APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice. (Reference under section 98, Civil Procedure Code, on difference of opinion between Mr. Justice Spencer and Mr. Justice Krishnan.)

ABDUL KADIR SAHIB (DEFENDANT), APPELLANT, 1922. May 3.

v.

U. T. M. SOMASUNDARAM CHETTIAR (PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), Arts. 11 and 132—Civil Procedure Code (V of 1908), O. XXI, r. 58—Claim petition—Decree for money—Attachment and sale of a tin-shed—Petitions by mortgagee of tin-shed to keep sale proceeds in Court and not to deliver tin-sheets after sale in right of his mortgage—Order dismissing petitions on the ground sales had already been concluded and property delivered—Suit by mortgagee to recover from the purchaser the amount due on his mortgage, four years after orders—Bar of limitation.

Where a mortgagee of a tin-shed, which was attached and brought to sale in execution of a money-decree obtained by the defendant against the mortgagor, filed two petitions in the executing Court, one to keep the sale proceeds in deposit in Court to meet his claim under his mortgage, and the other not to deliver the tin-sheets after sale, and, on both the petitions being dismissed on the ground that the sale had been already concluded and the tin-sheets delivered to the defendant as the auction purchaser, instituted a suit to recover from the defendant the amount due on the mortgage, four years after the dates of the orders on the petitions, and the latter pleaded the bar of limitation.

Held, that the petitions did not fall under Order XXI, rule 58 of the Civil Procedure Code; that Article 11 of the Limitation Act did not apply, but that the suit fell under Article 132 of the Act, and was not barred. *Venkataratnam* v.

* Second Appeal No. 893 of 1920.

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Ranganayakamma, (1918) I.L.R., 41 Mad., 985 (F.B.), distinguished; *Barhamdeo Prasad* v. *Tara Chand*, (1914) I.L.R., 41 Calc., 658 (P.C.), applied.

SECOND APPEAL against the decree of L. G. MOORE, District Judge of Madura, in Appeal Suit No. 331 of 1919, preferred against the decree of K. S. GOPALARATNAM AYYAR, Principal District Munsif, in Original Suit No. 571 of 1917.

One Lakshmanan Servai constructed a tin-shed on a site rented by him from Abdul Kadir Sahib the defendant in the present suit. The latter filed Original Suit No. 460 of 1908 in the District Munsif's Court of Madura against the former to recover possession of the site after removal of the shed by Lakshmanan Servai and for damages. He obtained a decree, attached the tin-shed and brought it to sale on 20th November 1913. The sale was held and a sum of Rs. 750 and odd was realized and set off against the decree. Lakshmanan Servai had, however, executed a mortgage deed on 18th July 1912 for Rs. 1,000 in favour of Somasundaram Chetti, securing two items of property one of which was the tin-shed. On 20th November 1913, the mortgagee (Somasundaram Chetti) filed a petition in the executing Court praying that the sale proceeds should be kept in deposit in Court, and another petition on 21st November 1913, praying that the tin-sheets should not be handed over to the purchaser. Abdul Kadir Sahib was the purchaser of the tin-sheets in Court auction and he was permitted to set off the sale price against the amount due under his decree. The terms of the first petition, and order thereon passed on 21st November 1913, are set out in the judgment of KRISHNAN, J.

In the other petition filed on 21st November 1913, the petitioner prayed that the decree-holder might be ordered not to remove the tin-sheets sold to him and the order thereon, dated 24th November 1913, was as

follows: "The moveables seem to have been already handed over. The petition is therefore dismissed."

The mortgagee realized a portion of the mortgage debt by the purchase of the other item of property mortgaged to him from the Official Receiver in whom the properties of Lakshmanan Servai had vested. He then filed the present suit to recover the balance of the mortgage-debt from Abdul Kadir Sahib who had purchased the tin-sheets and set off the sale proceeds against his decree-debt as already stated. The suit was filed on 19th December 1917. The defendant pleaded that the suit was barred by limitation under Articles 11, 39, 48 or 49 of the Limitation Act. The District Munsif held that none of the articles applied, that the suit was not barred by limitation, and decreed the suit, directing the defendant to pay the sum of Rs. 756 and odd with interest. On appeal by the defendant, the District Judge confirmed the decree and dismissed the Appeal. The defendant preferred this Second Appeal. The Second Appeal was heard by SPENCER and KRISHNAN, JJ., who differed in opinion on the question of limitation and referred the case to a third Judge under section 98 of the Civil Procedure Code in the following judgments:

SPENCER, J.—The respondent brought this suit to enforce the terms of a simple mortgage against a person whom he alleged to be in possession of the proceeds of the property secured to him under his mortgage.

