

(1961) 07 AP CK 0014
In the Andhra Pradesh High Court
Case No : A.A.O. No. 267 of 1959

V. Alwar Chetty and Others	Vs	APPELLANT
Madala Pitchaiah Naidu and Others		RESPONDENT

Date of Decision : 28-07-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 57, Order 21 Rule 58, Order 23 Rule 1, Order 23 Rule 1, Order 38 Rule 11

Citation : AIR 1962 AP 469

Hon'ble Judges : Sanjeeva Row Nayudu, J

Bench : Single Bench

Advocate : G. Venkatrama Sastry, for the Appellant; A. Gangadhara Rao, M. Bhujanga Rao and P. Sitarama Raju for 1st and 2nd Respondents, for the Respondent

Final Decision : Dismissed

Judgement

Sanjeeva Row Nayudu, J.—This appeal is directed against the judgment and order of the District Judge's Court, Nellore, dated 18th March, 1959 in A. S. No. 114 of 1958 on the file of the said Court, reversing the judgment and decree of the Subordinate Judge's Court, Nellore, in O. S. No. 77/58 on the file of the said Court and directing a remand of the matter for further enquiry by that Court.

2. The facts having bearing on this appeal may be, briefly referred to:

The appellants herein are the legal representatives of one Alwarayya Chetty, who brought the suit, O. S. No. 794 of 1953 on the file of the City Civil Court, Madras, against one Malapati Venkayya, 3rd respondent in this appeal, claiming to recover a sum of Rs. 4,937-15-0 due on a promissory note dated 27-10-1951, executed by the said Venkayya.

The suit was filed on 21-5-1953, and I. A. No. 666 of 1953, was filed in that suit, praying for attachment before judgment of the properties of the said Venkayya, who figured as the sole defendant in that suit. This attachment before judgment

was ordered, and, according to the appellants, effected on 6-7-1953. Thereupon, the respondents 1 and 2 to this appeal filed I. A. No. 768 of 1953 in the City Civil Court, Madras, in O. S. No. 794 of 1953 praying that the attachment in question be raised on the ground that the properties so attached fell to their share in a partition which took place on 24-7-1950, which partition was embodied in a registered partition deed dated 15-6-1953, and that consequently, they could not be attached on 6-7-1953 as the properties of Venkayya. This claim petition was filed on 20-7-1953. It may be noticed that the plaintiff in O. S. No. 794 of 1953 was a registered partnership firm doing business at Madras, represented by the two partners Alwarayya Chetty and Sheenivasulu Chetty, while the defendant to that suit Malapati Venkayya, as well as the petitioners in I. A. No. 788 of 1953, belong to a village in Nellore District.

While the claim petition I. A. 768 of 1953 was pending, the suit O. S. No. 794 of 1953 was decreed ex parte, and thus disposed of on 27-8-1953. Nevertheless, I. A. No. 768 of 1953, the petition filed by the present respondents 1 and 2, was kept pending. On 21-9-1953, the plaintiff in O. S. No. 794 of 1953 filed a counter and when the claim petition came on for hearing on 26-10-1953, the counsel for the petitioners therein endorsed on the petition as follows:

Applicant will renew this application in the executing Court. With this liberty, the application is not pressed here.

The Court passed the following order:

Return the claimant's documents to their counsel. Not pressed. Dismissed.

Thereafter, the plaintiff in O. S. No. 794 of 1953 obtained transmission of the decree therein to the District Munsif's Court, Nellore, for execution and filed in that Court E. P. No. 364 of 1954. Thereafter the properties were also brought to sale. Meanwhile, the 1st partner of the plaintiff-firm that obtained the decree in O. S. No. 794 of 1953 above referred to, died on 6-8-1954, and his legal representatives were brought on record. The second partner also died on 14-3-1955 and his legal representatives were also brought on record. It is these legal representatives of the two partners who represented the plaintiff firm in O. S. No. 794 of 1953 that figure as the appellants in this appeal.

When the properties were being brought to sale as aforesaid on E. P. No. 364 of 1954 filed by the decree-holder in O. S. No. 794 of 1953, the present respondents 1 and 2 filed E. A. No. 124 of 1955 praying that the attachment of the properties which were being brought to sale, be raised. The appellants resisted this application on the ground that the previous order in I. A. No. 768 of 1953 was a final order, and was an adverse order against the respondents 1 and 2, and as the same had not been questioned by filing of a suit as provided for in Order 21 Rule 63 C. P. C, the present application E. A. No. 124 of 1955 was unsustainable.

It was also claimed that any suit that could have been brought to set aside the

order of dismissal passed in I. A. No. 768 of 1953 should have been brought within one year from the date of the order, and such a suit not having been brought, the order became final and conclusive, and any suit brought thereafter would be barred by limitation under Art. 11 of the Limitation Act. This E. A. No. 124 of 1955, however, came to be dismissed for default on 11-8-1955.

