ANTHAYA v. MANJAIYA.

of the property attached and it makes no difference in our opinion as to the effect of the attachment. When the attachment is taken as revived by the decree in the subsequent suit we must take it the order of release, which is as much a provisional order in the case of debt as in other cases is cancelled and any payment made under that order of release becomes void as section 64 comes into play. We must therefore allow plaintiff's second objection and hold that the two payments made in this case are not valid against him on that ground.

The decree of the Subordinate Judge is therefore right. The Second Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1921, September 1.

A. T. K. P. L. M. MUTHIAH CHETTY (PLAINTIFF), APPELLANT,

v.

PALANIAPPA CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 62 and 63—Limitation Act (IX of 1908), art. 11—Attachment before judgment—Order for attachment passed, no actual attachment made—Claim petition by mortgagee from judgment-debtor—Petition dismissed on merits—Subsequent suit by mortgagee to establish his right withdrawn after obtaining leave of Court to file another suit—Later suit for sale on mortgage more than one year after order on claim petition—Suit, whether barred by limitation—Claim petition in the absence of attachment, whether competent—Acquiescence of parties—Jurisdiction of Court—Effect of order.

---

* Appeal Suit No. 145 of 1917.

A mortgagee from a judgment-debtor filed a claim petition in respect of his hypotheca under Order XXI, rule 62, Civil Procedure Code, in execution proceedings in a suit in which the plaintiff had obtained a conditional order for attachment before judgment, but no attachment had ever been actually made. On the claim petition being dismissed on the merits, the mortgagee filed a suit to establish his right but withdrew it after obtaining leave of the Court to file another suit. More than a year after the order on his claim petition, he instituted a suit for sale on his mortgage against the auction purchasers in the execution sale in the previous suit and the mortgagors, who pleaded the bar of limitation under article 11 of the Limitation Act. It appeared that neither the Court nor the parties to the claim petition were aware of the absence of attachment in the previous suit.

Held, that the mortgagee having filed the claim petition as if the properties had been attached, and the decree-holders having acquiesced in the procedure adopted by him, the Court had jurisdiction to deal with his claim petition as one made under Order XXI, rule 62, Civil Procedure Code, and the order passed thereon was subject to the incidents specified in Order XXI, rule 63 of the Code;

and that the suit for sale fell under article 11 of the Limitation Act, and was barred by limitation.

APPEAL against the decree of K. A. KANNAN, Temporary Subordinate Judge of Sivaganga, in Original Suit No. 91 of 1915.

The plaintiff sued to recover the amount due on a mortgage bond (Exhibit E), dated 19th March 1910, executed by the widows of two partners, Muthu and Raman Chetty, as guardians of first to fourth defendants, their minor sons. Defendants 5 to 10 were some of the creditors of the deceased partners, who had sued and eventually obtained a money decree for about Rs. 30,000, interest and costs, and they had obtained at an early stage of their suit, on 14th March 1910, an order for attachment before judgment but no attachment was ever actually made in pursuance of the order. The mortgage to the plaintiff was executed, after the order

MUTHIAH CHETTY v. PALANIAPPA CHETTY.

for conditional attachment, for a consideration of Rs. 33,200, out of which Rs. 18,900 was due to himself and the balance was to be paid to four creditors of the firm. The defendants pleaded that the mortgage was a sham and fraudulent transaction entered into between the mortgagors and the plaintiff (a close relation) to defeat and defraud the other creditors (defendants 5 to 10 herein) of the firm. Subsequent to the attachment before judgment in the creditors' suit, the decree-holders therein obtained the issue of a sale proclamation. The mortgagee (plaintiff) preferred a claim petition, dated 20th March 1912, which was disallowed on 15th April 1912; and the sale was held and delivery made on 2nd January 1913. The mortgagee had brought a suit (Original Suit No. 56 of 1913) for a declaration that the sale should be subject to his mortgage right. He, however, withdrew that suit, having obtained leave of the Court to sue again, and he then brought the present suit for sale on his mortgage on 7th October 1915. The defendants pleaded on these facts that the suit was barred under article 11, of the Limitation Act. The Subordinate Judge, dismissed the suit, holding that the mortgage-bond was a nominal transaction unsupported by consideration and was brought about to defraud the creditors of the firm. The plaintiff preferred this Appeal.