The question to be decided in the Second Appeal is whether the suit is time-barred by reason of Article 11 of the 1st Schedule of the Limitation Act, or otherwise. By Article 11, a person who prefers a claim or makes an objection to the attachment of property attached in execution of a decree must, if an order is passed under the Code of Civil Procedure against him after investigation of his claim, institute a suit under Order XXI, rule 63, within one year to establish the right which he claims to the property in dispute. If the Court declines to investigate the claim on the ground that it has been designedly or unnecessarily

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delayed and dismisses it under the proviso to Order XXI, rule 58, the claimant still has only one year to institute his suit. That is the effect of the Full Bench decision in *Venkataratnam* v. *Ranganayakamma*(1). The respondent's father on 20th and 21st November 1913 put in two petitions in the District Munsif's Court which was executing the appellant's money decree by sale of a tin-shed standing on the propery mortgaged to the petitioner. In one he asked that the sale proceeds of the tin-sheets should be kept in Court deposit, and in the other he asked that the moveable properties belonging to the judgment-debtor should be ordered not to be removed pending further orders of the Court. The Court's order on the first was that the sale had been already concluded and the decree-holder who purchased the articles sold had set off the amount against his decree. The order on the second petition was that the moveables had been already handed over. Both petitions were dismissed.

Now both applications must be taken to have been made on the strength of the respondent's mortgage right, as the existence of the simple mortgage in favour of petitioner's agent is mentioned in each case in the petition or in the accompanying affidavit. But there was no prayer to have the mortgage right investigated, and the Court seems to have considered it unnecessary to investigate it. The orders on the petitions indicate that the Court declined to adjudicate upon the petitioner's claim. There is no doubt that the principal reason that influenced the Court in dismissing the petitions was that it was too late to interfere after the property had ceased to be in *custodia legis*. But this is not the same thing as saying that the Court considered that the claim or objection had been designedly or unnecessarily delayed. It dismissed the petitions as there was no object in keeping them pending. It did not expressly state that they were dismissed for delay under the proviso to Order XXI, rule 58- nor have the orders been understood as passed under that pro, viso in the District Munsif's Court where they were passed.

Seeing that rule 58 lays down that the Court to which a claim or objection is made "shall proceed to investigate" it unless it acts under the proviso, it may be held that it is the duty of the

(1) (1918) I.L.R., 41 Mad., 985 (F.B.).

Court to go into every claim that is not dismissed for intentional or unnecessary delay. That in fact was the view of WALLIS, C.J., in *Ramaswami Chettiar* v. *Mallappa Reddiar*(1). It follows that if a Court does not take either of these two alternative courses the order that it passes is not an order against the claimant and does not cause limitation to run against him.

The decisions in *Munisami Reddi* v. *Arunachala Reddi*(2), *Koyyana Chittemma* v. *Doosy Gavaramma*(3) and *Sarala Subba Rau* v. *Kamsala Timmayya*(4), which laid down that there must be an investigation into the merits of the claim to make the one year's period of limitation applicable were passed under the Code of the Civil Procedure of 1882 and may not be considered as altogether good law under the altered language of the present Code according to the interpretation placed upon it in the Full Bench decision in *Venkataratnam* v. *Ranganayakamma*(5). The decision of Mr. Justice GREAVES in *Panchu Muchi* v. *Bhato Muchi*(6) that Article 11 has no application to a consent order made without investigation of the claim conflicts with the judgment of a Bench of this Court in *Venkatarama Aiyer* v. *Narayana Aiyer*(7) which expressed an opinion that even an order passed with the consent of a claimant might nevertheless be against him.

But the decision in *Ponaka Balarami Reddi* v. *Hazi Mahomed Abdul*(8), *Ayya Pattar* v. *Attapurath Manakkal Karnavan*(9) and *Lakshmi Ammal* v. *Kadiresan Chettiar*(10) are instances of orders being passed which did not distinctly negative claims made under Order XXI, rule 58, and this Court held in those cases that the claimant was not bound to institute a suit under rule 63 to have the order in question set aside. The two former were decisions under the present Code of Civil Procedure and the two latter were subsequent to the Full Bench ruling in *Venkataratnam* v. *Ranganayakamma*(5).

