

SUNDARA  
RAMANUJAM  
v.  
SIVALINGAM.  
—  
VENKATA-  
SUBBA RAO, J.

The right to possession claimed in the second suit must be deemed to be the right based upon the conveyance and not arising out of the contract to sell. This is, in my view, the true principle and, judged in the light of it, the decisions are easily reconcilable, and the view I am taking is not opposed to the principle underlying these various decisions.

In the result I agree with the order proposed by my learned brother.

N.R.

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## APPELLATE CIVIL.

*Before Mr. Justice Odgers and Mr. Justice  
Hughes.*

ARSAMMA (2ND DEFENDENT), APPELLANT,

v.

MOIDIN KUNHI BEARI AND ANOTHER  
(PLAINTIFFS), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58 and 63—  
Claim Petition—Dismissal for delay—Order stating that the  
sale in execution will not affect claimant's rights, if any—Effect  
of the statement—No suit by claimant to establish his title—  
Suit by auction purchaser to eject claimant—Bar by the  
order—Adverse possession of claimant—Order, Effect of, on  
possession.*

Where a claim petition was dismissed without investigation on the ground of delay but the order of dismissal added that the sale in execution would not affect the rights, if any, of the petitioner, and the latter did not file a suit within one year to establish her title,

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\* Second Appeal No. 267 of 1921.

*Held*, in a suit by the auction-purchaser, that the claimant ought to have sued, within one year of the order on her claim petition, to establish her right to the property, and as she did not bring such a suit, the order had become conclusive against her. *Venkataratnam v. Rangayakamma*, (1918) I.L.R., 41, Mad., 985 (F.B.), applied.

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*Held further*, that the rejection of the claim petition, which was not contested by suit, estopped the claimant from pleading adverse possession at the date of the order in a suit brought to eject the claimant.

SECOND APPEAL against the decree of A. NARAYANA NAMBIYAR, Acting District Judge of South Kanara, in A.S. No. 148 of 1920, preferred against the decree of A. V. GOPALA RAO, District Munsif of Mangalore, in Original Suit No. 399 of 1918 on the file of the District Munsif's Court at Mangalore.

The material facts appear from the judgment.

*B. Sitarama Rao* for appellant.

*K. Yegnanarayana Adiga* for respondent.

### JUDGMENT.

HUGHES, J.—The point to be decided now is whether the question of second defendant's title has been concluded against her by reason of the order passed in R.E.A. No. 243 of 1910 in R.E.P. No. 375 of 1910.

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The suit property was attached in R.E.P. No. 375 of 1910 and the second defendant filed a claim petition (R.E.A. No. 243 of 1910) claiming right to the property. The order passed on that petition is Exhibit E and runs as follows :—

“There is no time to investigate into this claim. This petition is dismissed without investigation on the ground of delay. I may add that the sale will not affect the rights, if any, of this petitioner.”

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The plaintiff's contention is that as the second defendant did not file a suit within a year from the date of this order her right to the property is barred.

Now if the order had been merely, "This petition is dismissed without investigation on the ground of delay," the matter would have been quite simple. It would be covered exactly by the Full Bench case, *Venkataram v. Ranganayakamma*(1), where it was held that such an order was an order rejecting the claim, to which the provisions of Order XXI, Rule 63, will apply. The question is what is the effect of the added sentence "The sale will not affect the rights, if any, of this petitioner." Can it be said that when the order expressly declared that the sale would not affect the right of the petitioner, the order was one passed against the party?

The answer to this is, I think, to be found in the Full Bench case referred to. In that case the order that was under consideration was as follows:—

"As this petition was filed late, this claim is ordered to be notified to the intending bidders."

It was held that the order amounted to a rejection of the claim on the ground that it was filed too late. It was pointed out in the judgment of SESHAGIRI AYYAR, J., that

"When a claim is preferred, the usual prayer is that the attachment should be raised as the property does not belong to the judgment-debtor but belongs to the claimant. On the presentation of such a petition if the order is not that the property be released from attachment, it must be taken to be an order against the claimant,"

and further

"His right to raise the attachment must be deemed to have been negatived when the property was ordered to be sold without releasing it from attachment. Therefore an order on a

(1) (1918) I.L.R., 41 Mad., 385.

claim petition which expresses no final judgment upon the right put forward but simply directs the sale after notifying the claim is an order against the claimant."

In the present case the fact that the order wrongly stated that the petitioner's rights would not be affected does not help her. She asked for a release of the property from attachment and she sought to establish her right. She did not succeed. I think therefore, following the judgment of the Full Bench case as quoted *supra*, it must be held that the order was against her and it was her duty to proceed to assert her title by suit within one year.

The case of *Lakshmi Ammal v. Kadiresan Chettiar*(1) has been referred to, but that is not in point because in that case the attachment had terminated and the District Munsif had no authority to dispose of the petition of claim.

One other case has been quoted, the case of *Saharabi v. Ali*(2), but in that case the claimant's petition had not been dismissed and his claim to an undefined share in the property attached had not been negatived. In the present case the petition was dismissed and though it may be argued that the rider attached to the dismissal, to the effect that the order would not affect the claimant's right, means that that was not negatived, it is plain the right was not established and in the light of the observations in the Full Bench case the order was one against the party. I think therefore the District Judge was right in the view taken by him of the effect of the order on the claim petition. It has then been urged that the second defendant can still rely upon adverse possession, but the case of *Velayuthan v. Lakshmana*(3), is an authority for the position that the rejection of a claim, if not contested by suit, will estop

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(1) (1921) 41 M.L.J., 198

(2) (1925) 44 M.L.J., 141.

(3) (1885) I.L.R., 8 Mad., 506.

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the claimant from pleading adverse possession at the date of the order in a suit brought to eject him. Since the date of the order, the possession has been insufficient to establish a title.

The decision of the District Judge is right and the appeal must be dismissed with costs.

ODGERS, J. ODGERS, J.—I agree.

K.B.

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### APPELLATE CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.U., Chief Justice,  
and Mr. Justice Krishnan.*

1923,  
August 20.

ANGLO-PERSIAN OIL COMPANY, LIMITED, MADRAS  
(DEFENDANTS), APPELLANTS,

v.

P. S. PANCHAPAKESHA AIYAR  
(PLAINTIFF), RESPONDENT.\*

*Sec. 19—Indian Arbitration Act (IX of 1899)—Stay of legal proceedings—Considerations for Court before staying or refusing to stay—Discretion of Court and onus of proof.*

The mere fact that the defendant who was threatened with legal proceedings for breach of a contract containing an arbitration clause did not, before the institution of the suit, insist on the arbitration clause but relied on it for the first time only in his written statement is no ground for not granting his application for stay of proceedings under section 20 of the Arbitration Act (IX of 1899). Under the section, the onus is on the plaintiff to show why the application for stay should not be granted and why the matter should not be referred to arbitration. It is a discretionary matter with the Court to refuse to stay. Stay is generally refused where there are serious allegations of fraud or a novel or difficult point of law likely to be considered by the arbitrators fit to be referred to the Court. If the matter is a commercial one fit for decision of commercial men as arbitrators,

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\* Original Side Appeal No. 59 of 1923.