APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

DAMARAJU NARASIMHA RAO (PLAINTIFF), APPELLANT,

v.

THADINADA GANGARAJU AND OTHERS (DEFENDANTS NOS. 2 TO 5, AND FIRST DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

1908. February 11, 12. March 6. August 10, 18.

Limitation Act, Act XV of 1877, sch. II, arts. 29, 49, 62, 120—Suits to recover proceeds of sale of moveable property wrongfully attached and sold governed by art. 29 or 49 of sch. II of Limitation Act.

A, *B* and *C* brought a suit against *D* and on the 10th December 1899 attached before judgment certain paddy. *E* put in a claim petition in respect of the paddy which was dismissed on 8th March 1900. *E* then brought a suit under section 283 of the Code of Civil Procedure, on 26th March 1900, against *A*, *B* and *C* for a declaration of his title to the attached property, and his title was finally declared on appeal on 7th February 1903. In the meanwhile the attached property was sold, and on 15th May 1900, the proceeds was distributed between *A*, *B*, *C* and also *F* who claimed rateable distribution. In a suit brought by *E* on 1st June 1903, against *A*, *B*, *C* and *F* for a refund of the sale-proceeds :

Held (SANKARAN NAIR, J., dissenting), that limitation began to run from the date of the wrongful seizure ; that the suit for purpose of limitation fell within article 29 or 49 of schedule II of the Limitation Act, and that it was accordingly barred by limitaion.

Per SANKARAN-NAIR, J.,—The suit was not barred, as the article which applied was either article 62, or 120 of the second schedule to the Limitation Act. The wrong complained of was the payment to the defendants of the sale-proceeds to which the plaintiff was entitled.

Article 29 did not apply, because so long as the property remained in the custody of the Court, it was not lost and plaintiff could not claim any compensation for its loss. The loss of the property was not a necessary consequence of the attachment, as the Civil Procedure Code contains provisions which enable the party to establish his right and recover the property attached. Article 29 only applied when the loss complained of was directly due to the seizure. Article 49 did not apply as the suit was not for any specific moveable property and the defendants had not wrongfully taken, injured or detained such property.

Per Sir ARNOLD WHITE, C.J.—Article 29 of the second schedule which is specific in its terms applied to the suit and not the general provisions of article 62 or 120.

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* Second Appeal No. 480 of 1905, presented against the decree of E. L. Vaughan, Esq., District Judge of Godavari, in Appeal Suit No. 71 of 1904, presented against the decree of M. R. Ry. R. Hanumanta Rau, District Munsif of Ellore, in Original Suit No 219 of 1903.

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Article 29 should not be construed as limited to claims for consequential damages and not applicable to cases where the plaintiff seeks only to recover the value of the property seized or the sale-proceeds, if the property had been sold

The provision of section 283 of the Code by which a claimant may establish his right to property attached, cannot have the effect of postponing the time when limitation begins to run or of suspending time when limitation has begun to run.

Per PINHEY, J.—The cause of action is the original wrongful seizure and article 29 or 49 applies.

The time spent in proceedings under section 283 of the Code of Civil Procedure cannot be excluded in computing the period of limitation.

THE facts necessary for this report are sufficiently set out in the judgments of Sir Arnold White, C. J., and Sankaran-Nair, J.

Sir ARNOLD WHITE, C.J.—The question for determination in this appeal is whether the plaintiff's suit is barred by limitation. For the purpose of this question the material facts and dates are as follows:—

Defendants Nos. 1 to 3 brought a suit against the fifth defendant and on December 10th, 1899, attached certain paddy before judgment. The plaintiff put in a claim petition with respect to the paddy. On March 8th, 1899, this petition was dismissed. On March 26th, 1900, the plaintiff brought a suit under section 283 of the Code of Civil Procedure to establish his right to the property. On November 18th, 1901, he obtained a declaration as to his right. On February 7th, 1903, this declaration was affirmed on appeal. In the meantime, the property had been sold by the Court, and on May 15th, 1904, the proceeds had been distributed to the defendants, the fourth defendant having received his share as a party entitled to rateable distribution. On June 1st, 1903, the present suit for a refund of the money by the defendants was instituted. The plaintiff contends that time began to run from the date of the distribution of the proceeds of the sale of the attached property. If this is so, and the period of limitation is 3 (three) years—deducting (as it is conceded the plaintiff is entitled to deduct) the time when the Court was closed, the suit is in time.