Thereafter, praying that that order dismissing E. A. No. 124 of 1955 be set aside, the present respondents 1 and 2 filed a claim suit O. S. No. 3 of 1956 in the Subordinate Judge's Court, Nellore, impleading the said Alwarayya Chetty and Sreenivasulu Chetty, the original partners of the plaintiff firm in O. S. No. 794 of 1953 above-referred to, but on coming to know that both the partners had died even before the filing of the suit, that suit O. S. No. 3 of 1956 had to be withdrawn by the respondents 1 and 2 herein, obtaining the leave of the Court to institute a fresh suit against the legal representatives. This withdrawal was on 5-4-1956. Subsequently, the respondents 1 and 2 brought the present suit O. S. No. 77 of 1956, out of which this appeal has arisen, on 20-7-1956 for setting aside the order on E. A. No. 124 of 1955.

3. In this suit, the respondents 1 and 2 herein prayed that the order of the District Munsif, Nellore, in E. A. No. 124 of 1955 in O. S. No. 794 of 1953 on the file of the Madras City Civil Court be set aside and the property attached therein be raised from attachment.

4. The suit was contested by the registered partnership which figured as the plaintiff-decree-holder in O. S. No. 794 of 1953, represented in the suit by the legal representatives of the two partners, who are the appellants herein, on the same lines as they contested E. A. No. 124 of 1955. Mainly they pleaded, that the prior order in I. A. No. 768 of 1953 became final and conclusive, and that order if at all could have been set aside under Article 11 of the Limitation Act within one year from the date of the said order, and that, that order not having been so set aside, could not be questioned in these proceedings.

5. The learned Subordinate Judge framed a number of issues in the suit arising on the pleadings, and treating issue 4 framed by him as a preliminary issue, heard and disposed of the suit on that issue, which is as follows:

Whether the suit is barred by virtue of the order on I. A. No. 768/53 on the file of the City Civil Court, Madras.

He held that the order dated 26-10-1953 made by the City Civil Court, Madras, on I. A. 768/53 had become conclusive against the respondents 1 and 2, who could not, therefore, re-agitate their claim to the properties in the suit, and so holding he dismissed the suit as unsustainable, awarding half the costs in view of the disposal on a finding, which merely involved the question of law.

Aggrieved by this decision, the respondents 1 and 2 herein took the matter up in appeal to the District Judge's Court Nellore, and the appeal was heard by the Additional District Judge, Nellore, who disagreed with the finding reached by the

learned Subordinate Judge on the issue in question, and held that the order in I. A. No. 768/53 was not conclusive, and did not operate as an adverse order against the appellants before him, that that order, therefore, did not require to be set aside by a suit, and that as the suit was brought to set aside the order on the claim petition in E. A. No. 124 of 1955 and the suit having been brought within one year from the date of that order, there was no question of limitation.

He further held, that even if the period of limitation had to be reckoned from the date of the first order, that is the order in I. A. No. 768/53, the period of limitation applicable thereto is not one year under Article 11 of the Limitation Act, but six years under Article 120 of the Limitation Act, as the attachment in question was not affected in execution, but before judgment, and that as the present suit was brought within six years even from the date of the order on I. A. No. 768/53, the suit was in time, and there could be no question of limitation.

So holding, he reversed the finding reached by the learned Subordinate Judge and consequentially remanded the suit to the trial Court, namely, the Court of the Subordinate Judge, Nellore for disposal on the merits and on all the other issues arising for determination in the suit. It is against this order of remand that the present appeal has been preferred.

6. Two main points have been taken by Mr. Venkatrama Sastry, the learned counsel for the appellants, in this appeal:

Firstly, that the order of the City Civil Court, Madras dated 26-10-1953 dismissing I. A. No. 768 of 1953 was an adverse order, adverse to the claim of the respondents 1 and 2 made therein, and that that order had become conclusive under Order 21, Rule 63 C. P. C. not having been set aside within one year and that consequently, any subsequent claim petition in respect of the same matter, such as E. A. No. 124 of 1955 is barred and that so long as the order on I. A. 768/53 is not set aside by a suit filed under Order 21 Rule 63 C. P. C. within one year from the date of the order, no relief could be given to the plaintiffs in the present suit O. S. No. 77 of 1956.

Secondly, that even if it is assumed that Article 11 of the Limitation Act did not apply, as Order 21 Rule 63 C. P. C. anyhow applied, even if Article 11 is not to apply and Article 120 of the Limitation Act is held to apply, this being not a suit to set aside the order in I. A. No. 768 of 1953 no relief could be given to the respondents 1 and 2 in the instant suit.

7. As against these contentions, Mr. Gangadhara Rao, the learned Counsel for the respondents 1 and 2, claimed that the order in I. A. No. 768/53 dated 26-10-53 was not a final order or an adverse order which required to be set aside, under Or. 21 Rule 63 C. P. C., and that even if it is required to be set aside, the article of the Limitation Act applicable is not Article 11 as the attachment in this case was not effected in execution, but Article 120 which applied to cases of attachment before judgment which fell outside the language of Article 11 of the Limitation Act; that the present suit must be regarded as being within time as it

is filed within one year from the date of E. A. No. 124 of 1955, and within six years of the order on I. A. No. 768/53.

