APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Spencer, Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1921, May, 2.

ARUNACHALAM CHETTY AND ANOTHER (PLAINTIFFS), APPELLANTS IN BOTH,

v.

PERIASAMI SERVAI AND ANOTHER (DEFENDANTS), RESPONDENTS, IN SECOND APPEAL NO. 369 OF 1920.

MEENAKSHI AND ANOTHER (DEFENDANTS), RESPONDENTS IN SECOND APPEAL NO. 370 OF 1920.*

Limitation Act (IX of 1908), arts. 11, 13 and 120—Attachment before judgment—Decree and order for sale—Claim to attached property, filed after order for sale—Order allowing claim—Suit filed after more than one year to contest the order on claim—Limitation.

Property was attached before judgment, and after a decree in the suit and an order for sale in execution were passed, a claim to the property was preferred and allowed by the Court. On a suit to contest the order on the claim, being filed more than a year after such order,

Held, that the property must be deemed to have been attached in execution of a decree by virtue of Order XXXVIII, rule 11, Civil Procedure Code, and that article 11 and not article 13 or 120 was applicable and that the suit was barred by limitation.

SECOND APPEAL against the decree of L. R. ANANTANARAYANA AYYAR, Temporary Subordinate Judge of Sivaganga, in Appeals Nos. 36 and 37 of 1919, preferred against the decrees of P. R. GOVINDA RAO, District Munsif of Sivaganga, in Original Suits Nos. 31 and 33 of 1919.

The facts appear in the Order of Reference and in the second paragraph of the opinion of Sir JOHN WALLIS.

The Second Appeal came on for hearing before NAPIER and KRISHNAN, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.—The point that arises in this Second Appeal is one of limitation. The suit is one for a declaration that the plaintiffs are entitled to attach the suit properties and to bring

* Second Appeals Nos. 369 and 370 of 1920.

them to sale in execution of a decree. The properties were attached on 9th May 1912 in a suit (Original Suit No. 122 of 1912), prior to judgment. The plaintiffs endeavoured to bring them to sale in execution of the decree passed in that suit, but the defendants put in claim petitions which were allowed. The present suit was filed more than a year after the order in the claim petitions. The lower Appellate Court held that the suit was barred by article 13 of the Limitation Act. Hence this Appeal. It has not been contended before us that article 13 applies, but it is urged by the appellants that article 120 applies, while the respondents rely on article 11. Article 11 is as follows :

" . . . on an objection made to the attachment of property attached in execution of a decree."

Clearly, the words if strictly applied do not cover the present case, but it can be argued that the descriptive words are only intended to indicate the class of orders, and that as such orders are made in claims against attachment before judgment by virtue of Order XXXVIII, rule 8, of Civil Procedure Code, the article should be read accordingly. Additional force is given to this argument by the provisions of Order XXXVIII, rule 11, for it is certainly arguable that rule 11 operates to *make* the attachment one in execution of a decree. In Second Appeal No. 194 of 1920 a Bench has decided otherwise, but with respect, I cannot appreciate the reasons of that decision. If the Bench had held that neither under the Code of 1877 nor under the present Code could either article 11 of the old Limitation Act or article 11 of the present Act apply, I could understand that view, but the learned Judges seem to think that where specific sections of the Code are mentioned, as in article 11 of the old Act, the application may be made, but where the words " in execution of a decree " are used it cannot be done. With deference, the Bench overlooks the fact that section 487 of the Code, which applies the procedure of the claim sections, is not included among the sections referred to in article 11, so that the position under the old Act instead of being stronger seems to me to be weaker, for sections 281, 282 and 283 set out in article 11 are all ancillary to section 278 which refers to property attached in execution of a decree. It seems to me easier to give a wide

