plaint or the report unless there was an implied order of discharge. This appears to be the opinion expressed in the decision of the Full Bench of the Madras High Court to which I have referred, and I am prepared to follow that, as it is undoubtedly in consonance with the trend of the other decisions that have been referred to in this case, and is not really inconsistent with the decision of the Calcutta Bench in *Abdul Hakim* v. *Bazruk Ali* (1).

In my opinion, therefore, there was a case before the Magistrate under section 307 and although he has not passed any orders in regard to that part of the case, it must be held that an order of discharge is implied. The Sessions Judge therefore had jurisdiction under section 437 of the Criminal Procedure Code to direct that the applicants should be committed for trial. As regards the merits of the case, it need only be said that the Magistrate apparently considered that no charge should be drawn and the Sessions Judge considered that there had been a miscarriage of justice and that the Magistrate in disposing of the case under section 307 himself was clutching at jurisdiction with which he was not invested. There is no reason, therefore, to interfere and I dismiss the application.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

HABIB ULLAH AND ANOTHER (PLAINTIFFS) *v.* MAHMOOD AND OTHERS (DEFENDANTS)* 1933 *November*, 9

Civil Procedure Code, order XXI, rule 63—Attachment in execution—Claimant's objection to attachment dismissed by execution court—Attachment withdrawn on default of decree-holder within one year—Order against claimant vacated thereby—Unnecessary to bring suit to avoid the order—Such

*First Appeal No. 140 of 1930, from a decree of Raj Rajeshwar Sahai, First Subordinate Judge of Cawnpore, dated the 31st of January, 1930.

(1) (1917) 22 C.W.N., 117.

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order not conclusive in case of a fresh objection upon a fresh attachment—Stare decisis.

Where a claimant's objection to attachment, under order XXI, rule 58 of the Civil Procedure Code, is dismissed by the execution court, and subsequently the attachment ceases to exist within the period of one year from the dismissal of the objection, it is no longer incumbent upon the claimant to file the suit, contemplated by order XXI, rule 63, for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case; and the order in the claim case ceases to be conclusive as between the decree-holder and his representative on the one hand, and the objector and his representative on the other, when the property is subsequently attached by the same decree-holder or his successor in title.

Although the language of order XXI, rule 63 is ambiguous, and the word "conclusive" can have several meanings, yet on the principle of *stare decisis* the above interpretation should be maintained.

Quaere—Whether, in case the order is passed in favour of the claimant and against the decree-holder, releasing the property from attachment, and the decree-holder does not file a suit and voluntarily gets his application for execution dismissed, he would be entitled to re-agitate the question on filing a fresh application for execution and again attaching the same property.

The Division Bench hearing this case referred a question to a Full Bench by the following referring order:—

MUKERJI and BENNET, JJ.:—This is a first appeal brought at the instance of the plaintiffs. The facts briefly are these. One Ram Chandra obtained a decree on the original side of the Calcutta High Court, being decree No. 705 of 1926, on the 10th of November, 1926. The decree was for money, and against one Nanhen Mistri of Cawnpore. Before the decree could be transferred to Cawnpore for execution, and indeed one day before the decree was passed, Nanhen sold on the 9th of November, 1926, a house of his, which is now in dispute, to one Wali Muhammad, for a sum of Rs.5,000. Ram Chandra having got his decree transferred to Cawnpore sought the attachment of the house of Nanhen, and attachment was made on the 9th of December, 1926. Wali Muhammad objected to the attachment on the ground that the property belonged to him and did no longer belong to Nanhen Mistri and therefore could not be attached in execution of a decree against Nanhen. This objection was dismissed on the 22nd of January, 1927, it being held that the pro-

perty still belonged to Nanhen, and Wali Muhammad had no title to the property, being only a fictitious transferee.

Wali Muhammad instituted a suit to have this order set aside on the 25th of January, 1927. In the meanwhile the execution case was struck off for default by the Cawnpore court on the 20th of April, 1927. Wali Muhammad thereafter did not prosecute his suit, and it was dismissed for default on the 6th of May, 1927.