He contends that E. A. 124/55 must be regarded as a mere renewal of the claim petition in I. A. 768/53, and that, consequently, the suit is not only maintainable, but is also not barred by limitation. He further filed a petition for amendment of the plaint so as to include a prayer therein for setting aside the order in I. A. 768/53 in order to obviate any possible technical objections, and that once the amendment is allowed, the suit covered both the orders, that is, the order in I. A. No. 768 of 1953 as well as the order in E. A. 124/55 and, consequently, there can be no question of the suit not being maintainable in law.

8. Before I deal in detail with the various points taken and the contentions raised by the learned counsel on either side it would be necessary to consider the relevant provisions of the Code of Civil Procedure, having bearing on the determination of the issues in this appeal. The following rules of Order 38 C. P. C. which deal with attachment before judgment may be required to be referred to:

9. Rule 5:

5. Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him -

a) is about to dispose of the whole or any part of his property, or

b) is about to remove the whole or any part of his property, from the local limits of the jurisdiction of the Court,

the Court may direct the defendant within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

2. The plaintiff shall, unless the Court otherwise directs, specify the, property required to be attached and the estimated value thereof.

3. The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Rule 6 :

1. Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

2. Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

Rule 8 :

Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner herein before provided for the investigation of claims to property attached in execution of a decree for, the payment of money.

Rule 9 :

Where an order is made for attachment before judgment, the Court shall order attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Rule 10 :

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

10. Rule 11 provides for the taking of further steps in the attachment before judgment, after the decree and it is in the following words :

Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

11. It may be seen from the above rules, that having regard to the language of Rule 8 any investigation of a claim to property attached before judgment has to be made in the same manner as has been provided for the investigation of claims of property attached in execution of a decree for payment of money. This, therefore, takes us to the consideration of Rules 58 to 63 of Order 21 C. P. C. These rules are as follows :

12. Rule 58 :

1. Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

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

2. Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Rule 59:

The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Rule 60:

Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Rule 61:

Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

x x x

Rule 63:

Where a claim or any 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.

13. Reading O. 38 R. 8 along with the above extracted Rules 58 to 61 and 63 of Order 21 C. P. C. it is clear that the claim preferred even in the case of attachment before judgment shall be investigated by the Court effecting the attachment, in the same manner and exercising the same power as if the claimant or objector was a party to the suit, unless the Court considers the claim or objection to have been designedly or unnecessarily delayed, in which case no such investigation need be made. It is clear that Rules 58 to 61 of Order 21 C. P. C. provide in detail the procedure to be followed in the investigation of a claim or objection, and there are indications that before a final order is made, the Court shall conduct the investigation into the subject matter of the claim and make an order either allowing the claim under R. 60 thereof if the conditions are fulfilled or disallow the claim under R. 61, as the case may be.

Then comes the drastic consequence provided for in Rule 63, namely, that if a suit is not instituted to establish the right which is claimed in the claim petition by the party against whom the order therein is made, that order shall be

conclusive, and if a suit is so brought it shall be subject to the result of such suit. As this rule requires to be interpreted and applied to the subject-matter of this appeal, it would be necessary to analyse it.

For the rule to apply, the following conditions require to be fulfilled:

1. That a claim or an objection should have been preferred against attachment;
2. That an order therein should have been made against one or other of the parties thereto; and
3. Such an order shall be conclusive unless questioned in a separate suit, in which case the result of the suit would govern the final rights of the parties affected by the order.
14. At the outset, the point that arises for consideration is whether the order made by the City Civil Court, Madras, in I. A. No. 768/53 on 25-10-1953 could be regarded as an order falling within the scope of R. 63 of Order 21 C. P. C. This leads us to the determination of the question whether that order can be regarded as an order made against the respondents 1 and 2.
15. In this connection, it would be necessary to recapitulate the circumstances in which the order on that petition came to be passed and the nature of it.

First of all, the attachment was effected before judgment by a Court outside the district to which the respondents 1 and 2 belonged. They filed a claim petition 1. A. 768/53 on 20-7-1953 objecting to the attachment. This petition was not disposed of as it should have been before the suit itself was dealt with, as it was only an interlocutory application and ultimately owed its continuance to the existence of the suit, as it was filed to take effect during the pendency of the suit. But, unfortunately the City Civil Court, Madras did not dispose of that application, but, instead, decreed the suit on 27-8-1953, leaving the application pending, and it was nearly two months after the disposal of the suit that the claim petition 1. A. 768/53 came up for disposal. It was then endorsed on the petition by the counsel for the respondents 1 and 2 as follows:

Applicant will renew this application in the executing Court. With this liberty, the application is not pressed here.

This endorsement was made on 26-10-1953, and, thereupon, the Court passed the following order on the petition as seen from the public copy produced by the learned counsel for the respondents 1 and 2:

""Return the claimants" documents to the Counsel. Not pressed. Dismissed.

This order was made on the very same, date, namely, 26-10-1953. Obviously the Court made this order in consequence of and as a result of the endorsement made by the counsel for the petitioners on their petition. Reading the two together, it is clear that the reason why the learned advocate endorsed that the petition is not being pressed at that time was because he was going to renew the

application in the executing Court, and prayed that liberty should be given to him. It is, therefore, obvious that the endorsement of not pressing the application was, in view of the desire of the applicant to renew the application in the executing Court, and of the liberty to be extended to him to that effect. When such an endorsement is made, two courses are open to the Court:

1. Accept the conditions of the endorsement and dismiss the petition as not pressed; or
2. refuse to comply with the conditions and insist on the petition being heard.