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meaning to words, than to include sections not enumerated in the article. It is curious that there are no reported cases under the old Act or Code on the point, but I am informed by one of my colleagues who has long experience in claim petitions, that article 11 has always been applied under the old Code to claims in execution in respect of property attached before judgment—doubtless in view of sections 487 and 490. I may point out that the Full Bench in *Prasada Nayudu* v. *Virayya*(1), have given an extended meaning to the word "investigated" in Order XXXVIII, rule 8, following the policy and intention of the Code rather than the actual words, and it may be possible to do so with reference to article 11 of the Limitation Act for it has been laid down that the Code and the Limitation Act, must be read and construed together. I do not feel prepared to go so far myself in view of the decision above referred to, but I think that the question is one which does require an authoritative ruling as early as possible, now that it has been raised. There is, of course, nothing in principle distinguishing claims in execution proceedings to property attached before judgment from claims to property attached after judgment.

I, therefore, think it advisable to refer to a Full Bench the following question:

Does article 11 of the Limitation Act apply to suits arising out of claim petitions regarding property attached before judgment? If not, does article 13 or article 120 apply?

KRISHNAN, J.—The question we have to consider in these cases is what article of the Limitation Act applies to suits by defeated claimants under Order XXI, rule 63, to contest orders passed on claim petitions with reference to property attached before judgment. It was recently ruled by a Full Bench in *Prasada Nayudu* v. *Virayya*(1), overruling the contrary view taken in *Ramanamma* v. *Kamaraju*(2), that rules 58 to 63 applied to cases of attachment before judgment also. Now the question is what is the limitation applicable to such suits, a question which was not directly decided by the Full Bench.

(1) (1918) I.L.R., 41 Mad., 849 (F.B.). (2) (1918) I.L.R., 41 Mad., 28.

The Munsif applied article 11 and that is supported by the respondent before us. The Subordinate Judge applied article 13 but the appellant argues that neither article 11 nor article 13 applies but that only the residuary article 120 applies. In support of his contention the appellant has referred us to a recent ruling of OLDFIELD and SESHAGIRI AYYAR, JJ., in Second Appeal No. 194 of 1920, still unreported, and it certainly supports him. That decision, however, leads to the manifest anomaly of allowing six years to a defeated claimant when the attachment is one before judgment, whereas in all other cases the one year rule under article 11 will apply. No good reason has been shown why such a distinction should have been made by the Legislature; in fact the learned Judges think that it is a case of oversight made per incuriam by Legislature. But before we attribute mistakes to Legislature we must, I think, be fully satisfied that the language of the particular enactment cannot possibly be construed so as to avoid doing so. The learned Chief Justice has pointed out in his judgment in the Full Bench above referred to, that "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." In view of this observation and of the anomaly I have pointed out above, I think, with all respect, that the view taken in Second Appeal No. 194 of 1920 should be reconsidered, and I agree with my learned brother's proposal to refer the question to the Full Bench to have an authoritative ruling on it. The learned Judges in Second Appeal No. 194 of 1920 consider that the language of article 11 is altogether inapplicable to cases of property attached before judgment, as it speaks of property "attached in execution of a decree." Though this may appear to be so at first sight, it seems to me that the effect of Order XXXVIII, rule 8, as explained by the Full Bench is to bring property attached before judgment within the purview of rules 58 to 63 of Order XXI and thus within the expression "property attached in execution of a decree," which is the very expression used in rule 58. The learned Judges concede that article 11, as it stood under the repealed Act IX of 1877, covered suits referring to property attached before judgment, for that article expressly referred to orders under sections 280 to 282 of

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the old Code and section 487 corresponding to Order XXXVIII, rule 8, made the order on a claim petition in a case of attachment before judgment one under one of those sections. If this view is correct, as I respectfully think it is, it seems to me easy to hold that the words of article 11 (1) referred to all orders under rules 60 to 62 and do not exclude such orders when passed in cases of attachment before judgment. I do not think the change of language was intended to alter the scope of the article in any way, but was really due to the fact that provisions in sections 280 to 282 of the old Code were not enacted in the body of the present Code, but were relegated to the rules which were declared to be subject to alteration by the High Courts in section 122 of the Code. If the rules were referred to by number in the article an alteration in the rules by a High Court may introduce a difficulty. The use of the compendious expression "property attached in execution of a decree" in article 11 instead of referring to the rules 60 to 62 themselves seems to be intended to avoid this difficulty, and not to any intention to alter its scope. I think, therefore, the words "property attached in execution of a decree" includes property attached before judgment as well. I am, therefore, inclined to the opinion that article 11 applies to the present suit and not article 120, but as the question is referred to the Full Bench I need not come to any decision on it.