Wali Muhammad sold the house he had purchased from Nanhen to the plaintiffs on the 22nd of December, 1927. Ram Chandra, the decree-holder, also sold his decree, and to one Mahmud. Mahmud applied for execution of the decree and attached the property on the 30th of October, 1928. Thereupon the plaintiffs, who had made the purchase from Wali Muhammad, filed an objection to the attachment, and by a lengthy judgment the learned Subordinate Judge dismissed it on the 11th of December, 1928. The appellants applied in revision to this Court, but a learned single Judge of this Court dismissed the application in revision on the 22nd February, 1929. Then the plaintiffs filed the suit out of which this appeal has arisen on the 6th of March, 1929.

The defence to the suit was manifold, and one of the defences was that the suit was barred by time. The learned Subordinate Judge held that the date from which the limitation began to run was the 22nd of January, 1927, when the objection of Wali Muhammad, the predecessor in title of the plaintiffs, was dismissed.

On behalf of the appellants it is contended that after the order of the 22nd of January, 1927, was passed, the execution case was dismissed for default on the 20th of April, 1927, with the necessary result that the attachment was withdrawn, and that, therefore, it was no longer necessary for Wali Muhammad to prosecute his suit, and it was no longer necessary for the plaintiffs to institute a suit within one year from the 22nd of January, 1927.

On behalf of the appellants the case of *Basanti Devi* v. *Chhoteylal Durga Prasad* (1) has been relied on. In this case the learned Acting Chief Justice and one of the Judges of this Court held that the language of order XXI, rule 63 was ambiguous, but in view of the fact that other High Courts had taken the view that the withdrawal of the attachment relieved the losing party in the objection case from instituting a suit within one year of the order, their Lordships should also take that view.

(1) (1931) I.L.R., 53 All., 918.

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We have for ourselves considered the language of order XXI. rule 63. So far as it is relevant for our purposes it runs as follows: "Where a claim or an objection is preferred . . . the order shall be conclusive." The portion of the rule which we have not quoted states that this provision of law is subject to the result of a suit that may be instituted by the unsuccessful party to establish the right which he claims. If the order is going to be conclusive, this means that it is going to be conclusive between the contending parties, that is to say, between the decree-holder on the one hand and the objector on the other. There is no provision in rule 63 or anywhere in the Code which says that the withdrawal of the attachment will operate to nullify the order that may be passed on the claim case.

We have considered the result that would follow from the conclusion that the withdrawal of the attachment would nullify the decision of the court, and we find that it would be indeed startling. An unsuccessful decree-holder has only to have his execution application dismissed for default, and then he can again attach the property and again contest the objector's claim, although the latter may have been successful at an earlier stage of the execution. Similarly, as has happened in this particular case, the objection of the plaintiffs' predecessor in title was heard and decided against him, and yet the plaintiffs say that they are not bound by the decision obtained against their predecessor but were entitled to re-agitate the matter in the execution court, and being unsuccessful, are entitled to bring a suit, although the period of limitation (one year, article 11 of schedule I of the Limitation Act) expired long ago.

Convenience is not a clear and cogent reason for reading a particular rule of law in a particular manner, especially where the language of the law is clear and admits of no exception. Rule 63 says in most clear terms that the decision in the claim or objection case shall be conclusive, subject to only one proviso, namely, the result of a suit instituted (within one year of the decision). It nowhere says that there is a further exception, namely, the dismissal of the execution application for default and the withdrawal of the attachment.

The conclusiveness of the order applies to the decree-holder and his representative, on the one hand, and the objector and his representative, on the other. If in execution of the same decree the same property is again attached, the previous decision between the same parties or their predecessors should be conclusive, subject of course to the result of the suit.

We being strongly of opinion that nothing should be added to the language of rule 63, order XXI, and the considerations which weighed in certain decisions of other High Courts were more or less not to the point, we refer this case for an authoritative decision to a Full Bench. The record of the case will be placed before his Lordship the Chief Justice for orders.

The question to be determined is: Whether, on the attachment having ceased to exist within the period of one year from the dismissal of the objection, it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case, and whether the order in the claim case ceases to be conclusive as between the decree-holder and his representative, on the one hand, and the objector and his representative, on the other, when the property is subsequently attached by the same decree-holder or his successor in title?