In other words, if the Court was disposed to act upon the endorsement that the application was not pressed now, it could only do so on the assumption that it accepts the condition, subject to which that endorsement was made. Otherwise, it would be the duty of the Court to proceed with the investigation of the claim as required by Rules 58 to 61 of Order 21 C. P. C. and if, thereafter, no evidence is adduced, or the parties are as default other consequential orders might follow, but at the stage at which the endorsement was made, as I pointed out above, the Court could only have either agreed to dismiss the petition as not pressed, subject to the condition indicated in the endorsement, or proceed to hear the same. Apparently, the Court chose the former course and that is why we find the endorsement:

Return the claimants' documents to the counsel. Not pressed. Dismissed.

It would, in my opinion, be quite wrong for the Court to dismiss the application as not pressed, when it is not acceding to or acquiescing in the conditions, subject to which the endorsement was made. In this connection, my attention has been invited by Mr. Gangadhararao, the learned counsel for the respondent, to the following decisions: *Golam Mahomed v. Shibendra Pada Banerjee* ILR 35 Cal 990 at p. 995; *Keekangote Narayana Tantri Vs. Nagappa and Others*, and *Khudi Rai Vs. Lalo Rai and Others*,

16. In ILR 35 Cal 990 at p. 995 an application was made by the plaintiff to withdraw the suit with liberty to institute a fresh suit, on which an order was passed on the same day giving permission to withdraw the suit. But nothing was stated in the order as to the plaintiff's liberty to institute a fresh suit on the same cause of action.

In that connection, the following observations were made by the learned Judges constituting the Division Bench in that case :

We have already observed that on the 30th January, 1903 an application was made by the plaintiff to withdraw from his suit with liberty to institute a fresh suit, on which an order was passed on the same day giving permission to withdraw from the suit. Although nothing was said in that order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the application, on which it was passed. In that application we find a distinct prayer to be allowed to withdraw from the suit with

liberty to institute a fresh suit on the same cause of action, and the Deputy Collector appears to have taken particular care in noting that the application for withdrawal was filed before delivery of judgment, that is to say, before the order of dismissal was passed.

Accordingly their Lordships held:

.....therefore, the plaintiff, that is, the present respondent, was not debarred from instituting a fresh suit with regard to rents for 1308 and 1309, notwithstanding the fact that he had not obtained distinct permission to do so.

17. This decision was quoted with approval and followed by a Full Bench of the Madras High Court reported in *Keekangote Narayana Tantri Vs. Nagappa and Others*,

In that case a petition was presented under S. 373 of the Code of Civil Procedure, 1882, (which corresponds Order XXIII Rule 1 of present Code) for liberty to withdraw from the suit with permission to bring a fresh suit, the Court merely passed the order "plaintiff is permitted to withdraw from the suit". It was held that the order must be read with the petition and construed as granting it, that is, as granting permission to file a fresh suit. In that case, the reservation made by the plaintiff was in the following words:

That the plaintiff reserving the right to file this suit again may withdraw the present suit without further proceedings.

The referring Judge, Bakewell, J. concluded from this that the liberty to file a fresh suit having been expressly applied for and not having been expressly granted must be taken to have been refused. It is this that he learned Judges constituting the Full Bench in that case considered was not correct, and they observed :

In the original vernacular petition it is quite clear that what the petitioner asked for was liberty to withdraw with permission to bring a fresh suit.

In these circumstances following ILR 35 Cal 990, he think that the order "plaintiff is permitted to withdraw from the suit" must be read with the petition and construed as granting it. On the other construction the order is most misleading to the petitioner and not an order contemplated by the Code.

18. In *Khudi Rai Vs. Lalo Rai and Others*, their Lordships of the Patna High Court followed the decision reported in ILR 35 Cal 990.

In that case, the plaintiff in a previous suit presented a petition for liberty to withdraw from the suit with permission to bring a fresh suit and the Court, however, gave the plaintiffs permission to withdraw from the suit, but did not in terms, gave them liberty to bring fresh suit. Applying the rule in the above quoted decision and following the Full Bench decision of the Madras High Court, the learned Judges held :

Where an application is made by a plaintiff to withdraw from a suit with liberty to bring a fresh suit on which an order is passed giving the permission to withdraw from the suit, although nothing is said in the order is to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read long with the petition and construed as granting permission to file a fresh suit.

19. I most respectfully follow the above quoted decisions and would hold that the order of the Madras city Civil Court must be read along with the prayer of the petitioners, which is incorporated in the endorsement made by their counsel. So considered, it would not be difficult to hold that what the Court was permitting was the withdrawal of the petition with the liberty to bring a fresh petition in execution.

In the view I have taken, it is unnecessary to examine the validity of the order made in I. A. 768/53 on the around that the Court had become functus officio in that had already disposed of the suit and therefore had further locus standi in the matter, to dispose of the petition.