Velu Padayachi v. *Arumugam Pillai*(11) was a plain case of a mortgage claim being dismissed under the proviso to rule 58

(1) (1920) I.L.R., 43 Mad., 760 at p. 772 (F.B.).
(2) (1895) I.L.R., 18 Mad., 265.
(3) (1906) I.L.R., 29 Mad., 225.
(4) (1908) I.L.R., 31 Mad., 5.
(5) (1918) I.L.R., 41 Mad., 985 (F.B.).
(6) (1919) 50 I.C., 649.
(7) (1915) M.W.N., 237.
(8) (1914) 26 M.L.J., 495.
(9) (1919) M.W.N., 805.
(10) (1921) 41 M.L.J., 198.
(11) (1920) 38 M.L.J., 397.

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as being too late owing to the claimant's delay, and the same may be said of *Lakshumanan Chettiar* v. *Parasivan Pillai*(1) which it followed.

I am therefore of opinion that the present suit was not barred by Article 11 of the Limitation Act. It is clear from the Privy Council decision in *Barhamdeo Prasad* v. *Tara Chand*(2), which dismissed an Appeal against a Full Bench decision of the Calcutta High Court in *Berhamdeo Pershad* v. *Tara Chand*(3), that where property which represented the security for a mortgage has been converted into money, the article applicable to a suit upon the mortgage is Article 132 under which the plaintiff has 12 years to follow up the proceeds in the hands of the defendants.

The present suit accordingly is in time and I consider that the Second Appeal should be dismissed with costs. As my learned brother differs from me we refer under section 98 of the Code of Civil Procedure the question of law whether the suit is barred by limitation for decision by a third Judge.

KRISHNAN, J.—The question for decision in this Second Appeal is one of limitation. Plaintiff sues to recover the balance due to him on a simple mortgage bond executed to him by one Lakshmanan Servai, from the defendant on the ground that one of the mortgaged properties, a "tin-shed," was pulled down by him and sold in Court auction and the sale proceeds were taken by him without recognizing the mortgage on it. Defendant had obtained a decree for possession of the land on which the shed had been built by Servai, after removal of the superstructure and also for payment of a certain sum of money. He obtained possession of the land after pulling down the shed and converting it into tin-sheets and attached the latter in execution of the money portion of his decree. He also seems to have obtained permission to bid at the auction and to set off his decree against the purchase money. When the sale was about to take place, the plaintiff's father put in a petition to Court on the day of the sale and the point whether the plaintiff is or is not barred by limitation under Article 11 of the Act depends upon the nature of that petition and of the order thereon.

(1) (1919) 37 M.L.J., 159. (2) (1914) I.L.R., 41 Calc. 654 (P.C.).
(3) (1906) I.L.R., 33 Calc., 92.

The petition is a short one and is as follows :—

"(1) The articles that are going to be sold in this suit belong to this petitioner under hypothecation.

(2) The plaintiff herein has taken the leave of the Court to bid for the properties in auction and he is attempting to appropriate the proceeds himself. If he does so, this petitioner will not be in a position to realize his amount. The leave obtained is not also valid.

I therefore pray that the sale proceeds are not taken by the plaintiff and that the same be held in Court deposit."

The order on it was only passed the next day; it says "sale is concluded already and decree-holder set off the decree amount—Dismissed."

There was some question raised whether the petition itself was not filed after the sale had been concluded, in which case it was argued it should be treated as a nullity. But that does not seem to be so; the opening sentence of the petition shows that the sale had not taken place at the time.

The petition did not cite the provision of law under which it was put in. But it seems to me clear that it was in the nature of a claim to the attached property which was going to be sold outright; it was based upon the plaintiff's mortgage right over it which had not been recognized in the proclamation as the sale was not stated to be subject to any encumbrance. Though the plaintiff's father did not ask the sale to be stopped, or to be held subject to his mortgage right, his petition certainly put in issue his mortgage right as against the decree-holder and if notice of the petition had gone to the latter that right would have been investigated by the Court. Whether on proof of the claim the Court would have acted under Order XXI, rule 62, or allowed a lien to the mortgagee on the sale proceeds as prayed for is, it seems to me, immaterial in considering the nature of the petition filed. I am of opinion that the petition was one under Order XXI, rule 58, there being no other provision under which it could have been filed and when the Court dismissed it, and refused to recognize any rights in the plaintiff as mortgagee on the ground that the petitioner had come too late, it acted under the proviso to rule 58 and its order was one against the plaintiff and he was bound to bring a suit under rule 63 within one year from its date if he

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wanted to assert his mortgage right on the property sold in the decree-holder—auction-purchaser's hands.