C. S. Venkata Achariyar for appellant.—The view of the Lower Court that the mortgage was unsupported by consideration, was a sham and fraudulent transaction, is wholly unsupported by evidence. There was clear intention to create a mortgage: even putting the onus on the plaintiff, he has amply discharged it, and the rule of fraudulent preference does not apply apart from the Insolvency law. Section 53, Transfer of Property Act, does not prohibit preference of some creditors to others:

see *Musahar Sahu* v. *Lala Hakim Lal*(1). The suit is not barred by limitation; article 11, Limitation Act, does not apply, as there was in fact no attachment, and the proceedings under Order XXI, rule 62, are wholly without jurisdiction.

T. Ranga Achariyar and *E. Duraiswami Ayyar* for respondents.—There are several suspicious circumstances in the execution of the mortgage. It is at the least fraudulent under section 53 of the Transfer of Property Act. In any event the suit is barred by limitation under article 11 of the Limitation Act. The plaintiff is estopped from questioning the jurisdiction of the Court to entertain the claim proceedings, though there was no attachment in the case. It is not a case of inherent want of jurisdiction which cannot be cured by consent or acquiescence of parties. The order was passed under the Code. On the admission of parties as to the factum of attachment, the Court entertained the claim and passed the order. No fraud is alleged in the case. On a judicially assumed attachment the Court acted; and the Court had competent jurisdiction. The sale is valid; want of attachment is only an irregularity.

C. S. Venkata Achariyar in reply.—Order XXI, rules 58 to 63, Civil Procedure Code, apply only to cases of properties attached. Article 11, Limitation Act, applies only to cases falling under Order XXI, rule 63 of the Code. The Court has no jurisdiction to entertain a claim petition, where there is no attachment. The fact that both parties were under a mistake that there was an attachment does not give jurisdiction to the Court to proceed under Order XXI, rule 62: see *Joy Prokash Singh* v. *Abhoy Kumar Chund*(2), *Bhar* v. *Raghunath*(3),

(1) (1916) I.L.R., 43 Calc., 521 (P.C.).
(2) (1897) 1 C.W.N., 701. (3) (1906) I.L.R., 30 Bom., 229 at 235.

MUTHIAH CHETTY v. PALANIAPPA CHETTY.

Nusserwanjee Pestonjee v. *Meer Mynoodeen Khan Wullud Sudroodeen Khan Bhadur*(1), *Sarjugsharan Lal* v. *Dukhit Mahato*(2), *Chintam Reddi Sanyasi* v. *Sri Rajasagi Appala Narasimha Raja Garu*(3) and Maxwell's Interpretation of Statutes, page 628. No suit to set aside the sale is necessary in this case. If there is no attachment, there is no claim enforceable under the attachment under Order XXI, rule 63, Civil Procedure Code. Just as no suit to establish the right under a claim petition is necessary, where an attachment has been set aside at the instance of another claimant or the decree-holder is paid otherwise, so also if there is no attachment there is no claim enforceable under the attachment. Where there is no jurisdiction in a Court in a matter, the mere fact that it was admitted by a party will not confer jurisdiction or estop him: see *Tukaram* v. *Hari*(4), *Jungheim, Hopkins & Co.* v. *Foukelmann*(5). Section 115, Indian Evidence Act, does not apply. Article 11, Limitation Act, does not apply as it refers to attached property. Even if the order is binding on the plaintiff and should be set aside, article 11, Limitation Act, does not apply; Order XXI, rule 63, does not specify any particular period of limitation; article 120 of the Act, giving six years, applies. The order of withdrawal with leave to sue again gives to the plaintiff a right of suit on his mortgage. The order is binding on the other side and they did not appeal against that order: see *Gollamapalli Subbayya* v. *Shankara Venkataratnam*(6).

OLDFIELD, J.

OLDFIELD, J.—On the merits the question in this Appeal is whether Exhibit E, a hypothecation bond in

(1) (1897) 6 M.I.A., 134.
(2) (1913) 17 C.W.N., 496.
(3) (1917) M.W.N., 851.
(4) (1904) I.L.R., 28 Bom., 601 (F.B.).
(5) [1909] 2 K.B., 948.
(6) (1917) M.W.N., 851.

favour of plaintiff-appellant by the widows of two partners, Muthu and Raman Chetty, as guardians of first to fourth defendants, their minor sons, is without consideration and merely colourable or was executed in the words of section 53, Transfer of Property Act, with intent to defeat or delay creditors.

