

The question raised is, therefore, one which falls within the scope of section 115.

The result is that the Rule must be made absolute and the order of the Court below set aside. The petitioners are entitled to their costs.

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BEACHCROFT J. I agree.

O. M.

*Appeal dismissed.*

*Rule absolute.*

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## APPELLATE CIVIL.

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*Before Richardson and Beachcroft JJ.*

NAGENDRA LAL CHOWDHURY

v.

FANI BHUSAN DAS.\*

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Jan. 15.

*Limitation—Attachment in execution—Claim proceeding—Claim rejected for default and without investigation—Subsequent title suit—Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908) O. XXI, rr. 58 and 63.*

Where a claim is preferred under O. XXI, r. 58 of the Civil Procedure Code and an order is passed either allowing or rejecting, the party against whom the order is made, may, irrespective of whether any investigation took place or not, bring a suit in the language of O. XXI, r. 63 "to establish the right which he claims to the property in dispute," or in the language of Art. 11 of Sch. I of the Limitation Act, 1908, "to establish the right which he claims to the property comprised in the order," and the suit must be brought within the year allowed by Art. 11.

\* Appeal from Appellate Decree, No. 2988 of 1914, against the decree of Ramesh Chandra Bose, officiating Subordinate Judge of Chittagong, dated May, 28, 1914, affirming the decree of Kumud Kanta Sen, Munsif of South Raozan, dated June, 30, 1913.

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*Sardhari Lal v. Ambika Pershad* (1), *Jugal Kishore Marwari v. Ambika Debi* (2) and *Umacharan Chatterjee v. Heron Moyee Debi* (3) referred to.  
*Narasimha Chetti v. Vijiapala Nainar* (4) and *Ponnusami Pillai v. Samu Ammal* (5) approved.

SECOND APPEAL by Nagendra Lal Chowdhury, the defendant No. 1.

One Fani Bhusan Das and his brother Manindra Nath Das were joint owners of certain property, which they had inherited from their deceased father. Manindra, subsequently, sold his share in the ancestral property, which included a *pucca* house, to his brother in order to avoid the said share falling into the hands of his creditors. It was agreed between the brothers that Manindra should remain in occupation of the *pucca* house above-mentioned, for a period of two years, within which Manindra would arrange for a separate house for himself and then give over vacant possession of the said *pucca* house to Fani Bhusan. On the expiration of the period of the two years stipulated above, Manindra refused to vacate the premises in question and Fani Bhusan in consequence served him with notice to quit. Thereupon, one Nagendra Lal Chowdhury, in execution of a decree attached Manindra's share in the ancestral property and put the same up for sale. Fani Bhusan thereafter preferred a claim under O. XXI, r. 58 of the Civil Procedure Code to the property ordered to be sold. The claim was, subsequently, dismissed for default on the ground of delay. After the lapse of a period of more than a year from the date of dismissal of the claim proceeding, Fani Bhusan instituted a suit under O. XXI, r. 63 of the Code praying, *inter alia*, for declaration of his title to the property in question,

(1) (1888) I. L. R. 15 Calc. 521 ; (3) (1913) 18 C. W. N. 770.

L. R. 15 I. A. 123.

(4) (1914) 27 Ind. Cas. 944.

(2) (1912) 16 C. W. N. 882.

(5) (1916) 31 Mad. L. J. 247.

for ejection of Manindra from the premises in occupation and for withdrawal of the attachment made by Nagendra. Both the lower Courts decreed the suit. Nagendra, thereupon, appealed to the High Court.

*Dr. Sarat Chandra Basak* (with him *Babu Chandra Sekhar Sen*), for the appellant. The *first* question was whether this was a suit within Art. 11 of Sched. I of the Limitation Act, 1908. There was a divergence of judicial opinion under the Limitation Act of 1877: see *Jugal Kishore Marwari v. Ambika Debi* (1). Whatever might have been the law under Art. 11 of the old Limitation Act, there was no question that the Legislature had materially altered the wording of the Article in the new Act, and now a suit must be instituted within one year from the date of the decision in the claim proceeding to prevent the suit being barred by Art. 11 of Sched. I of the Limitation Act, 1908. This Article applied equally to cases in which there had been investigation and to cases where there had been no investigation in the claim proceeding. In support of this contention *Ponnusami Pillai v. Samu Ammal* (2), *Narasimha Chetti v. Vijiapala Nainar* (3) and *Sardhari Lal v. Ambika Pershad* (4) were referred to.

The *second* question in this appeal was whether this suit was barred by s. 53 of the Transfer of Property Act.

[The Court stopped *Dr. Basak* and called on the respondents, holding that if it decided the appeal in the appellant's favour on the question of limitation under Art. 11 of the Limitation Act, there would be no need to go into the question of bar to the suit under s. 53 of the Transfer of Property Act.]

(1) (1912) 16 C. W. N. 882.

(2) (1916) 31 Mad. L. J. 247.

(3) (1914) 27 Ind. Cas. 449.