I may add that I agree with the view expressed in Second Appeal No. 194 of 1920 that article 13 is inapplicable for the reasons stated in it, and that besides the case referred to in it, *Sivarama* v. *Subramanya*(1), the rulings in *Ayyasami* v. *Samiya*(2), and in *Narasimma* v. *Appalacharlu*(3), are to the same effect.

I agree to the order proposed by my learned brother.

ON THIS REFERENCE

N. A. Krishna Ayyar (with *T. R. Ramachandra Ayyar*) for appellants.—[WALLIS, C.J.—In this case the claim was made *after* decree and after an application for execution. As the Civil

(1) (1886) I.L.R., 9 Mad., 57. (2) (1885) I.L.R., 8 Mad., 82.
(3) (1889) I.L.R., 12 Mad., 294.

Procedure Code lays down that when there has once been an attachment before judgment there need not be any further attachment in execution, why should not this claim made after decree be considered as one coming within the wording of article 11 ?]

Article 11 can apply only if the *attachment* is after decree. Order XXXVIII, Civil Procedure Code, enacts only a rule of procedure and not a rule of limitation and even that makes a distinction between an attachment before judgment and one in execution of a decree. It is only the latter that is dealt with in the Limitation Act.

[WALLIS, C.J.—We must read both the Civil Procedure Code and the Limitation Act together.]

Reference was made to Order XXXVIII, rules 7 and 8. RAMESAM, J., referred to Order XXXVIII, rule 10, Civil Procedure Code.

Reference was made to Appendix F, No. 5, as to the form of attachment before judgment, and to Appendix E, No. 16, as to the form of attachment after judgment. An attachment before judgment is not in every sense equivalent to one after judgment: see *Basiram Malo* v. *Kattyayani Debi*(1). Where the language of a Statute is plain we should not speculate as to the intention of the legislation: *Vestry of St. John, Hampstead* v. *Cotton*(2), *Salomon* v. *Salomon & Co.*(3).

A. V. K. Krishna Menon for the respondent.—Where the intention of the legislature is plain the Statute must be applied unless it is impracticable: *Salmon* v. *Duncombe*(4). Article 11 applies.

WALLIS, C.J.—The scope of the claim proceedings sections has recently been considered by Full Benches of this Court in *Prasada Nayudu* v. *Virayya*(5), *Venkataratnam* v. *Ranganayakamma*(6), and *Ramaswami Chettiar* v. *Mallappa Reddiar*(7). In all these cases it has been pointed out that the

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(1) (1911) I.L.R., 38 Calc., 448, 450. (2) (1887) 12 App. Cas., 1, 6.
(3) [1897] A.C. 22, 38. (4) [1886] 11 A.C., 627, 634.
(5) (1918) I.L.R., 41 Mad., 849 (F.B.). (6) (1918) I.L.R., 41 Mad., 985 (F.B.).
(7) (1920) I.L.R., 43 Mad., 760 (F.B.).