In the above view I have taken, it is unnecessary to consider and exmine the various decisions cited by Mr. Gangadhararao, the learned counsel for respondents 1 and as regards Or. XXIII C. P. C. and the non-application Sec. 141 C. P. C. to interlocutory applications. Suffice to say that the decisions above quoted are equally stood under Or. XXIII R. 1 C. P. C. which is almost on the same lines as the corresponding provision in the previous Code of Civil Procedure.

I would, however, refer to the decisions in Marudachala Nadar Vs. Chinna Muthu Nadar and Another, in this connection. In that decision, the petitioner s plaintiff, applied under Or. XXIII R. 1 sub-R. (2) Civil Procedure Code, for permission to withdraw from his suit with liberty to institute a fresh suit in respect of the same subject-matter. The District Munsif, while refusing to grant such liberty had thought that it was open to him to accept the former portion of the application and to allow the withdrawal of the suit.

In that connection, Curgenvén, J., made the following observations:

I think there is no doubt that an application of this kind must be treated as an indivisible whole, and if a party is not allowed liberty to institute a fresh suit his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained upon file. This is the view taken in Bhagwat Pershad v. Lachmi Pershad 10 Ind Cas 346 (Cal) and Mahant Biharidasji v. Parshotamdas ILR 32 Bom. 345 : 10 Bom LR 293.....

20. It is however, contended by Mr. Venkatrama Sastry, the learned counsel for the appellants, that the order in this case had been construed in various decisions as an adverse order under Or. XXI R. 63 C. P. C.

He placed reliance on a Full Bench decision of the Madras High Court reported in The Cannanore Bank, Limited Vs. Pattarkandy Arayanveettil Madhavi and Others, In that case, an application was made on 12th of July 1932, for the removal of

the attachment, but the petitioners did not press their application with the result the Court made the endorsement on the same day, namely, 12th of July, 1932, "Petition not pressed. It is dismissed." Notwithstanding this order, the petitioners filed another application for the removal of the attachment subsequently on 5th of September, 1935. This was dismissed on the 14th of October, 1935. On the 12th of October, 1936, that is, two days short of twelve months, the plaintiffs-respondents filed the suit out of which the appeal had arisen before the learned Judges. It was contended that the suit was barred by the law of limitation, and that, in any event, the suit could not be maintained, because the property attached was in fact the private property of the judgment-debtors.

In that connection, the question arose whether the order in question, which was not an order made after investigation as provided by the Code, should be regarded as an adverse order coming within the purview of Or. XXI R. 63 C. P. C. In that connection Leach C. J. who spoke for the Full Bench in that case, made the following observations at page 959 (of Mad LJ) : (at pp. 42-43 of AIR):

The test is whether the order is "against" the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. Even an order of dismissal for default will fall within the rule; so long as it remains in force it is obviously adverse to the claimant. But if the person objecting to the attachment does not ask for his claim to be investigated, and the order on the petition is merely that it be recorded, it cannot be said that this is an order "against" him. In such a case, the application will not fall within R. 58 (See P. R. Ayya Pattar v. Attupurath - 1919 Mad WN 805 : (AIR 1920 Mad 522)). Again, the petition may contain a prayer not contemplated by R. 58 or it may have been presented after the Court has sold the attached property, and, therefore, the court has no longer jurisdiction to entertain it. The dismissal of such a petition can scarcely be regarded as an adverse order. (See Abdul Kadir Sahib Vs. U.T.M. Somasundaram Chettiar,

x x x

It is not an adverse order if the petition is dismissed because the power to investigate is in another Court. (See Lakshmi Ammal Vs. Kadiresan Chettiar and Another, . But the position is very different where the application clearly falls under R. 58, the Court has jurisdiction petition.

Referring to the decision in G. Lakshminarasamma and Another Vs. Navugotla Pydanna, of Coutts Trotter, C. J., and Ramesam J., Leach C. J. observed as follows :

The basis of this decision was apparently the assumption that the claimant wished to abandon his claim and to have it treated as if it never had been made. If the petitioner had in fact asked to be allowed to withdraw the petition and the Court had acquiesced in the course it might very well be that the order would not be an adverse order within the meaning of the rule, but we do not agree that because a claimant says to the Court that he does not press the petition and

consents to an order of dismissal it is not an adverse order.

x x x

x x x

Where the petitioner informs the Court that he wishes to withdraw his petition the Court may allow him to do so and by the use of appropriate language in the dismissal order make it quite clear that it is not intended to be an adverse order. We can see no reason why the claim petition should not be withdrawn if the claimant wishes to withdraw it, but the order passed in such circumstances should be worded so as not to attract the operation of Art. 11 of the Limitation Act.....

x x x

Then again at page 962 (of Mad LJ) : (at p. 44 of AIR), the learned Chief Justice observed as follows :

If the petition is a petition which falls within R. 58, and the petitioner has not sought permission to withdraw it without prejudice to his rights, it is obviously an order which is against him. The Court is not however, able to answer the question because the facts are not before it. But assuming that the facts are that the petitioner personally or through his advocate merely stated that he did not press the petition the order dismissing it would be an adverse order, and we answer the question referred in this sense.