(4) (1888) I. L. R. 15 Calc. 521 ;

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*Babu Jogesh Chandra Roy* (with him *Babu Probodh Kumar Das*), for the respondent, submitted that the Legislature never intended to overrule the old cases. It merely contemplated bringing all the cases under one article of the Limitation Act. In the present case the claim proceeding was rejected for delay and no investigation had taken place in that proceeding. That order of rejection did not fall under Art. 11 of the Limitation Act, 1908. The word "order" in that Article meant an order made either after investigation or in default. Where a claim was not entertained at all, there could not be any order in such a proceeding. It was only in the case of a claim being entertained and an order made after investigation or in default that Art. 11 would apply: see *Venkapa v. Chenbasapa* (1), *Krishnaji Vithal v. Bhashkar Rangnath* (2), *Kallar Singh v. Toril Mahton* (3), *Karsan v. Ganpatram* (4) *Sarat Chandra Bisu v. Tarini Prasad Pal Chowdhry* (5), *Sarala Subba Rau v. Kamsala Timmayya* (6), *Umacharan Chatterjee v. Heron Moyee Debi* (7) and *Ganesh Krishna Kulkarni v. Damoo Nathu Shimpi* (8).

The appellant was not called on to reply.

RICHARDSON J. The only question to which we need address ourselves in this appeal is the question of limitation, In the course of certain execution proceedings, the property now in dispute was attached. The present plaintiff preferred a claim to the property under Order XXI, rule 58 of the Code of Civil Procedure. The claim was rejected and he brought this suit to establish his title to the property and

(1) (1879) I. L. R. 4 Bom. 21.

(2) (1880) I. L. R. 4 Bom. 611.

(3) (1895) 1 C. W. N. 24.

(4) (1897) I. L. R. 22 Bom. 875.

(5) (1907) I. L. R. 34 Calc. 491.

(6) (1907) I. L. R. 31 Mad. 5.

(7) (1913) 18 C. W. N. 770.

(8) (1916) 18 Bom. L. R. 782.

for consequential reliefs. It is not disputed that if the order made in the execution proceedings rejecting the claim was an order within the scope of Order XXI, rule 63, the present suit is a suit of the nature contemplated by that rule and is governed as to limitation by Article 11 of the Limitation Act of 1908. The period of limitation prescribed for such a suit is one year from the date of the adverse order in the claim case. Here the suit was instituted more than a year after the claim was rejected. The defendant No. 1 pleaded therefore that the suit was out of time. The contention put forward on the plaintiff's behalf is that the claim having been rejected for default and without investigation, the order of rejection was not an order within Order XXI, rule 63 and Article 11 had no application. The contention proved successful in the Courts below and the appeal before us has been preferred by the defendant No. 1.

Now, it may be useful to cite in this connection the language used by Lord Hobhouse in delivering the judgment of the Privy Council in the case of *Sardhari Lal v. Ambika Pershad* (1). Lord Hobhouse said: "The order," that is, the order in the claim case to which he was referring "was made; and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought."

If that was the policy of the law under the Civil Procedure Code of 1877 and the Limitation Act of the

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same year, it is still more emphatically the policy of the law under the present Civil Procedure Code and the present Limitation Act.

On the plaintiff's behalf reliance has been placed on decisions of this Court under Article 11 of the Limitation Act of 1877, but those decisions are no longer of authority because the language of Article 11 has been altered in the Act of 1908. The change made follows the change made in section 283 of the Code of 1882 now represented by rule 63 of Order XXI. Section 283 ran as follows: "The party against whom an order under sections 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute." Rule 63 on the other hand says that "where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute." The specific reference to the previous sections or rules has been omitted. A corresponding change has been made in Article 11. The ground therefore on which the cases under the previous Limitation Act and the previous Code were decided, that the sections specifically referred to in Article 11 and in section 283 of the Code required some investigation to be made, is gone. Rule 63 of the present Civil Procedure Code and Article 11 of the present Limitation Act are quite general in their terms. All that is now necessary is that a claim should be preferred under rule 58 and that there should be an order either allowing or rejecting it. The party against whom the order is made may then bring a suit in the language of rule 63 "to establish the right which he claims to the property in dispute" or in the language of Article 11 "to establish the right which he claims to the property comprised in the order" and the suit must be brought within the year allowed by Article 11.

The Courts below have plainly erred in applying the old cases to the present law. Even under the Limitation Act of 1877 there was some difference of opinion on the question whether an order rejecting a claim made without investigation came within Article 11 or not. In the case of *Jugal Kishore Marwari v. Ambika Debi* (1), Mookerjee and Beachcroft JJ. observed in their judgment that though there might be some divergence of judicial opinion there was weighty authority in support of the view that where an application had been dismissed with or without investigation a regular suit, if instituted, must be commenced within one year from the date of such order; and the learned Judges cited reported cases in support of that observation.

The case of *Umacharan Chatterjee v. Feron Moyee Debi* (2) was decided in 1913 but the Article applied was Article 11 of the Limitation Act of 1877 and the case is of no assistance to the plaintiff. No doubt the learned Judges there held that Article 11 of the Act of 1877 was not applicable where there had been no investigation of the claim. But at the same time they referred to the change which had been made in the language of Article 11 by the Act of 1908 and remarked that the change might have altered the law.

The view we take is supported by two decisions of the Madras High Court, *Narasimha Chetti v. Vijiapala Nainar* (3) and *Ponnusami Pillai v. Samu Ammal* (4), in which the learned Judges pointed out that the language of Article 11 of the Act of 1908 was more comprehensive than the language of the preceding Act and refused to restrict the Article to those cases in which an investigation had taken place.

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The result is that this appeal must be allowed and the whole suit dismissed with costs, both here and in the Courts below. But the dismissal of the suit will be without prejudice to any right which the plaintiff may have as against the defendant No. 2.

BEACHCROFT J. I agree.

O.M.

*Appeal allowed.*