 1908, for restoration of possession.

The Subordinate Judge dismissed the application holding that it was not proved that the applicants were in possession on their own account at the time that the plaintiff got possession.

On appeal, the District Judge was of opinion that no appeal lay as the order dismissing the application was made under Rule 101 of Order XXI of the Civil Procedure Code, 1908, and the same became conclusive under Rule 103 of the Order. He, therefore, dismissed the appeal.

The defendants appealed to the High Court.

P. V. Kane, for the appellants :—I take it for granted that the application was made under Rule 100 of Order XXI, Civil Procedure Code, 1908 and the same was disallowed under Rule 101 of the Order. I submit that such an order dismissing the application is not contemplated by Rule 101. It only provides for an order of a positive nature, viz., that the Court, on being satisfied that the applicant was in possession of the property on his own account, the applicant shall be put into possession of the property; and the order refusing such a relief would not be an order under that Rule. If the intention of the Legislature was to include in the rule an order dismissing the application, the Legislature would have done so in express terms. Under section 332 of the old Civil Procedure Code, 1882, both

1917.

ZIPRU
v.
HARI SUPDU-
SHEE.

1917.

ZIPRU
v.
HARI SUPDU-
SHEET.

the alternatives had been provided for, but the latter alternative, viz., 'the Court shall dismiss the application' is omitted from the new Rule 101. Compare also Rules 98 and 99 which expressly provide for an order granting an application as well as for refusing it. I submit there must be some purpose in omitting the order rejecting an application from Rule 101 and the Rule as it stands should be construed strictly. So construed an order dismissing the application would not be conclusive under Rule 103 and the right to appeal against such an order cannot be taken away. Moreover, section 47 of the Civil Procedure Code, 1908, is comprehensive and should not be limited by Rule 103.

N. M. Patwardhan with *D. C. Virkar*, for the respondents:—We submit that an order dismissing an application is as much an order 'made under Rule 101' within the meaning of those words in Rule 103, as an order granting the application. The Legislature in enacting the Code of the Civil Procedure, 1908, has constantly used the expression 'an order made under rule so and so' as covering both the order which the rule directs shall be made and a dismissal of the application for such an order. This will be apparent from the following instances: Order IX, Rule 9 which contemplates a positive order, viz., setting aside the order of dismissal read with Order XLIII, Rule 1 (c) which shows that an order rejecting an application must be ascribed to the same provision of the Code as makes a positive order: See also Order IX, Rule 13 read with Order XLIII, Rule 1 (d); Order XXII, Rule 9 read with Order XLIII, Rule 1 (k); Order XXV, Rule 2 read with Order XLIII, Rule 1 (n); Order XLI, Rule 19 read with Order XLIII, Rule 1 (t); and Order XLI, Rule 21 read with Order XLIII, Rule 1 (t).

We further submit in execution-proceedings it is at three stages a person can intervene.

(1) Where he finds the property is attached and asks relief from attachment under Order XXI, Rules 58 to 63. In this case the Court may either raise attachment or refuse to do so.

(2) At the time when the possession is being handed over to the decree-holder under Order XXI, Rule 98, he can intervene and on the application of the decree-holder the Court may or may not grant him the relief.

(3) After possession has been handed over, the intervenor may make the application under Order XXI, Rule 100 as in the present case.

In the earlier two stages there is no appeal provided for and it is hardly likely that the Legislature could have intended to give him higher remedies in spite of his being comparatively late in seeking relief from the Court.

We, therefore, say that the order under Rule 101 is conclusive under Rule 103 and the remedy for the applicants is by a separate suit and not by way of appeal.

SCOTT, C. J. :—The appellants being aggrieved by the possession obtained by the judgment-creditor of family property in which they had an interest, and they not being judgment-debtors applied under Order XXI, Rule 100, complaining of their dispossession by the judgment-creditor. Upon that application the Court decided in favour of the judgment-creditor and dismissed the application. The question is whether the appellants are now parties against whom an order has been made under Rule 101 who may institute a suit to establish the right which they claim to present possession of the property, and against whom in default of a suit the order is conclusive. In my opinion the order made against an applicant refusing him relief under

1917.

ZIPRU
v.
HARI SUPDU
SHET.

1917.

ZIPRU
v.
HARI SUDDU-
SHET.

Rule 101 is as much an order under that rule, as an order granting him relief would be. The Rule is a reproduction with certain alterations of part of section 332 of the Code of 1882, which provided that "if the Court finds that the ground mentioned in the first paragraph of this section exists, it shall make an order that the applicant recover possession of the property, and, if it does not find as aforesaid, it shall dismiss the application". The words "it shall dismiss the application" are not to be found in the present Code, but that appears to me to be because they were unnecessary. If an application is not granted it must be dismissed, but nevertheless the order is made on the application, and I find it very difficult to hold that an order dismissing an application does not fall under the same rule as an order granting the application. If Rule 103 applies to the present case, as I think it does, then the appellants though parties to the suit, and not judgment-debtors, cannot have an appeal under the general section 47.

The question which has been re-argued at the desire of the Court is whether an order made upon an application under Rule 100 of Order XXI dismissing the application is an order "made under Rule 101" within the meaning of those words in Rule 103. Mr. Patwardhan on behalf of the respondents has shown that the Legislature in enacting the Code of Civil Procedure, and the rules framed thereunder, has constantly used the expression "an order under rule so and so" as covering both the order which the rule directs shall be made and a dismissal of the application for such an order. That appears from a perusal of Order IX, Rule 9 read with Order XLIII, Rule 1 (c); Order IX, Rule 13 read with Order XLIII, Rule 1 (d); Order XXII, Rule 9 read with Order XLIII, Rule 1 (e); Order XXV, Rule 2 read with Order XLIII, Rule 1 (n); Order XLI, Rule 19 read with

Order XLIII, Rule 1 (t); and Order XLI, Rule 21 read with Order XLIII, Rule 1 (t). We should violate a sound principle of construction if we were to construe the words "an order made under rule" in Rule 103 of Order XXI in a different sense to the obvious construction to be placed upon the words "an order under rule" throughout Order XLIII. We dismiss the appeal with costs.

BATCHELOR, J.:—I agree that this is probably the right construction of Rules 100, 101 and 103 of Order XXI, having regard to the corresponding provisions of the Code of 1882. But I must say for myself that I have some little difficulty in extracting this conclusion from the words of Rule 101, and it seems to me that if we were to be guided by those words alone, there would be much force in the argument that the only Order contemplated by this Rule 101 is an order putting the applicant into possession of the property, so that an order refusing to put the applicant into possession would be merely an order rejecting his application, and not an order falling under Rule 101. It may well be, however, that the phraseology in Rule 101 is to be explained by a desire on the part of the Legislature to abbreviate their language so far as possible, and having regard to the provisions in the old Code, provisions which there seems to have been no intention to vary, I agree that the appeal must be dismissed.

Decree confirmed.

J. G. R.

1917.

ZIPRU
v.
HARI SUPDU-
SHET.