An application of the above quoted Full Bench decision to the facts of the instant case, shows that the latter directly fell within the exceptions contemplated by the learned Chief Justice in the above case viz., when the petitioner has sought permission to withdraw it without prejudice to his rights, and that the petitioner had in fact asked to be allowed to withdraw the petition making it conditional on his having the liberty to renew it in execution; and obviously the Court had acquiesced in the course proposed when it acceded to the request of the petitioner and dismissed the application as "not pressed".

Hence, in my considered opinion, the observations of the Full Bench decision above quoted, directly apply to the order in question, and take it out of the character of an "adverse" order, or an order "against" within the meaning of Order XXI R. 63 C. P. C.

Reference has, no doubt, been made in the above case to the Full Bench decision *hi Venkatarathnam v. Ranganayakamma*, ILR 41 Mad 985 : 35 Mad LJ 335 : (AIR 1919 Mad 738) (FB) wherein it was held that O. XXI R. 63, C. P. C. applied also to orders on claims preferred to property attached before judgment; and that even when the order is made without investigation but the petition is dismissed on the ground that it was made too late, that order would also be an adverse order within the meaning of Order XXI Rule 63 C. P. C.

In that case the orders that were considered were in the following terms:

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

x x x

And on a fresh petition, the order passed is in the following terms

The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last ten months.

These orders were considered by Wallis C. J. as amounting to and as having been understood as, the rejection of the claim on the ground that it was filed too late, apparently under the proviso to R. 58 of Or. XXI C. P. C. Such an order, according to that Full Bench decision, came within the scope of an adverse order under Or. XXI R. 63, C. P. C. and required to be set aside by a suit. Seshagiri Ayyar J. one of the Judges constituting the Full Bench, construed the order as follows:

His right to raise the attachment must be deemed to have been negated when the property was ordered to be sold without releasing it from attachment. Therefore in my opinion an order on a 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 and he is bound to institute a suit under Article 11 of the Limitation Act.

21. On the facts of the instant case, it is unnecessary in my opinion, to examine the correctness of these observations.

22. The next contention is that the attachment in this case, although effected before judgment, amounted to an attachment under the provisions of Or. XXI C. P. C. and that consequently, it must be regarded as an attachment in execution and therefore, Article 11 of the Limitation Act applied. The matter becomes academic in view of the finding reached by me that the order made by the Madras City Civil Court in I. A. No. 768 of 1953 was not an adverse order and that, therefore, did not require to be set aside by a suit brought under Order XXI Rule 63 Civil Procedure Code.

But as the question had been argued at great length I shall briefly advert to the propositions relied on and the rulings referred to. Mr. Venkatarama Sastry contended that although Article 11 of the Limitation Act made reference to an attachment in execution, that article would apply even in the case of claims dealt with in regard to attachments before judgment. He contended that Or. XXXVIII R. 8 C. P. C. extracted above, laid down that any claim preferred to property attached before judgment shall be investigated in the same manner as claims to property attached in execution of decree for payment of money, and that Rule 11 treated an attachment before judgment as being on the same footing as an attachment in execution, when once a decree follows, and an execution petition is filed to execute the decree.

Article 11 of the Limitation Act is in the following words:

It is, clear from the wording of the Article that in express terms it refers to property attached in execution of a decree. But what Mr. Venkatrama Sastry wishes to contend is that as an attachment before judgment, post decree, becomes an attachment in execution, and as a claim made in respect of an attachment before judgment must be dealt with on the same footing as a claim made in respect of an attachment in execution, the order disposing of a claim petition filed, objecting to an attachment before judgment, would be governed by Article 11 of the limitation Act. In this connection, he placed reliance on the decisions of the Full Bench in Mallikarjuna Prasada Nayudu v. Virayya, ILR 41 Mad 849 : 35 Mad Li 231 : (AIR 1918 Mad 25) (FB) and Arunachalam Chetty and Another Vs. Periasami Servai and Others,

ILR 41 Mad 489: 35 Mad LJ 231 : (AIR 1918 Mad 26) (FB) lays down that O. XXI R. 63 CPC applies also to orders on claims preferred to property attached before judgment.

The next Full Bench decision is Arunachalam Chetty and Another Vs. Periasami Servai and Others, In this decision, it is laid down that property attached before judgment is not, in all cases, treated as an attachment in execution of a decree within the meaning of Article 11 of the Limitation Act. Wallis C. J. who spoke for the Full Bench observed as follows :

There is, therefore, no apparent reason to suppose that the Legislature intended to alter the law so as in the case of the claims arising out of attachments before judgment to give the unsuccessful party six years in which to sue; and, as attachment is the first step in execution and the effect of the provisions as regards attachment before judgment is in exceptional cases to allow that step to be taken without waiting for the decree, I was at first disposed to think that even an attachment before judgment might be regarded as an attachment "in execution of a decree" within the meaning of the new article, seeing that it is a step taken purely for purpose of execution and that we would best give effect to the real intention of the Legislature by so holding. On a further consideration of the subject, I think, that such a construction is inadmissible in view of the fact that S. 246 of the Code of 1859 referred to property "which may have been attached in execution of a decree" or under any order for attachment passed before judgment, and that S. 86 which has been reproduced in the subsequent codes and now appears as O. 38, R. 8 provided that claims to property attached before judgment should be investigated in the same manner as the claims to property attached in execution of a decree. As it is well-settled that the Limitation Act and the Code are to be read together, I have reluctantly come to the conclusion that we should not be justified in laying down generally that property attached before judgment is attached "in execution of a decree." within the meaning of the present Art. 11.