The Munsif held that time began to run from the date of the attachment (December 10th, 1899), that the article of the second schedule to the Limitation Act which applies was article 49, and that the suit was time-barred. The District Judge held that the question of limitation was governed either by article 49 or article

36 and affirmed the Munsif's decree. The Lower Courts have dealt with the case on the footing that the attached property was moveable property and I deal with the case on the same footing I am of opinion that the appropriate article is article 29, since this is the only article which refers specifically to wrongful seizure under legal process. This was the view taken by this Court in *Murugesa Mudaliar* v. *Jatharam Davy* (1). I do not think this article should be construed as limited to claims for consequential damages and as not applicable where the plaintiff seeks only to recover the value of properly seized, or the sale-proceeds, if the property has been sold This is obviously not the sense in which the word is used in articles 30 and 31, and I do not see why it should be construed in this restricted sense in article 29. If article 29 applies, the law is express and the time is one year from the date of the seizure. No doubt section 283 of the Code makes provision for a special procedure whereby a claimant to property which has been seized in execution may establish his right, but I fail to see how the provisions of this section can have the effect of postponing the time when limitation begins to run, or suspending the time which has begun to run, when the Limitation Act makes express provision in the matter.

Further, I can see no good ground for holding that time does not run so long as the property remains *in custodia legis*. The damage to the plaintiff is the seizure of his property. True he may eventually succeed in showing the property is his and in the meantime the property is safe, but he is none the less damaged by being deprived of the enjoyment of his own property. The measure of damages is of course a different matter. If he brings his suit after his property has been restored to him, and his suit is in time, he can of course only recover damages on the footing that he has not been permanently deprived of his property. If he has already recovered damages on the footing that he has been permanently deprived of his property, and it is afterwards determined that the property is his, or the plaintiff's suit is ultimately dismissed, a question may arise as to what order the Court ought to make with regard to the disposal of the attached property or the proceeds thereof if it has been sold ; but I do

(1) I.L.R., 23 Mad., 621 at p. 624.

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not think this is a question which can be taken into consideration in construing the plain language of the enactment.

In *Murugesa Mudaliar* v. *Jatharam Davy* (1), where goods were attached and sold whilst a declaratory suit by a party who claimed to be the owner of the goods was pending, it was held that time began to run from the date of the attachment. If article 29 does not apply, I think the appropriate article is article 49 (see *Ratnachalam Ayyar* v. *Venkatrama Ayyar*(2), and that time would run from the date when the property was wrongfully taken. In this view also the suit would be time-barred. The case *Ramaswamy Ayyar* v. *Muthusamy Ayyar*(3), where property had been seized by a Magistrate is, I think, distinguishable.

It was contended on behalf of the appellant that either article 62 or article 120 applies. As regards article 62, it is not necessary for me to consider whether if there had been no specific article applicable, the money received by the defendants in this case is money had and received to the plaintiff's use within the meaning of the article. I think article 29 which is specific in its terms applies, and not the general provisions of article 62 or 120. As I read the judgment of West, J., in *Jagjivan Javhordas* v. *Gulam Jilani Chaudhri*(4), I think it supports my view.

As regards the fourth defendant who received a portion of the sale-proceeds by way of rateable distribution, I do not think that, with reference to the question of limitation, any distinction can be drawn between his case and that of the other defendants, since his right to rateable distribution is dependent on the seizure which has been held to be wrongful as against the plaintiff.

I would dismiss the appeal with costs.

SANKARAN-NAIR, J.—The suit was instituted on 1st June 1903 to recover the value of the paddy crops belonging to the plaintiff, attached by the defendants Nos. 1, 2 and 3 before judgment in a suit brought by them against the fifth defendant, and sold on the 10th April 1900 to satisfy the decree obtained in that suit. The proceeds of the sale were distributed among the defendants on the 15th May 1900, and it is accordingly argued before us that article 29 applies and the suit is barred as it was not

(1) I.L.R., 23 Mad., 621 at p. 624.
(2) I.L.R., 29 Mad., 446.
(3) I.L.R., 30 Mad., 12.
(4) I.L.R., 8 Bom. 19. 19.

brought within one year from the date of the attachment. The plaintiff presented a claim petition when the property was attached which was dismissed on the 8th March 1900. He sued to declare his title on the 26th March 1900 and he obtained his final decree declaring his title on the 7th February 1903.