Mr. *Mushtaq Ahmad*, for the appellants.

Messrs. *P. L. Banerji*, *M. A. Aziz*, *G. S. Pathak*, and *Mahbub Alam*, for the respondents.

SULAIMAN, C.J.:—The question referred to the Full Bench is as follows: "Whether, on the attachment having ceased to exist within the period of one year from the dismissal of the objection, it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case, and whether the order in the claim case ceases to be conclusive as between the decree-holder and his representative on the one hand, and the objector and his representative on the other, when the property is subsequently attached by the same decree-holder or his successor in title."

The answer to this question depends on the interpretation of order XXI, rule 63 which provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Now the word "conclusive" can have one of three possible meanings: (1) It may either mean that it is

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conclusive as between the parties for all purposes. On this interpretation the order declaring that the claimant had or had not the right to the property would be final and decisive, subject to the result of the declaratory suit as between the claimant and the decree-holder and could not be re-agitated in any subsequent suit or proceeding, no matter whether it arose out of an execution of that decree or not. (2) Or, it may mean that it is conclusive for the purposes of that proceeding, i.e., the proceeding relating to the attachment of that property. In this case it would follow that so far as this rule is concerned the order would be vacated and there would be no necessity for the filing of a suit for a declaration in case the attachment is withdrawn or falls through, because by that the proceeding would terminate. (3) It may mean that it is conclusive for the purposes of that decree which was in execution. In such an event the matter would remain conclusive so far as the claimant and the decree-holder are concerned with regard to the execution of that decree, no matter whether it was in the same proceeding or in a separate proceeding started on a fresh application for execution.

It seems to me that the language is certainly ambiguous and there is much to be said for either of these three views. But the fact remains that this language has remained in the Code since 1882 and the legislature in 1908 retained that word and re-adopted the old phraseology. It also cannot be disputed that the decisions in all the High Courts are unanimous on one point, namely, that if a claimant's objection has been dismissed by the execution court, and before the time for filing the suit has expired the attachment is withdrawn and no longer subsists, it is not incumbent on him to file the suit; and that if the decree-holder re-attaches the property afresh it would be open to the claimant to re-agitate the question, or, at any rate, to bring a fresh suit for a declaration of title within one year of the fresh attachment.

The learned advocate for the decree-holder has only cited an early case of this Court, *Jeoni* v. *Bhagwan Sahai* (1), which was decided under the language of Act VIII of 1859 which was quite different. Furthermore, the learned Judges felt themselves bound by the pronouncement of an earlier Full Bench in *Badri Prasad* v. *Muhammad Yusuf* (2). In that Full Bench case, however, the attachment had not been withdrawn and therefore the point which we have to decide in this case did not at all arise.

On the other hand, all the other High Courts have taken the view that there is no complete bar against the claimant if the attachment is withdrawn. I may mention the cases of *Satish Chandra Ray* v. *Joy Chandra Roy* (3); *Najimunnessa Bibi* v. *Nacharuddin Sardar* (4), *Kashinath Morsheth* v. *Ramchandra Gopinath* (5), *Manilal Girdhar* v. *Nathalal Mahasukhram* (6), *Kumara Gounden* v. *Thevaraya Reddi* (7), *Gollanapalli Subbayya* v. *Sankara Venkataratnam* (8), *N. S. P. R. M. S. F. Firm* v. *Attaudin* (9), *Fateh Din* v. *Qutab Din* (10).

In *Onkar Prasad* v. *Dhani Ram* (11), a Bench of this Court agreed with the view expressed in two of the earlier Bombay cases and considered that an attachment which had been objected to by the claimant having been withdrawn, the claimant was not prevented from maintaining a suit after the expiry of one year. It may, however, be pointed out that in that case the attachment had been withdrawn because the decree had been stated to have been satisfied.

