APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

SRIMANTH RAJAH YARLAGADDA MALLIKHARJUNA PRASADA NAYUDU BAHADUR ZEMINDAR GARU (PLAINTIFF), APPELLANT

1918, February 4 and July 15 and 22.

v.

MATIAPALLI VIRAYYA AND OTHERS (DEFENDANTS NOS. 1 TO 24), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, r. 63, applicability to claims to property attached before judgment—O. XXXVIII, r. 5.

Held by the Full Bench that Order XXI, rule 63, Civil Procedure Code, applies also to orders on claims preferred to property attached before judgment. *Ramanamma* v. *Bathula Kamaraju* (1918) I.L.R., 41 Mad., 23, overruled.

SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Temporary Subordinate Judge of Masulipatam, in Appeal No. 132 of 1915, preferred against the decree of G. G. SOMAYAJULU Garu, the Principal District Munsif of Masulipatam, in Original Suit No. 622 of 1912.

The facts are given in the first two paragraphs of the Order of Reference of KRISHNAN, J., to the Full Bench.

C. V. Anantakrishna Ayyar, Vakil, for appellant.

C. Rama Rao for *P. Narayanamurti*, Vakil, for respondent.

This Second Appeal coming on for hearing in the first instance before BAKEWELL and KRISHNAN, JJ., the following Orders of Reference to a Full Bench were delivered by—

KRISHNAN, J.—The facts necessary for this reference may be briefly stated as follow: The first defendant who is the appellant before us brought a suit for money against defendants Nos. 2 to 4 and when that suit was pending he obtained an order under rule 6, Order XXXVIII, of the Code of Civil Procedure, for attachment before judgment and attached the plaint properties. The plaintiff intervened and claimed the properties as belonging to him by reason of a prior purchase from the same defendants. The claim was enquired into and an order was passed in March 1910 in plaintiff's favour disallowing the attachment. In 1912 first

* Second Appeal No. 1561 of 1916.

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defendant obtained his decree for money against defendants Nos. 2 to 4 and he then proceeded again to attach the same properties. He had taken no steps to contest the order on the claim petition nor has he done so up to date. Nevertheless when plaintiff again filed a claim against the second attachment his claim was dismissed and the attachment was confirmed. For some reason not apparent the Court failed to consider the effect of the first order. Plaintiff has filed this suit under rule 63 of Order XXI of the Code of Civil Procedure for a declaration of his title and for setting aside the order of attachment.

Both the lower Courts have decreed the plaintiff's suit without going into the merits on the ground that the order on the first claim petition was conclusive between the parties because that order had decided in favour of plaintiff's title and against the first defendant's right to attach. In second appeal it is argued before us that as that order was passed on a claim to property attached *before judgment* it is of no force now and that it is not an order to which rule 63 applies or which need be set aside.

The appellant's vakil has relied on the ruling in *Ramanamma* v. *Bathula Kamaraju*(1) which certainly supports him. But on the other side our attention has been drawn to the decision in *Muthukumara Chettiyar* v. *Alagappa Chettiyar*(2) where my learned brother Mr. Justice SPENCER and I were of opinion that rule 63 did apply to cases of attachment before judgment. As there is a clear conflict between the two decisions on the point before us and as I still adhere to the view expressed by us in the second appeal, I consider that the question should be referred to the Full Bench.

As our attention was not drawn to the ruling in *Ramanamma* v. *Bathula Kamaraju*(1) when we were hearing *Muthukumara Chettiyar* v. *Alagappa Chettiyar*(2) we then stated our reasons for our view only very briefly. It is necessary now to state my reasons more fully as, with all respect to my learned brothers who decided *Ramanamma* v. *Bathula Kamaraju*(1), I am unable to accept their view that rule 63 is inapplicable in cases of attachment before judgment.