We are not concerned with the question whether the order on the petition was right or wrong but only as to whether it was against the claimant or not. It is now settled by the Full Bench in *Venkataratnam* v. *Ranganayakamma*(1) that an order refusing to investigate a claim on the ground of delay is an order against the claimant and Article 11 of the Limitation Act applies. Following that ruling I would hold that the present suit brought about four years after the order on the claim petition is barred by limitation.

Reliance was placed for the respondent on the recent ruling of my learned brother and RAMESAM, J., in *Lakshmi Ammal* v. *Kadiresan Chetiiyar*(2), but that ruling has no application to the present case. That was an order passed by a Court which had no jurisdiction and it was further held by my learned brother that the order in the case was not against the claimant as the sale was actually stopped. Here the sale was completed without any recognition of the claimant's mortgage right and the sale proceeds were allowed to be taken by the decree-holder in spite of his petition to retain them in Court. The two cases are thus quite dissimilar.

With all respect to my learned brother I am inclined to hold that the suit is barred by limitation under Article 11 and I would allow the Second Appeal and dismiss the suit with costs throughout. But as we are differing on the question of law raised in this case I agree to the order proposed by my learned brother.

In pursuance of the Order of Reference the Second Appeal came on for hearing before the learned Chief Justice.

ON REFERENCE—

K. V. Krishnaswami Ayyar for appellant.—The suit is barred by limitation under Article 11 of the Limitation Act, because the suit has been instituted more than one year after the order was passed on the plaintiff's claim

(1) (1918) I.L.R., 41 Mad., 985 (F.B.). (2) (1921) 41 M.L.J., 198.

petitions filed by him in the executing Court. The petitions are in effect claim petitions put in on the footing of mortgage right. Any order passed on those petitions, though not after investigation, falls under Order XXI, rules 58 and 63, Civil Procedure Code, and consequently falls under Article 11 of the Limitation Act. See *Venkataratnam* v. *Ranganayakamma*(1); again Article 29, Limitation Act, will apply, for the plaintiff sues only for compensation for a wrongful act of conversion by sale, and the suit is barred.

K. Bashyam for respondent was not called upon.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This Second Appeal is referred to me by reason of a difference of opinion between SPENCER and KRISHNAN, JJ., the referring Bench. The question referred is whether the suit is barred by limitation.

The first article of the Schedule to the Limitation Act which is relied upon is Article 11. The effect of that article is that, where an order is made under the Civil Procedure Code, 1908, on a claim preferred, or objection made, to the attachment of property in execution of a decree, the limitation is one year from the date of the order. The facts of this case are these: Property which was mortgaged to the present plaintiff was seized in execution by the present defendant and brought to sale. The sale was advertised to take place on the 20th of November 1913. On that day an application was filed on behalf of the plaintiff asking that the proceeds of the sale which was about to take place should be held in Court, because he claimed they belonged to him under hypothecation. I have very considerable doubt whether, in fact, that was filed before or after the actual sale and I am rather inclined to the view that it was filed after

(1) (1918) I L.R., 41 Mad., 985 (F.B.).

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the sale, because when the matter came before the Court next day the Court said that the sale was already concluded and the decree-holder had got his amount and dismissed the application. It is difficult to understand how the Court could have done that if the petition was in time, and I am told that under Order XXI it is the recognized practice that you are too late altogether if you take your proceeding after the sale has taken place. If the petition was out of time it is quite easy to understand the order of the District Munsif. Otherwise it is very difficult to understand how the District Munsif came to make that order. But however that may be, one thing, to my mind, is quite clear that the District Munsif dismissed that application not on the ground of delay or anything of that kind, but on the ground, that he had no jurisdiction to hear it. He says : " The sale has taken place, I cannot hear this "—that is how I interpret the order that he has made, and it is quite clear that he did not hear it. He did not consider the question whether or not there was a mortgage or whether or not the present plaintiff was entitled to the property or the proceeds of the sale. It was never considered at all. That being so, in my judgment, there is no order on a claim preferred within the meaning of the Limitation Act and no order within the words of rule 63, Order XXI, on a claim or objection preferred against the present plaintiff. Rightly or wrongly, in my view, the District Munsif simply said, "I will not hear you." It is argued, however, that, notwithstanding that, I am bound by the decision of the Full Bench of this Court in *Venkataratnam* v. *Ranganayakamma*(1), to hold that this was an order coming within the rules and Article 11 of the Limitation Act. I do not