In *Basanti Devi* v. *Chhoteylal Durga Prasad* (12), decided by a Bench of which I was a member, it was pointed out that rules 58 to 61 indicated that the objection of the claimant was principally directed against the attachment of his property and his endeavour was

(1) (1878) I.L.R., 1 All., 541.
(2) (1877) I.L.R., 1 All., 381.
(3) (1925) 94 Indian Cases, 120.
(4) 1923) I.L.R., 51 Cal., 548
(5) (1883) I.L.R., 7 Bom., 408.
(6) (1920) I.L.R., 45 Bom., 561.
(7) A.I.R., 1925 Mad., 1113.
(8) (1917) 42 Indian Cases, 683.
(9) A.I.R., 1933 Rang., 191.
(10) (1921) I.L.R., 3 Lah., 7.
(11) [1930] A.L.J., 594.
(12) (1931) I.L.R., 53 All., 918.

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to get it released from such attachment, and that if the attachment was subsequently withdrawn the claimant was not debarred from re-agitating the question on a fresh re-attachment. It was pointed out that the language of rule 63 was somewhat ambiguous and it was possible to treat it as implying that it was the duty of the objector whose objection had been dismissed to establish his claim to the property in dispute within one year from the dismissal of the objection. But inasmuch as the courts in India had interpreted the rule so as to apply it to the order of attachment only, as had been held in Calcutta, Bombay and Madras, and there was the possibility that claimants acting on such rulings had omitted to file suits after the attachment had ceased to exist, the Bench considered that in view of this string of rulings it would not be proper for them to depart from that course of decisions and interpret the rule in a different way. In *Hanau* v. *Ehrlich* (1), EARL LOREBURN, L. C., at page 41 remarked: "If you are to look at the words of this statute without any previous guidance at all, to my mind either construction contended for is possible as a matter of language and pure interpretation of the meaning of language. But I agree with VAUGHAN WILLIAMS, L. J., that it is not right for even this House to reopen points of construction upon ambiguous language which have been settled for a long period of years; and I advise your Lordships to decide this case upon that ground. To my mind, when doubtful words in statute have for a long period been decided in a particular sense, we ought not to reopen the matter if we can help it. The doctrine '*Interest reipublicae ut sit finis litium*' ought in such a case to apply." On that principle it seems to me that it would not be proper for us to go back on this long course of decisions which have attained unanimity in all the High Courts and on which claimants whose objections have been disallowed might well have acted when attachments ceased.

(1) [1912] A.C., 39.

As the language of order XXI, rule 63 has remained the same since the old Code of 1882, it is our plain duty to give effect to the opinion which has been consistently expressed in all the High Courts.

According to this view these rules relate to summary investigation into a claim of objection to the attachment of property seized in execution of a decree and it is the duty of the defeated party to bring a suit in order to get rid of the order so long as that attachment is continuing; but if the attachment ceases to exist the order itself is vacated and there is no longer any further bar against re-agitating the matter on a fresh occasion whether on account of a fresh attachment or if some separate proceeding arises. The reason to my mind is obvious. The claimant does not object to the execution of the decree at all. Indeed, he has no right whatsoever to object to the execution. His objection can only be that the property attached should not be attached as it is his own property. If the attachment is released his object is gained and so it becomes unnecessary for him to seek relief by a regular suit.

Sulaiman, C.J.

It seems to me unnecessary to express any final opinion as to whether, if an order is passed against the decree-holder releasing the property from attachment and the decree-holder voluntarily gets his own application dismissed, he would still be entitled to re-agitate the question on filing a fresh application for execution. It may well be that although there is no bar under this rule there is a bar on account of some general principle of *res judicata* or on the ground that the cause of action in favour of the decree-holder arose out of the release of the property which continues just in the same way whether the application is pending or is not pending. It is possible to hold that there is a distinction between the position of a claimant and a decree-holder inasmuch as the position of a claimant is improved if the attachment ceases after the order is passed, whereas the position of the decree-holder is in no way altered merely

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because the application for execution is dismissed. In that view he must sue even if his attachment is gone.

In my opinion the answer to the question referred to the Full Bench is that on the attachment having ceased to exist within the period of one year from the dismissal of the objection it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case, and that the same rule applies as between the representatives of the decree-holder and the claimant.

Sulaiman, C. J.

MUKERJI, J.:—The facts of the case are stated in the referring order and they are as follows:

[The judgment then quotes the first three paragraphs of the referring order, printed at pages 538-39 *ante*.]