It then becomes necessary to consider cases in which the claim to property

attached before judgment is put in after decree, or even, as in the present case, after sale has been ordered in execution. As already observed, an attachment before judgment in default of security being given is always a step taken with a view to execution has the same effect as an attachment after decree which is the first order to be obtained in execution; and like such an attachment, enures until further orders of the Court. (See Sch. 1 App. F. No. 7 and App. E. No. 8). Order 21 R. 57 deals with property "under attachment in execution of a decree" but throws no light on the dismissal for default of an application for execution and for the attachment ceasing on such dismissal. Order 38 R. 11 is more in point, and provides in effect that, when an attachment before judgment continues in force after a decree for the plaintiff, it shall not be necessary on an application for execution to apply for a reattachment. This provision does not, in my opinion, enable as to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of Art. 11 of the Limitation Act or of O. 21, R. 57 already mentioned, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that the property is to be considered as attached in execution by virtue of R. 11 and I think a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11 and would answer the reference accordingly, merely adding, cases not governed by Art. 11 must be governed by Art. 120 as it has not been seriously argued that Art. 13 is applicable.

In the same case, Spencer J. while agreeing with the observations of the Chief Justice as regards the stage at which an attachment before judgment becomes an attachment in execution, observed:

An instance of an objection being raised to attachment or a claim being preferred before the passing of a decree and the commencement of execution proceedings has not occurred in the present case, and as I have endeavoured to show, is not likely to occur in other cases". The learned Judge took care to add that no opinion need be expressed on hypothetical cases; for, the instant case is one which the learned Judge thought is not likely to occur, as the claim in this case was preferred in respect of property attached before judgment during the pendency of the suit and not in execution proceedings, although the claim itself was disposed of after the decree.

The effect of this decision is that an attachment before judgment could be regarded as an attachment in execution within the meaning of Art. 11 of the Limitation Act, only on a decree being passed, execution petition being filed and accepted, and an order for sale having been passed by the Court on the footing that the attachment before judgment subsisted and continued for the purpose of execution.

23. In *Meyyappa Chettiar Vs. Chidambaram Chettiar*, which is also a judgment of five judges - though there was disagreement, as three judges took one view and two the contrary - the majority view was that O. XXI R. 57 C. P. C. applied to attachments before judgment which had become converted into attachments in execution, when an application is made to execute the decree passed in the suit. The purport of this decision is that an attachment before judgment can be regarded as an attachment in execution when, after a decree, an execution petition is filed and the, same accepted by the Court.

The following observations may be quoted:

Language is used in some of the cases which might suggest that the mere passing of a decree converts an attachment before judgment into an attachment in execution. I do not adopt that view, for the reasons pointed out by Wallis, C. J. in *Arunachalam Chetty and Another Vs. Periasami Servai and Others*, . The reasoning appears to; lie this - and I respectfully regard it as perfectly sound - that, a decree-holder need not proceed in execution, unless he chooses to do so, and it would therefore be absurd to say that an attachment is an attachment in execution when there is no execution. The turning point, comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute, his decree; and I am myself unable to escape from what, seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution. That seems to me to under-lie the reasoning of the Judges in the Full Bench case to which I have referred, particularly of Spencer J., with whom I find myself in complete accord.

Lower down, Coutts Trotter, J. (as he then was) observed" at page 431 (of Mad LJ): (at p. 500 of AIR)

In my opinion, when a decree-holder having obtained his decree takes out an execution petition, he has, in effect elected to take the benefit of O. 38, R. 11 and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election it seems to me that his attachment thereupon becomes subject to those requirements of diligence laid down by O. 21 R. 57. I cannot assent to the view that attachment before judgment and attachment in execution are two such wholly different things as to make any provision applicable in express terms to the one in no event applicable to the other; because in my view, as soon as a decree-holder applies for execution on the strength of the, attachment that he has obtained before judgment and which he seeks after judgment to use as validating the sale for which he is applying, he thereby by his own act asks the Court to treat his attachment as being an attachment in execution.

Referring to the earlier Full Bench decision in *Arunachalam Chetty and Another Vs. Periasami Servai and Others*, Ramesam, J. observed at page 436 (of Mad

LJ) : (at p. 503 of AIR):

The judgment is therefore an unanimous judgment of five judges laying down that an attachment before judgment may be converted into an attachment in execution of a decree, and is binding on this Court.