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object of these sections is to secure the speedy settlement of questions of title raised by attachments, as explained by the Judicial Committee in *Sardhari Lal* v. *Ambika Pershad*(1), and in the last of these cases attention was drawn to the fact that in claim proceedings the release, under rule 60, of the property attached, or the disallowance under rule 61 of the claim are made to depend not on title but on possession at the date of attachment, the question of title being left to be investigated in the suit which the unsuccessful party is bound to bring within the prescribed period on pain of losing all his rights. It is by this suit or the failure to institute it that the speedy settlement of the questions of title is secured, and all that the order on the claim petition does, beyond raising or confirming the attachment, is to decide which party is to sue on pain of losing his rights. Section 246 of the Code of 1859 expressly provided, as regards attachments before and after decree, that the suit was to be brought within the short period of one year, and this did not cease to be any the less a cardinal and most essential feature of this procedure, when in the supposed interests of uniformity the period of one year was omitted from the Code and transferred to the Limitation Act of 1871. It is not disputed that the period of one year continued to be prescribed by the Limitation Acts of 1871 and 1877, and the suggestion that in the Limitation Act of 1908 the Legislature consciously intended to make an alteration as regards orders on claims as to attachments before decree and to allow the unsuccessful party six years to sue under article 120 instead of one year under article 11 is *prima facie* most unlikely, seeing that the effect of the alteration is to defeat what has always been the essential feature of this procedure, the speedy settlement of titles. It is also clear that the occasion of the change made in 1908 in the terms of article 11 was the repeal of the sections of the old Code referred to in the article as it stood in the Act of 1877, and that no argument in favour of an intended alteration in the substance of the article can be based on the fact that the Legislature did not merely substitute for the repealed sections a reference to the corresponding rules of

(1) (1888) I.L.R., 15 Calc., 521 (P.C.).

Order XXI of the new Code, as it was a sufficient reason for not adopting that course that under the new Code numbering of the rules as well as the rules themselves are made subject to alteration by each of the High Courts in the exercise of its rule-making power. There is, therefore, no apparent reason to suppose that the Legislature intended to alter the law so as in the case of the claims arising out of attachments before judgment to give the unsuccessful party six years in which to sue; and, as attachment is the first step in execution and the effect of the provisions as regards attachment before judgment is in exceptional cases to allow that step to be taken without waiting for the decree, I was at first disposed to think that even an attachment before judgment might be regarded as an attachment "in execution of a decree" within the meaning of the new article, seeing that it is a step taken purely for purposes of execution and that we should best give effect to the real intention of the Legislature by so holding. On a further consideration of the subject, I think, that such a construction is inadmissible in view of the fact that section 246 of the Code of 1859 referred to property "which may have been attached in execution of a decree" or under any order for attachment passed before judgment, and that section 86, which has been reproduced in the subsequent Codes and now appears as Order XXXVIII, rule 8, provided that claims to property attached before judgment should be investigated in the same manner as claims to property attached in execution of a decree. As it is well settled that the Limitation Act and the Code are to be read together, I have reluctantly come to the conclusion that we should not be justified in laying down generally that property attached before judgment is attached "in execution of a decree" within the meaning of the present article 11.

It then becomes necessary to consider cases in which the claim to property attached before judgment is put in after decree, or even, as in the present case, after sale has been ordered in execution. As already observed, an attachment before judgment in default of security being given is always a step taken with a view to execution; it has the same effect as an attachment after decree which is the first order to be obtained in execution; and like such an attachment enures until a further order

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of the Court (see Schedule I, Appendix F, No. 7, and Appendix E, No. 8). Order XXI, rule 57, deals with property "under attachment in execution of a decree," but throws no light on the present question, as it merely provides for the dismissal for default of an application for execution and for the attachment ceasing on such dismissal. Order XXXVIII, rule 11, is more in point, and provides in effect that when an attachment before judgment continues in force after a decree for the plaintiff, it shall not be necessary on an application for execution to apply for a reattachment. This provision does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of article 11 of the Limitation Act or of Order XXI, rule 57, already mentioned, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that the property is to be considered as attached in execution by virtue of rule 11, and I think a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of article 11 and would answer the reference accordingly, merely adding cases not governed by article 11 must be governed by article 120, as it has not been seriously argued that article 13 is applicable.