The question which we have to answer is given in the judgment of the CHIEF JUSTICE, and I need not repeat it. I agree with him that the answer to the question should be in the negative for the first portion, and in the affirmative for the second portion.

As one of the Judges who were responsible for referring the case to the Full Bench, I wish to say a few words. If the interpretation of order XXI, rule 63 were a matter *res integra* I would unhesitatingly have come to the conclusion that the conclusiveness of the order passed under order XXI, rule 63 exists as between the decree-holder and his representatives on the one hand, and the claimant and his representatives on the other, till the decree is satisfied and it would be immaterial whether the execution proceedings under which the attachment is obtained are for the time being dismissed for default and the attachment is withdrawn. Indeed, I think, I could say much on the point in support of the view which I was inclined to take. Some of my grounds are given in the joint order of myself and my brother who agreed to refer the case to a Full Bench. But, as has been pointed out by the CHIEF JUSTICE, the interpretation that has been given to the rule has been one way

in all the courts and for a long period of time. Many persons, on the faith of those rulings, may have been advised not to file a suit, and if we hold otherwise today they might suffer and their loss may be irreparable. It is, therefore, necessary to stick to the interpretation which has been almost uniformly given, in the interest of the public at large, because it is for the interest of the public that the law exists.

In the view which the courts have taken it would not be incumbent on the claimant to institute a suit for a declaration of his title if the attachment is withdrawn for some reason or other. On the other hand, the decree-holder would not be relieved from the necessity of instituting his suit, if the claimant has succeeded in the execution department. This would be the result even if the decree-holder's application for execution is dismissed for default with the result that the attachment is withdrawn. This is a position which cannot be supported by the language of rule 63, but this position must be accepted as being the right rule of law, having regard to the numerous cases decided by all the High Courts.

As I have already said I agree in the answer proposed by the CHIEF JUSTICE.

KING, J.:—I concur in the answer proposed.

The High Courts in India have been unanimous in their decisions on the questions referred to us. I agree with my learned brothers that there is some difficulty in reconciling judicial opinion on this point with the language of order XXI, rule 63, but as the courts have been unanimous in their views for so many years, I think that on the principle of *stare decisis* we should answer the first question in the negative and the second in the affirmative, viz. that on the attachment having ceased to exist within the period of one year from the dismissal of the objection, it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the

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order in the claim case; and that the order in the claim case ceases to be conclusive as between the decree-holder and his representative, on the one hand, and the objector and his representative on the other, when the property is subsequently attached by the same decree-holder or his successor in title.

King, J.

BY THE COURT:—The answer to the first part of the question is in the negative and that to the second is in the affirmative.

PRIVY COUNCIL

TOSHANPAL SINGH AND OTHERS *v.* DISTRICT JUDGE OF AGRA AND OTHERS

J. C.* 1934 *July* 19

[On appeal from the High Court at Allahabad.]

Hindu law—Sons' liability for father's debt—Illegal and immoral debt—Fund under control of father—Criminal breach of trust—Onus of proof—Indian Penal Code, section 405.

The Hindu secretary of a school committee was in charge of a fund deposited at a bank, and was authorised to draw upon it only for specific purposes connected with the school. After his death the committee sued his sons to recover from them out of property left them by their father, or out of the property of their joint Hindu family, an alleged deficiency in the fund. The deficiency amounted to Rs.42,993, and according to the father's own admission Rs.30,016 of it was due to drawings by him for purposes other than those authorised: *Held,* that the drawings in question were criminal breaches of trust within section 405 of the Indian Penal Code, and that under Hindu law the sons to that extent were not liable, but that they were liable for the balance of the deficiency as they had not shown that they were not under a pious obligation in respect of it.

In the absence of further directions by the committee, the only obligation of the appellants' father in relation to the fund had been not to draw upon it save for the specific purposes which they had authorised, and until the moment of the improper withdrawals he had been guilty of no breach of duty, civil or otherwise; it was therefore unnecessary to consider whether sons were liable in Hindu law to pay a sum which had originally been a civil obligation of the father, but which he had subsequently misappropriated; nor whether the illegal and

*Present: Lord BLANESBURGH, Lord ALNESS and Sir JOHN WALLIS.