A person whose property is attached in a suit between third parties is entitled under the Civil Procedure Code to apply to the Court which attached his property to release the same from attachment, and the attachment will be set aside and the property released if he proves his title. The property if moveable remains in the custody of the Court while under attachment, and it will be restored to him on proof of his title.

If he fails in his application, the Civil Procedure Code allows him to bring a suit to declare his title *within one year from the date of his order*, and if he obtains a decree in his favour, the Court which attached his property and in whose custody it continues to remain is bound to restore it to him on his application. If the property has been sold and the proceeds are in Court, it is bound to deliver to him such proceeds. The loss of the moveable property is not, therefore, in my opinion, a necessary consequence of the wrongful seizure by attachment. The right to sue even after one year from the date of the attachment implies that the property continued in the claimant even after the expiry of the period prescribed by article 29. So long as the property remains in the custody of the Court he cannot be said to have lost it and is not therefore entitled to any compensation for its loss, and article 29 of the Limitation Act does not therefore apply. It might be otherwise where the loss to the plaintiff is directly due to the seizure. A suit, for instance, for damages on account of the deprivation of the use of the goods, for instance, for the hire of furniture under attachment would come within the article. If article 29 applies the result will be curious. If the owner of the moveable property gets his compensation from the plaintiff who attached his crops before judgment, and that plaintiff's suit is dismissed, to whom is the Court to deliver the property? Not to the owner, who has got his compensation. Not to the defendant as whose property it was attached, because it has been declared not to belong to him in the suit which awarded compensation. Not to the plaintiff who failed in his suit and never claimed it to be his property.

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The opinion expressed in *Murugesa Mudaliar* v. *Jatharam Davy*(1) that article 29 applies to such case is opposed to the opinion expressed on the same facts in *Murugesa Mudali* v. *Jotharam Davay*(2) and both were *obiter dicta*. From the statement of facts by the Judges of the Small Causes Court it does not clearly appear whether after attachment the property continued in the custody of the Court or in the possession of the defendant.

Nor in my opinion does article 49 apply. The suit is not for any specific moveable property, nor have the defendants wrongfully taken, injured, or detained the property. The wrongful seizure was by the Court, though at the instance of defendants Nos. 1 to 3. If there was any wrongful taking or detention of any property it was only when the money was paid over to the defendants. The article that applies is therefore either article 62 or article 120, and in either case the suit is not barred.

Mr. Ramesam contends that the plaintiff's cause of action arose when the wrong was inflicted on him. They may be so, but the wrong for which he now claims compensation is not the attachment, but the payment to the defendants of the money which belongs to him.

Of the authorities cited, the decision in *Lakshmi Priya Chowdhurani* v. *Rama Kanta Shaha*(3) supports my view. The case of *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*(4) was strongly relied upon by the respondent's pleader. But a careful consideration of that judgment has satisfied me that it strongly supports my conclusion. Mr. Justice West points out that when the plaintiff wants to recover his property, the proper course to follow is the one I have already indicated. He adds "besides the recovery of the article, the owner may seek compensation for damage to it and for his loss of the use of it, and, *for such a suit article 29 prescribes a term of one year*." I agree. But he also holds that when the recovery of the article may become impossible or undesirable, the owner may seek compensation both for the thing itself and for the damage he has sustained through being deprived of the use. To such a suit then article 29 would apply: "as the double claim of compensation consists of elements of identical character, these, though capable of separate existence, blend by contract in their subject into one." This reasoning will

(1) I.L.R., 23 Mad., 621.
(2) I.L.R., 22 Mad., 478.
(3) I.L.R., 30 Calc., 440.
(4) I.L.R., 8 Bom., 19.

only apply when they blend into one by the plaintiff finding it impossible or undesirable to recover the property, probably on account of its nature by reason of the seizure itself. It obviously cannot apply when the two claims blend into one after the expiry of the period prescribed by article 29. At any rate I do not think that the learned Judge had that case in view. The suit itself was apparently not brought within 3 years after payment to the defendants.

I am therefore of opinion that the plaintiff's claim is not barred and would accordingly reverse the decree of the Courts below and pass a decree in favour of the plaintiff with costs throughout.

As there is some conflict in the authorities we refer the Appeal under section 575 of the Code of Civil Procedure to a Bench of three Judges.

The case again came on for hearing in due course before the Bench constituted as above.

T. V. Seshagiri Ayyar for appellant.

T. Purushottama Ayyar for The Hon. The Advocate-General for fifth to seventh respondents.

V. Ramesam for third respondent.

The Court delivered the following :—

JUDGMENTS.—*The Chief Justice.*—I adhere to my former judgment.