The undisputed circumstances are that Exhibit E hypothecates for its full value all the immoveable property of first to fourth defendants; that plaintiff is the brother of one executant, the widow of Muthiah Chetty; and that of the four other creditors of the firm, whose debts plaintiff was to pay as part of the consideration, one is a dayadi of plaintiff and a cousin of the widow of Raman Chetty and another is plaintiff's partner and nephew. Plaintiff had been an agent of the firm and knew that it had been declining in prosperity since the death of Raman Chetty in 1909. Exhibit E moreover was executed just after fifth to fifteenth defendants, the contesting respondents, other creditors of the firm, who eventually obtained a decree against it for a little over Rs. 30,000, interest, and costs had at an earlier stage in their suit obtained a conditional order of attachment before judgment, of which plaintiff and the creditors may be supposed to have been aware, although the attachment was never actually made and, it may be added, is not relied on as invalidating this alienation. On these facts there is no doubt that the lower Court was justified in imposing the burden of proof of the substantial character and good faith of Exhibit E on plaintiff.

That, however, did not entitle the lower Court to require him, as it has done in respect of the greater part of the consideration and on other parts of the case, to discharge that burden with unreasonable strictness or to criticise his attempts to do so perversely.

MUTHIAH CHETTY v. PALANIAPPA CHETTY.

OLDFIELD, J.

[His Lordship then dealt with the evidence and concluded as follows:]

The conclusion must therefore be that consideration passed for Exhibit E except this small item of Rs. 1,800; and fifth to tenth defendants' case, that the document was a mere pretence and that there was no intention to create rights by means of it, must fail.

To turn to the application of section 53, Transfer of Property Act, there is no doubt no definite evidence of the existence of any creditor besides fifth to tenth defendants and those who have been paid by Exhibit E. The suspicions of the lower Court, based on the dates of the purchase of stamp papers and the 12 per cent rate of interest, which it thought oppressive, but which is in fact high but not exceptional, have not been shown to be well founded. We have then no doubt a transaction which exhausted the executants' assets for the sole benefit of some only of their creditors, including, it is true, three close relatives of whom one brought it about at a time of pressure on the estate. But, there being no question of insolvency, that is not sufficient. For, to follow the latest authority, *Musahar Sahu* v. *Lala Hakim Lal*(1), although Exhibit E prefers some creditors to others, it is not an instrument which removes property from the creditors to the benefit of the debtor and, after the foregoing findings, there is no ground for impeaching it in the fact that the fifth to tenth defendants, creditors, were losers by payment being made to a preferred creditor, the plaintiff. On the merits, therefore, plaintiff is entitled to succeed.

Fifth to tenth defendants have, however, resisted his claim on another ground. Reference has already been made to the fact that, although a conditional attachment

(1) (1916) I.L.R., 43 Calc., 521 (P.C.).

before judgment was ordered, none was actually made. This is said to have been due to delay in payment of fees. But neither plaintiff nor fifth to tenth defendants were, so far as appears, aware of the fact; and the latter proceeded, as though there had been an attachment, to obtain issue of a sale proclamation whilst the former, in Exhibit VI, claimed under Order XXI, rule 63, Civil Procedure Code, a declaration that the sale should be subject to Exhibit E. Thereon, without reference by the Court or the parties to the absence of an attachment, plaintiff's claim was disallowed under Exhibit VI (*a*) on 15th April 1912. A sale was held and delivery was given, as Exhibit VII shows, on 2nd January 1913. As to plaintiff's next step, the only information before us is given by his present plaint, that he brought Original Suit No. 56 of 1913 for a declaration that the sale should be subject to his mortgage right. Whether this suit was brought within one year of Exhibit VI (*a*) and whether plaintiff would have been advised to ask for leave to amend and include a prayer for other reliefs in it is not clear. But in any case he withdrew it, obtaining leave in Exhibit AA to sue again, and he then brought the present suit for recovery by sale on his mortgage on 7th October 1915. Fifth to tenth defendants contend that as this suit is brought one year after Exhibit VI (*a*) it is barred under article 11, schedule 1, Limitation Act, the rejection of the claim having become final under Order XXI, rule 63.

The suggestion that Exhibit AA is a recognition, binding on the lower or this Court of plaintiff's right to bring his present suit can be dismissed shortly, because such recognition is not entailed by the wording of that order and would not have been within the power of the Court which passed it. So also the lower Court's ground of decision that with reference to *Bhiku* v.

MUTHIAH CHETTY v. PALANIAPPA CHETTY. — OLDFIELD, J.