The decision on the point turns upon the construction of rule 63 of Order XXI and on the meaning to be attached to

(1) (1918) I.L.R., 41 Mad., 23. (2) (1917) 6 L.W., 516.

the word 'investigated' in rule 8, Order XXXVIII. The wording of rule 63 is clearly wide enough to include claims before decrees, for the rule speaks of "claims and objections preferred" without restricting them in any way to claims after decree. The change in the wording of that rule from what it was in the corresponding section 283 of the Old Code of 1882, by omission of all reference to sections 280 to 282 seems to indicate that it was intended to widen the scope of the rule and to make it clearer that claims of all kinds were included in it. This is the view taken in *Bisheshar Das* v. *Ambika Prasad*(1) and I agree with it in spite of the dissent from it in *Ramanamma* v. *Bathula Kamaraju*(2). As rule 63 is an enabling rule which gives a right of suit to parties defeated in claim proceedings which they will not otherwise have, I am inclined to think that we should not unduly restrict its scope. If the rule is held not to apply, the result seems to me to be that the original order becomes final without being subject to the result of a suit; I fail to see on what ground it can be treated as of no force as argued. It is an order between parties by a competent Court deciding that a certain property can or cannot be attached for realizing by sale the amount of the decree that may be passed and as such, it seems to me it is binding on the parties thereto unless set aside. Considering that the two sets of orders, those before and those after decree are passed after similar enquiries, no distinction should be made between them as to their effect unless the legislature has clearly indicated a distinction.

Such a distinction is sought to be made out by reference to the word 'investigated' in rule 6 of Order XXXVIII. It is argued that the word refers only to the enquiry on the claim and nothing more, in other words only rules 58 and 59 of Order XXI apply. Now it will be seen that the heading of the sub-division of Order XXI where these rules are is "investigation of claims and objections" and under this heading we have grouped all the rules from 58 to 63. It is a reasonable inference from this that the Legislature treated them all as steps in 'investigation' or parts of it. If we adopt a restricted meaning for the word 'investigated,' rules 60 to 62 will not be included

(1) (1915) I.L.R., 37 All., 575. (2) (1918) I.L.R., 41 Mad., 23.

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in it as they deal with orders to be passed after the 'investigation' proper is completed; and as a result we will have to hold that the Legislature has not made any provision for orders to be passed in claims under that rule as there is no other provision with regard to it except rule 8. Such a construction seems to me to be hardly right. If we consider that the order in the present case was passed under rule 60, Order XXI, read with rule 8 of Order XXXVIII, as I think we should, it follows that rule 63 applies to it as being an order under rule 60.

The restricted meaning is adopted in *Ramanamma* v. *Bathula Kamaraju*(1) as the learned Judges considered that it would be unfair and inexpedient to drive a plaintiff into a fresh litigation which might eventually turn out to be a futile proceeding if he failed to secure a decree. It may be remarked that even in cases of attachments after decree, the suit under rule 63 may turn out to be futile if the first decree is reversed on appeal or Second Appeal and plaintiff's suit is dismissed, and yet the Legislature has clearly given the right of suit. I can see nothing unfair in making a person sue if he wishes to insist on his right to attach a certain property in execution of his anticipated decree in spite of the adverse order against him in the claim. If his second suit turns out to be futile because he fails to secure a decree, the fault is his own in bringing an unfounded suit in the first instance. It seems to me however these are not relevant considerations in deciding whether a suit lies under rule 63, nor can the wording of the Article 11 of the Limitation Act be used to decide the question. If that article does not apply as to which I express no opinion it will be necessary to find what article does when the question arises.

A similar question as the one before us which arose in an attachment before judgment when the Code (Act VIII of 1859) was in force was considered by Sir BARNES PEACOCK, C.J., and Mr. Justice MITTER; the learned Judges held on a construction of sections 86 and 246 of that Code which were the corresponding provisions then in force, that the words "investigated in the same manner as a claim to property attached in execution of a decree" incorporated all the provisions of section 246 and gave the remedy by suit, which was the only and proper remedy, to

(1) (1918) I.L.R., 41 Mad., 23.

contest the order on the claim. This was decided in 1868 [*Kartick Chunder Mookerjee* v. *Mookta Ram Sircar*(1)] and till the decision in *Ramanamma* v. *Bathula Kamaraju*(2) no ruling has been cited to us to the contrary. I feel therefore fortified in my view that rule 63 does apply to claims before decrees as well. But on account of the conflict of authority in this Court the question must now be decided by the Full Bench.

