Privy Council Appeal No. 70 *of* 1926.

A. T. K. P. L. M. Muthiah Chetti - - - - - - *Appellant*

v.

Palaniappa Chetti and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MARCH, 1928.

Present at the Hearing:

LORD SHAW.
LORD ATKIN.
LORD SALVESEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree dated the 1st September, 1921, of the High Court of Judicature at Madras, affirming a decree dated the 19th September, 1916, of the Temporary Subordinate Judge of Sivaganga.

The suit out of which the appeal arises was brought by the appellant as mortgagee for recovery of monies due on his mortgage bond about to be referred to. That bond is dated the 19th March, 1910.

Muthiah Chetti and Raman Chetti were undivided brothers; the former was father of respondents 1 and 2, the latter father of respondents 3 and 4. They carried on a money-lending business at Rangoon. They both died prior to the date of the mortgage in question. After their deaths the respondents 1 to 4 still formed a joint and undivided Hindu family. They were, however, all minors, their guardians being Nagamai Achi, mother of the first two respondents, and Sittall or Minakshi Achi, mother of the respondents 3 and 4.

This mortgage dated the 19th March, 1910, was executed by the two ladies on their own behalf and on the behalf of their respective sons. It was in favour of the present appellant, who is the brother of one of the ladies. Respondents Nos. 5—12, or their representatives, also had a money-lending business, and on the 14th February, 1910, they had brought a suit against the before-mentioned minors claiming a decree for a debt of Rs. 38,413. On the 14th March, 1910, that is to say, five days before the mortgage under investigation, they made an application to the Court for attachment before judgment of the immoveable properties belonging to the respondents 1—4, and on the 18th March the Court passed an order for conditional attachment. On the following day the two ladies executed the mortgage which is the subject of this suit. It covered all the properties belonging to respondents 1—4, that is, to the minors aforesaid. It purported to have been for a consideration of Rs. 35,000, of which Rs. 1,800 was alleged to have been paid in cash.

On the 4th April, 1910, the Court made an order absolute. It was in the following terms :—

" No objection to attachment subject to mortgage already credited in favour of Muthu Chetty. Petitioner does not admit any such mortgage at present and wants the attachment as asked for. Attachment and order made absolute."

So far as the question of limitation is concerned, this order and its date form the crucial points for consideration of the question of limitation to be afterwards discussed.

The respondents 5—12 proceeded with their action, obtained decree thereunder on the 24th January, 1911, and having applied for execution of their decree by sale with permission to bid, the present appellant put in a claim and petition on the 20th March, 1912, to the properties in respect of his mortgage and prayed that the properties should be sold subject thereto. The appellant's claim was rejected by the Court on the 15th April, 1912, which held that the alleged mortgage was a sham transaction.

On the 4th November, 1912, the properties were purchased by respondents 5—12 and a sale certificate was issued. Thereupon the appellant filed a suit in the Subordinate Judge's Court to establish his right to the properties under the mortgage already mentioned of the 19th March, 1910.

In the course of that suit an important and vital fact was discovered, namely, that although, as already mentioned, on the 4th April, 1912, the " attachment and order were made absolute," yet in point of fact no attachment had been made. This was explained to the Court, and on the 15th August, 1914, " the plaintiff was allowed to withdraw his suit with permission to bring another based on the mortgage bond in question but correctly framed." The present suit was accordingly brought on the 7th October, 1915. It is an ordinary suit for recovery of the amount of the mortgage with interest, and it includes a declaration that the right set up by the purchasers is invalid, and for recovery from the

respondents 1—4 of the sum of Rs. 64,764, being the mortgage amount with accumulated interests and costs, with, of course, the further direction for sale.

This action is resisted upon two grounds. First, that it is excluded by limitation and, secondly, that the mortgage was what in language adopted in various orders in the proceedings is denominated a sham transaction.