Shujat Ali(1) and *Ganesh* v. *Damoo*(2), article 11 is not applicable to plaintiff's suit, brought to recover a debt on the security of the property, not to establish any right in it. For in the first of these cases the question was not of an ordinary claim petition, based like Exhibit VI on a mortgage, but of a petition to remove obstruction to delivery under section 335 of the Code then in force, corresponding with Order XXI, rules 100, 101; and there was nothing to bar the subsequent suit so far as it related to a different relief, the recovery of the sums due, which was asked for in the alternative and which the Court considered. The second authority relied on proceeded on the grounds, first, that the order in question was not on a claim, but was passed under section 287, corresponding with Order XXI, rule 66; and, next, that an order refusing to recognize a mortgage and continuing an attachment free from it is not one which must be displaced by the suit contemplated in article 11. But the latter conclusion is opposed to *Nemaganda* v. *Paresha*(3), which with all deference is not susceptible of the explanation proposed in the decision under consideration; and it is impossible to understand how an order disallowing *in toto* the mortgage right claimed is not as essentially an adverse order of the kind contemplated in Order XXI, rule 63, as one continuing the attachment subject to the mortgage instead of releasing it altogether.

The more serious argument for plaintiff is however that, as there was in fact no attachment, the claim proceedings were founded on a mistake of the Court and both parties and therefore had no legal effect or resulted at most in an order which may have been a

(1) (1902) I.L.R., 29 Calc., 25. (2) (1916) 18 Bom. L.R., 782.
(3) (1898) I.L.R., 22 Bom., 640.

nullity, since it was not one contemplated by the Code, and was in any case not subject to Order XXI, rule 63 or article 11; and it is suggested further that, as plaintiff was induced by fifth to tenth defendants' misrepresentation, even if it was unintentional, to embark on this course of procedure, the latter cannot benefit by the prejudice which results from their own conduct. This suggestion, however, is untenable. Plaintiff, no doubt, may have inferred from the sale proclamation issued at fifth to tenth defendants' instance, which he mentioned in Exhibit VI, that there had been an attachment in the ordinary course. But there is no question of fraud on their part and, when it was open to him to verify his inference by enquiry and he failed to do so, the fault was his own. In consequence of this failure he thought himself entitled to choose the cheap and speedy remedy afforded by the claim procedure in preference to the ordinary suit, subject to no special limitation, by which alone he could otherwise have proceeded; and he presumably had regard to his own advantage in his choice. Fifth to tenth defendants' subsequent omission to plead that there was no attachment, was not an invitation to plaintiff to continue in the course he was taking, but merely an acquiescence in his doing so, by the consequences of which they would equally with him have been bound if the result on the merits had been against them. The fact is simply that, plaintiff having submitted his claim to the Court in circumstances which did not strictly authorize his doing so, and fifth to tenth defendants having waived an objection on which they might have relied, both gave an implied consent to the investigation proceeding.

The principle applicable to such cases was stated generally by BOWEN, L.J., in *Ex parte Pratt*(1) as being

(1) (1884) 12 Q.B.D., 334.

MUTHIAH CHETTY v. PALANIAPPA CHETTY.

OLDFIELD, J.

that no one has a right so to conduct himself before a tribunal, as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him to turn round and say "you have no jurisdiction." This no doubt is subject to exceptions, those with which we are at present concerned being, to adopt the description of them in *Pisani* v. *Attorney-General for Gibraltar*(1), that departures from ordinary practice by consent will not nullify the proceedings or divorce them from the ordinary incidents of procedure (in that case a right of appeal) "unless there is an attempt to give the Court a jurisdiction, which it does not possess, or something occurs, which is such a violent strain on its procedure that it puts it entirely out of its course." It was held accordingly in *Toronto Railway* v. *Toronto Corporation*(2), and *Deno Nath Batabyal* v. *Nilhor Chunder Sett*(3), that the parties' consent did not enable the Court to deal with issues outside the scope of its statutory powers; and in *Ex parte Pratt*(4) already referred to, *Ex parte May*(5) and *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar*(6), that, the opposite case, where jurisdiction over the subject matter exists, requiring only to be invoked in the right way, the party who invited or allowed the Court to exercise it in the wrong way cannot afterwards challenge the legality of the proceedings due to his own invitation or neglect. One instance of entire diversion of the Court's procedure from its course may be given, because it is significant in the present connexion. In *Joy Prokash Singh* v. *Abhoy Kumar Chund*(7), claim proceedings without a preceding attachment were treated as a nullity, not on any ground such

(1) (1874) L.R., 5 P.C., 516.
(2) [1904] A.C., 809.
(3) (1900) 4 C.W.N., 470.
(4) (1884) 12 Q.B.D., 334.
(5) (1884) 12 Q.B.D., 497.
(6) (1887) I.L.R., 11 Bom., 153.
(7) (1897) 1 C.W.N., 701.

as plaintiff here relies on, but because the decree under execution was for sale on a mortgage and recognition of a claim would *pro tanto* have deprived the mortgage decree of its effect otherwise than in the regular suit contemplated by the law.