Even so, the result of the changes introduced in the Limitation Act of 1908 is to leave the law on this subject in a very unsatisfactory state. The whole object of the summary claim procedure is frustrated when a period of six years is allowed under article 120 for questioning an order on a claim petition, and I think that the matter should be set right by the Legislature at the earliest opportunity.

OLDFIELD, J. OLDFIELD, J.—I agree.

KUMARASWAMI SASTRI, J. KUMARASWAMI SASTRI, J.—I agree.

RAMESAM, J. RAMESAM, J.—I agree.

SPENCER, J.—The whole object and aim of attachments before judgment is to prevent property being put out of the reach of creditors in the interval which must elapse between such attachment and the passing of a decree. As observed by the Privy Council in *Moti Lal* v. *Karrabuldin*(1), "Attachment only prevents alienation, it does not confer title."

I conceive that it was with this object in view that section 64 of the Code of Civil Procedure (corresponding to section 276 of the Code of 1882) was enacted, making any private transfer or delivery of the property attached void as against all claims enforceable under the attachment. The section only restricts transfers being made by or in favour of defendants. Attachment ceases automatically upon the connected petition being dismissed. (See Order XXI, rule 57).

When property is attached before judgment, there is no disturbance at this stage of the possession of persons other than the debtor-defendant, for Order XXXVIII, rule 7, declares that attachment is to be made in the manner provided for the attachment of property in execution of a decree, which means that the person in possession of movable property attached other than the judgment-debtor is prohibited under Order XXI, rule 46, from giving it over to the judgment-debtor (who may be termed the debtor-defendant before the decree is passed), and that the debtor-defendant, if the property is immovable, is prohibited under Order XXI, rule 54, from transferring or charging the property, and other persons are prohibited from benefiting by any such transfer or charge.

There is no occasion then for third parties to object to attachments made before judgment as they create no rights and disturb no third party's possession. Order XXXVIII, rule 10, expressly saves the rights, existing prior to the attachment, of persons who are not parties to the suit. They are not prohibited from making transfers between themselves. If, as the result of the trial, the suit is dismissed, the attachment has by the provision in Order XXXVIII, rule 9, to be forthwith withdrawn. If, on the other hand, a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree, because Order XXXVIII,

(1) (1893) I.L.R., 25 Calc., 179 (P.C.), 185.

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rule 11, declares that no re-attachment is necessary. As attachment is the first step in the execution of all decrees against property, just as sale or delivery of property is the last step, the effect of this provision is that execution is made to date back to the first attachment which was before judgment.

Rule 8, which directs that investigation into claims preferred to property attached before judgment shall be made in the same manner as if it was attached after judgment, is another indication that for all purposes an attachment before judgment was intended to be treated as if it was made after judgment.

In Civil Miscellaneous Second Appeal No. 21 of 1920, ABDUR RAHIM and SADASIVA AYYAR, JJ., held that a claim to property attached before judgment was a matter arising in execution of a decree falling under section 47 of the Civil Procedure Code.

In the Appeals before us the claims preferred by the first defendant in each suit were put in after the properties were brought to sale in the execution proceedings. I find no difficulty in classing such a claim under the heading of "a claim preferred to . . . property attached in execution of a decree," which are the words of article 11 of the 1st Schedule, Indian Limitation Act. At the time when the claim was made, there was a decree, the decree was being executed, and the property had been attached in a manner which the law declares to be sufficient.

As the suits, which were subsequently filed to establish rights denied to the plaintiffs by the orders passed on the claim petitions, were not instituted within one year of the date of the orders, they were rightly dismissed. An instance of an objection being raised to attachment or a claim being preferred before the passing of a decree and the commencement of execution proceedings has not occurred in the present case, and, as I have endeavoured to show, is not likely to occur in other cases. No opinion need be expressed on hypothetical cases. The first question referred to the Full Bench may be answered in the affirmative and the alternative question in the negative.

To remove the doubts that have arisen I concede that it is desirable that article 11 should be made clearer by adding the words "before judgment or" between the words "property" and "in execution of a decree."

N.R.