

**(1917) 02 MAD CK 0023**  
**In the Madras High Court**

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|-----------------------------------------------|------------|
| Ramanamma alias Videhi Patnayakam and Another | APPELLANT  |
| Vs                                            |            |
| Bathula Kamaraju and Others                   | RESPONDENT |

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**Date of Decision :** 09-02-1917

**Acts Referred:**

**Citation :** 39 Ind. Cas. 863

**Hon'ble Judges :** William Ayling, J; Napier, J

**Bench :** Division Bench

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## **Judgement**

William Aying, J.—Appellants' contention before us is that the suit is barred under Article 13 of the Indian Limitation Act. This Article is clearly inapplicable in terras, since the plaint contains no prayer to alter or set aside any decision or order of a Civil Court. Appellants' Counsel, however, argues that the District Munsif's order, dated 6th December 1910, allowing his clients' claim under Order XXXVIII, Rule 8 (attachment before judgment), is governed by Order XXI, Rule 63, and unless set aside, will become final; in which case it will preclude any proceedings against the same property in execution of the decree subsequently obtained. Hence, whatever the prayer in the plaint, the suit must be treated as a suit to set it aside: otherwise it will not be maintainable at all.

2. As authority for his proposition that Order XXI, Rule 63, governs orders passed in investigation under Order XXXVIII, Rule 8, Mr. Chenchiah relies on a ruling in Bisheshar Das v. Ambika Pershad 89 Ind. Cas. 622; 13 A.L.J. 732. This is, no doubt, direct authority in his favour, but with all respect, I am unable to follow it. Order XXXVIII, Rule 8, simply provides for the manner of investigation into claims to property sought to be attached before judgment: and I can see no ground for holding that, as stated by the learned Chief Justice in the case above quoted, its effect is to incorporate all the provisions of Order XXI and amongst them Rule 63. The manner of an investigation and the finality of the order passed on the same investigation are two totally different things. In the absence of a specific provision, I should be most loath to hold that an order passed under Order XXXVIII, Rule 8, was final in the sense of determining the ownership of the

property in dispute even for the purpose of the suit in connection with which it was passed. It would be both unfair and inexpedient to drive a plaintiff into a fresh litigation to establish a defendant's title to property, with a view to attachment, before it is certain that he will secure a decree under which to attach.

3. In my opinion the suit as framed will stand and the existence of the order releasing the attachment before judgment is no bar to it. It is not time-barred.

4. I would, therefore, dismiss the appeal with costs.

Napier, J.

5. I agree.

6. It is urged before us that Article 13 is a bar to this suit even though it is not in form a suit to set aside an order, the argument being that as an order has been passed releasing the property before judgment, that order must be set aside by suit before any relief can be obtained. The contention is that Rule 63 of Order XXI is made applicable to investigation of claims under Order XXXVIII by Rule 8. The case reported as *Bisheshar Das v. Ambika Pershad* 89 Ind. Cas. 622 ; 13 A.L.J. 732. is relied on. The dictum in that case does support this contention, but it was not necessary for the decision and I think that the learned Judges, who give no reasons for their view, have not realised the result of their view, which is shortly this: that a plaintiff whose attachment has been raised would very likely have to bring, a suit for a declaration before he even got his decree in the first suit, and this decree might be useless to him if he never got that decree at all or unnecessary if he could levy execution more easily on other property of the defendant. I cannot imagine a more futile proceeding than such a suit with its first and second-appeals going on contemporaneously with the main suit and its appeals. I am quite clear that Rule 8 only applies the procedure of investigation in Order XXI. A Court dealing with an application under Order XXXVIII has only power to order the property to be placed at the disposal of the Court and conditionally attached, and it can only do this when it is satisfied that the defendant is endeavouring to dispose of the property. Of course it must be satisfied that it is the property of the defendant and so a third party is allowed by Rule 8 to make a claim, but the order passed under Order XXXVIII does not purport to decide conflicting claims but only the right to attach in the circumstances of the case. It is clear that Article 11 of the Limitation Act does not apply, because the words "attached in execution of a decree" prevent that. If Rule 63 was intended to apply to prior attachments, one would expect to find Article 11 worded in such a manner as to include these orders. The suit is one to establish the right which he claims and is not one to set aside an order. If a suit in that form is proper where an order has been made under Rule 63, as is clearly indicated by the rule itself, I do not see why it is not the proper form of suit in this case and as the Article does not bar it, I see no reason to assume that the order must be set aside, or go to Article 13 to find a bar.

7. The second appeal is dismissed with costs.