Sankaran-Nair, J.—I have nothing to add to my former judgment.

Pinhey, *J.*—I have no doubt that the present suit is barred. It is urged that the wrong for which the appellant claims compensation is not the attachment of his paddy, but the payment to the defendants of the money realized by its sale.

If the seizure was not wrongful there was nothing wrongful in the payment.

It is conceded that the seizure was wrongful. This is not a continuing wrong. Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action.

The cause of action therefore was the original seizure and time began to run from that date. The article of Schedule II of the Limitation Act that governs the case would appear to be either article 29 or article 49.

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The property seized was moveable.

There was admittedly a wrongful seizure under legal process.

The suit is for the value of the property seized and for interest from the date of decree but not for other damage.

Whether article 29 or article 49 applies depends on the view taken of the scope and meaning of these two articles. The learned Chief Justice takes the view that article 29 is not restricted in its application to cases of consequential damage, but applies also to the case where the value of the property itself is sought to be recovered. He further holds that the distinction between article 29 and article 49 is that the former article applies to a case of wrongful seizure made under *legal process*, whereas the latter applies when the wrongful seizure is made by a private person.

There is much to be said in support of this view, but it seems to me unnecessary, now, to decide which of the two articles applies, for the suit is admittedly barred whichever article is applied, if the wrongful seizure is taken as the starting point for limitation, and no allowance is made for the time spent in litigating the title under section 288, Code of Civil Procedure.

As regards the time spent in litigating the title I know of no provision of law under which this can be excluded. Nor do I see how the special period of limitation allowed by article 11, schedule II of the Limitation Act for suits under section 283, Code of Civil Procedure, can affect the limitation fixed by other articles of the Limitation Act.

It seems to me the plaintiff in this case mistook his remedy. Section 283, Code of Civil Procedure, and article 11 read together afford the plaintiff one year from the 8th March 1900 to file a suit, but section 283, Code of Civil Procedure, does not purport to lay down what the consequences will be in the event of success. The plaintiff contented himself with filing a suit for declaration of title, but he omitted to get an injunction and so prevent the property which was moveable, from being dealt with by the Court that had attached it. The property was sold soon after the institution of the suits and the sale-proceeds distributed.

There was obviously no use in continuing a suit for cancellation of the order alone or for mere declaration of right to property which was no longer in the custody of the Court.

The plaintiff might have amended his plaint under section 53, Code of Civil Procedure, and brought the fourth defendant on

record, but did not. In the result he obtained an infructuous decree and finds that his remedy as regards the property itself or its value is barred by specific articles of the Limitation Act, which prescribe within what period suits for recovery or compensation must be filed.

I hold that the cause of action arose on the seizure of the property; that article 29 or article 49 of Schedule II, Limitation Act, governs the case and that the suit is barred.

The appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

1908. March 13. April 8.

CHAMA SWAMI AND ANOTHER (DEFENDANTS NOS. 3 AND 4), APPELLANTS.

v.

PADALA ANANDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Lien of purchaser of land paying off mortgage – Purchaser in possession paying off mortgage subrogated to the right of the original mortgagee, when purchase found invalid.

A purchaser of land, who, while in possession of the land purchased, pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off.

Syamalarayudu v. *Subbarayudu*, (I.L.R., 21 Mad., 113), followed.

The American Courts, when equity requires it, allow persons, paying off mortgages on properties not belonging to them, to be subrogated to the rights of the original mortgagees; and subrogation is allowed as a matter of right for the benefit of a purchaser who has extinguished an encumbrance on the property purchased. This is the right principle to be applied in India.

Gokaldas Gopaldas v. *Puranmal Bemsukhdas*, (I.L.R., 10 Calc., 1035), referred to.

Dakhina Mohan Roy v. *Saroda Mohan Roy*, (I.L.R., 21 Calc., 142), referred to.

DEFENDANTS Nos. 1 and 2 executed a mortgage in favour of the seventh defendant on 30th September 1897. The plaintiffs bought

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* Second appeal No. 213 of 1906, presented against the decree of M.R. Ry. Y. Janaki Ramayya Sastri, Subordinate Judge of Cocanada, in Appeal Suit No. 37 of 1905, presented against the decree of M.R.Ry. K. Krishnamachariar District Munsif of Amalapur, in Original Suit No. 462 of 1904.