(1) (1918) I.L.R., 41 Mad., 985 (F.B.).

read that case to decide anything of the kind. What that case did was to take an order which was made by the District Munsif and referred to as Exhibit V which I have sent for and examined, and treat that order as a refusal of the application on the ground that there had been *laches* or delay which brought the matter under the proviso to Order XXI, rule 58, which is in these terms:

"Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed,"

and the Full Bench held, and held only, that where a decision is given on the ground that the matter has been designedly or unnecessarily delayed, that is a decision and an order against the applicant under Order XXI, rule 63, to which Article 11 applies. I think this is quite clear from the judgment of the learned Chief Justice and SESHAGIRI AYYAR, J. The latter says

"The language of Order XXI, rule 63, leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule."

Assuming that to be rightly decided, it does not affect this case, because there is no order, in my judgment, in this case negativing the rights set up by the claimant. It follows that I agree with SPENCER, J., that this suit is not barred under Article 11 of the Limitation Act.

Another point was taken and I have held that it is covered by the terms of the reference though I confess I have very grave doubt on that subject because SPENCER, J., decided it one way and KRISHNAN, J., said nothing about it at all; but I accept what I am told, that he, having said nothing about it, might have been going to differ about it, and it was unnecessary for his decision to say anything about it at all, in the view he took of the case on the other point, and that on its being

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pointed out to the Court, the Court answered, "Well, your point is covered by the Order of Reference." Therefore, I think it is right that I should deal with the matter and save the parties from further expense and further hearing. On this matter too I agree with SPENCER, J. I think the matter is really concluded by the decision of the Privy Council in *Barhamdeo Prasad* v. *Tara Chand*(1). It would indeed be a singular thing if a person in possession of mortgaged property, by going through the form of a sale by Court auction to himself, got the mortgaged property in fact, but also by reason of the sale got the money, and were enabled to say when attacked by the mortgagee,

> "I have not got the mortgaged property at all; I have got some money and the article barring suits for money had and received is the article that applies; and I escape from liability and can retain both the money and the property."

But the learned vakil argues,

> "you cannot sue for the money but only for the property; and if you sue for the property, you cannot succeed in this action but you must bring another."

In *Barhamdeo Prasad* v. *Tara Chand*(1), it was held that proceeds of mortgaged property for the purpose of the Limitation Act are to be treated as within the meaning of Article 132 of the Schedule to the Limitation Act. An action to enforce payment of money charged upon immoveable property, says the Privy Council, is within the meaning of Article 132. This is really an action to enforce payment of money charged upon the property. The money was charged on the property. The defendant has got the property and I cannot see how by himself converting the property into money he could bring into play articles of the Limitation Act other than

(1) (1914) I.L.R., 41 Calc., 654 (P.C.).

those which would apply if he had not co verted it into money.

I, therefore, anwser the question of the referring Bench by saying that the suit is not barred by limitation. I, therefore, hold that this Appeal must be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

MOHIDEEN PAKKIRI MARAKKAYAR (ACCUSED), PETITIONER.* 1922, July 17.

Income-Tax Act (VII of 1918), ss. 40, 17, 21 (3)—Indian Penal Code (XLV of 1860), sec. 177—False verification—Presentation of petition—Jurisdiction of Court, whether where verification made or petition presented.

A person making a false verification in a statement under section 17 or 21 (3) of the Income-tax Act, 1918, can legally be tried under section 40 of the Act only by a Court having jurisdiction over the place where the verification was made and not by a Court having jurisdiction over the place where the petition was presented.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of N. KELU NAYAR, Sub-Divisional First-Class Magistrate of Devakottai, in Calendar Case No. 79 of 1921.

The facts are set out in the judgment.

C. S. Venkata Achariyar and *M. S. Ramanuja Ayyangar* for petitioner.

Public Prosecutor for the Crown.

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* Criminal Revision Case No. 12 of 1922.