KRISHNAN, J.

I would submit the case for the opinion of the Full Bench on the following question:—

"Does rule 63 of Order XXI, Civil Procedure Code, apply to orders on claims preferred to property attached before judgment?"

BAKEWELL, J.—I agree.

BAKEWELL, J.

ON THIS REFERENCE—

C. V. Anantakrishna Ayyar for appellant.—The question must be answered in the negative. As regards claims arising on attchments before judgment, it is only the manner of investigation prescribed by Order XXI, rule 63, and not the finality mentioned therein that applies. One year's period of limitation provided by Article 11 (*a*) of the Limitation Act of 1908 does not apply, but Article 120 applies, for Article 11 (*a*) refers to attachments in execution of a decree. It is open to the unsuccessful claimant to file a suit, but he is not bound to do so. The order has life only till a decree is passed. Reference was made to the language of section 86 and section 246 of Civil Procedure Code of 1859, and section 487, Civil Procedure Code of 1877 and sections 278 to 283 and Order XXI, rule 63 and Order XXXVIII, rule 5, Civil Procedure Code of 1908. I rely on *Ramanamma* v. *Bathula Kamaraju*(2). *Charles Agnew Turner* v. *Prestonji Fardunji*(3) and [*Kartick Chunder Mookerjee* v. *Mookta Ram Sircar*(1)] do not really decide this question. *Bisheshar Das* v. *Ambika Prasad*(4) is not a case in point. All these simply decided that a suit lies; not that a suit should be brought within a year; see *Basiram Malo* v. *Kattyayani Debi*(5). In *Kissorimohun Roy* v. *Harsukh Das*(6) it was assumed that a suit would lie.

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(1) (1868) 10 W.R., 21. (2) (1918) I.L.R., 41 Mad., 23.
(3) (1896) I.L.R., 20 Bom., 403 at p. 407.
(4) (1905) I.L.R., 27 All., 575 at p. 583. (5) (1911) I.L.R., 38 Calc., 448.
(6) (1890) I.L.R., 17 Calc., 436 at p. 414 (P.C.).

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P. Narayanamurti for respondent was not called upon.

The OPINION of the Court was delivered by—

WALLIS, C.J. WALLIS, C.J.—Section 86 of the Code of Civil Procedure of 1859, which was re-enacted without material alteration in section 487 of the Code of 1877 and in Order XXXVIII, rule 8 of the present Code, admittedly had the effect of applying to claims in respect of attachments before judgment all the provisions of section 246 of that Code, including the final provision enabling the party against whom the order was given to bring a suit to establish his right at any time within one year from the date of the order. By the Indian Limitation Act IX of 1871 the provision as to limitation was taken out of section 246 and dealt with in Article 15 of that Act. In the Code of 1877, sections 278 to 283 were substituted for section 246 of the Code of 1859. In section 283, which corresponded to the last sentence of section 246, the language was altered, but there was nothing in the alteration from which an intention to make any of these provisions inapplicable to attachments before judgment could be inferred, nor is there anything of the sort in the changes made in the Code of 1908. The general policy of the law is that questions of title raised by claims against attachments before or after judgment should be promptly disposed of and, as has been pointed out to us, this section was applied without question to a case of attachment before judgment which came before the Privy Council in *Kissorimohun Roy* v. *Harsukh Das*(1).

We must overrule *Ramanamma* v. *Bathula Kamaraju*(2) and answer the question in the affirmative.

N.R.

(1) (1890) I.L.R., 17 Calc., 436 (P.C.). | (2) (1918) I.L.R., 41 Mad., 23.