It is clear that plaintiff's resort to the claim procedure in the present case is within neither of these classes of exceptions. For it did not result in any entire diversion of the course of procedure but only in the selection of one of two procedures which were available instead of the other, and there has been no attempt to give the Court a jurisdiction which it did not possess, since its general power to deal with claims is not disputed. It is urged on the latter point that reference to its general power is an insufficient ground of decision because that power is not general or inherent, but derived only from statutory provisions and must be exercised only in accordance with them; that is, in the event specified in Order XXI, rule 58 (1), of an attachment having been made. But a similar objection was, it is to be observed, available in *Ex parte Pratt*(1), *Ex parte May*(2) and *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar*(3), already referred to, and the fact that statutory powers were in question was not considered. In *Angan Lal* v. *Gudaramal*(4), an order appropriate to a claim petition was no doubt set aside on the ground, among others, that there had been no attachment. But the facts there were peculiar, since there had been no submission by both parties to the Court following the claim procedure and the Court entered on it in disregard of the petitioners' averments. In fact, cases of mistake and acquiescence such as plaintiff's must be rare, since the

(1) (1884) 12 Q.B.D., 334.
(2) (1884) 12 Q.B.D., 497.
(3) (1887) I.L.R., 11 Bom., 153.
(4) (1888) I.L.R., 10 All., 479.

MUTHIAH CHETTY v. PALANIAPPA CHETTY.

OLDFIELD, J.

absence of an attachment will seldom be overlooked in the first instance or when evidence is adduced under rule 59. But in dealing with them it must be remembered that in accordance with *Sheodhyan* v. *Bholanath*(1) and *Sivakolundu Pillai* v. *Ganapathy Iyer*(2), the absence of an attachment will not make a Court sale illegal as between the parties to it and persons like plaintiff whose interest is affected by it; it is merely an irregularity, on account of which the sale can under Order XXI, rule 90, on proof of substantial injury be set aside on their application; and the reason is, as the former decision explains, that the object of attachment is only to bring the property under the control of the Court in order to prevent its alienation, the actual proclamation being the notice to the public that the sale is to take place. This is so in spite of the explicit reference to attachment in Order XXI, rule 64; and it is not necessary or possible to regard attachment, where it is similarly referred to in Order XXI, rule 58, as essential to the jurisdiction of the Court. For there also the existence or absence of a previous prohibition against alienation by the judgment-debtor cannot affect the Court's power to deal with the claims of those who like plaintiff, have notice from the proclamation that their rights are in peril; and accordingly, whether or no there has been an attachment, they are, if they submit the merits of their claims to the Court for investigation, equally persons against whom an order is passed, which under Order XXI, rule 63, will become final, if it is not displaced.

In these circumstances the conclusion must be that article 11, schedule 1, Limitation Act and Order XXI,

(1) (1899) I.L.R., 21 All., 311. (2) (1917) M.W.N., 89.

rule 63, apply. The Appeal must therefore be dismissed with costs of tenth to thirteenth respondents.

MUTHIAH CHETTY v. PALANIAPPA CHETTY.

RAMESAM, J.—I agree and have nothing to add.

RAMESAM, J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

P. S. NARAYANA AYYAR (THIRD DEFENDANT), APPELLANT,

v.

BIYARI BIVI AND OTHERS (PLAINTIFF AND FIRST AND SECOND DEFENDANTS), RESPONDENTS.*

1921, September 8.

Muhammadan Law—Dower—Wife in possession of her husband's property during his life-time—Undivorced wife's right to lien during her husband's life-time—Civil Procedure Code (Act V of 1908), sec. 64—Attachment of judgment-debtor's property—Subsequent decree on award—Submission to arbitration by judgment-debtor and another—Decree on award affecting attached property—Transfer under decree whether void under sec. 64, Civil Procedure Code—Private transfer.

Under the Muhammadan Law, a wife, who has not been divorced from her husband, has, during his life-time, no lien for her unpaid dower over his property in her possession.

Abi Dhunimsa Bibi v. *Muhammad Fathi Uddin*, (1918) I.L.R., 41 Mad., 1026, explained.

Where, subsequent to an attachment of property of a judgment-debtor, a decree was passed in accordance with an award made on a reference to arbitration submitted to by the judgment-debtor and another person, and it appeared that such submission, award and the decree thereon were not a collusive proceeding resorted to for investing a private arrangement with the appearance of a public adjudication,

---

* Appeal No. 184 of 1920.