In view of the clear pronouncement of the two Full Bench decisions of the Madras High Court, I find it impossible to give any weight or value to the observations made by a Division Bench of the Madras High Court in Ramanandhan Chettiar Vs. Veerappa Chettiar and Others, apart from the fact that the observations made therein are in the nature of obiter as the claim in that case was admittedly preferred in execution in respect of an attachment effected in execution. While the earlier Full Bench seems to proceed on the footing that an attachment before Judgment became an attachment in execution only on an execution petition having been filed to execute the decree that is passed subsequent to the attachment before judgment, and on an order for sale being made on the execution petition by the Court, the latter Full Bench decision seems to hold that the conversion of an attachment before judgment into an attachment in execution could be held to have taken place on an execution petition having been presented and the same having been numbered as an execution petition.

But on the facts of the instant case, these ruling may not be of much assistance inasmuch as the original claim petition in this case was made when the suit was pending and was disposed of, no doubt, after the decree But there is no question of execution having been taken, out or being pending at the time when the petition was disposed of. Therefore, the claim order that was made in this case on I. A. No. 768 of 1953 cannot be regarded as an order made in execution; nor can the property under attachment at that stage be regarded as property attached in execution of a decree within the meaning of Art. 11 of the Limitation Act. Hence, I experience no difficulty in coming to the conclusion that Art. 11 has no application at all to the facts of the case; and if at all the order in I. A. No. 768 of 1953 were required to be set aside, the proper Article that would apply would be Article 120 of the Limitation Act. On this point, practically all the High Courts are in agreement, Vide Jagjivan Dhondiram Kirad Vs. Gopal Vinayak Joshi, , Trimbak Tumdushet Rangari Vs. Ziparu Chaturdas Bairagi, , Ningauda Girimallappa Patil Vs. Nabisaheb Abalal Patil, , Rasananda Rath Vs. Ratha Sahu, Nandlal Singh and Another Vs. Mt. Baratan and Others, Abdul Latif Laskar and Another Vs. Aklu Mia Laskar, , Benoy Krishna De and Others Vs. Ashutosh De and Others, Mt. Aziz Jahan Begam Vs. Sardar Singh and Others and Sabir Husain, , AIR 1929 865 (Lahore) AIR 1931 1 (Oudh) and AIR 1948 369 (Nagpur)

24. Number of authorities have been cited before me by Mr. G. Venkatrama Sastry, the learned counsel for the appellants, on the question that an order under O. XXI R. 63 C. P. C. is conclusive. For that position, in my humble opinion, no authority is necessary as the Rule itself makes absolutely clear that when an order is made under that Rule, that order, provided it is an order against a party thereto, would be conclusive, subject to any suit that may be brought to set

aside, provided the requirements of the rule are satisfied by the order made thereunder.

25. To summarise the various legal principles that have been considered above :

I. Order XXI Rule 63 C. P. C. is as much applicable to a claim or objection made against an attachment before judgment as it is applicable to claims made against attachments in execution of decrees.

II. An order made under R. 63 of O. XXI would be conclusive subject to the result of a suit in the following cases:

1. When the claim or objection is dismissed without investigation as having been designedly or unnecessarily delayed under the proviso to R. 58(1).

2. Where the claim or objection is dismissed for default;

3. Where the claim or objection is dismissed as not pressed without any reservation or qualification made by the party concerned;

4. Where the claim or objection is negatived or allowed on investigation.

In all the above cases, the order would be an order against the party affected.

III. The order made on a claim or objection would not be an order falling under O. XXI R. 63 in the following cases:

1. Where the person objecting to the attachment does, not ask for his claim to be investigated and the order on the petition is merely that it is recorded;

2. Where the claim or objection petition contains a prayer not contemplated by R. 58; or

3. Where it had been presented after the Court had sold the attached property and therefore the Court would have no longer jurisdiction to entertain it;

4. If the claim is for an inquiry not contemplated by the Rule;

5. Where the Court dismissing a petition expressly states that the rights of the petitioner are not prejudiced by the order;

6. Where the Court dismisses on the ground that it had no jurisdiction:

7. Where the claimant wished to abandon his claim and to have it treated as if it never had been made;

8. Where the petitioner had asked to be allowed to withdraw the petition, with liberty to apply again later, and the Court acquiesced in the course;

9. Where the petitioner informs the Court that he wishes to withdraw his petition and the Court allows him to do so without prejudice to his rights.

IV. An attachment before judgment would not become an attachment in execution until a decree is passed and an execution petition is presented by the

decree holder and accepted and numbered by the executing Court.

V. In all cases where the claim is preferred against an attachment before judgment and an order is made on the claim petition falling within the scope of O. XXI

R. 63 C. P. C., the Article of the Limitation Act that would be applicable for a suit would be Art. 120 and not Art. 11.

VI. Article 11 of the Limitation Act would only apply to cases where the claim is preferred in pending execution proceedings and when by reason of the attachment before judgment having become converted into an attachment in execution under O. XXXVIII R. 11 C. P. C. and under IV supra, and it could be said that the property in respect of which the claim is preferred is property attached in execution of the decree within the meaning of Art. 11.

26. in the result, I do not see how any exception could be taken to the judgment and order of the lower appellate Court which, applying the principles enunciated in the above decisions, is perfectly sound and is the only proper order to make in the circumstances of the case. I would accordingly confirm the judgment and order of the Court below and dismiss this appeal. Costs in this appeal would follow the result of the decision in the Court of first instance. No leave.