As to the question of limitation, the point taken was agreed by the learned counsel at the Bar to be an important one in Indian practice, and the differing judgments in the present case upon the point seem also to show this.

It depends upon the language of Article 11 of Schedule I of the Indian Limitation Act, 1908, which is as follows :—

Description of Suit.	Period of Limitation.	Time for which Period begins to run.
11. By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the Order :— (1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution.	One year.	The date of the order.

It is to be noted that by Order 21, rule 63, of the Code of Civil Procedure, 1908, it is provided as follows :—

> " 63. 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."

The point to be considered is—Is the appellant a person against whom an order as just described has been made ? The Board is of opinion in the negative. By Article 11 of the Limitation Act already quoted, he must be a person against whom an order has been made under the Civil Procedure Code " on a claim preferred to, or an objection made to the attachment of, property attached in execution." The case thus comes to be narrowed down to whether it is a necessity of the order here specified that the property to which a claim is made, or to the attachment of which there is an objection, must be property which had been *de facto* attached.

It would seem to be so by the words, and by the very nature of the case, for the only property referred to is " property attached in execution." Unless there has been attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached ; and without such an order, there is no *terminus a quo* for the running of limitation, and with this the limitation itself is non-existent. The first head of Article 11, in the opinion of their Lordships, can on its words mean nothing else.

It is only in view of the asserted importance of the point on the construction of the Civil Procedure Code that their Lordships think that it may not be inexpedient to carry this investigation of the topic further.

It may be pointed out that if the words of the article were otherwise construed, then it might be possible under such a construction to write out a not inconsiderable portion of Order 21 applicable to the execution of decrees and orders.

A fasciculus of clauses, beginning at Rule 41 of Order 21 and applicable to "attachment of property," shows in instance after instance that attachment is a real thing, with a variety of real applications suited to the nature of the property to be attached. Where it is moveable property it is to be attachment by "actual seisure"; where it is agricultural produce the attachment is to be made by affixing a copy of the warrant—on the land where there is a growing crop, and on the threshing floor, and other places where produce has been cut and gathered. In the case of an attachment of debt, there is to be a written order prohibiting the creditor from recovery, and the debtor from making payment, and prohibiting the handing over of the property by anyone in whose name it stands, and this order is to be affixed publicly to the Court House. There are other provisions as to the attachment of shares of moveables, even shares of salary, and as to attachment of partnership property. In regard to negociable instruments, the attachment is to be by actual seisure of the instrument which is to be brought into Court.

These instances go to show that under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished.

It may now be considered necessary however to cite Order 21, rule 54, applicable to a case like the present, namely, that of immoveable property. It is as follows :—

"(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property, and then upon a conspicuous part of the court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate."

In view of these provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would

be that a person holding an order could dispense with attachment altogether, as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done.

Their Lordships now ask whether attachment took place in the present case. Fortunately the pronouncements of both Courts make the point clear. The Subordinate Judge says :—

> " The mere order for attachment is not sufficient to show that there has been attachment. The right to put in a claim petition arises only after the properties are attached. In this case, the parties were under the mistaken impression that there was an attachment and under that impression a claim petition was put in."

The High Court says :—

> " Reference has already been made to the fact that, although a conditional attachment before judgment was ordered, none was actually made. This is said to have been due to delay in payment of fees. But neither plaintiff nor 5th to 10th defendants, were, so far as appears, aware of the fact ; and the latter proceeded as though there had been an attachment, to obtain issue of a sale proclamation."

It was further, of course, frankly admitted before the Board that these statements could not be impugned. In these circumstances their Lordships think it unnecessary, the view upon the order being so far to the effect already stated, to enter upon a discussion of cases cited to the Board, none of which seem to have a very direct bearing upon the point in hand. For the case before the Board is not that the order was defective in form ; the order was from the beginning a nullity. After full consideration they think that the judgment of the Subordinate Judge to the following effect is right :—

> " It has been argued by the learned Vakil for defendants 10 and 11 that, as the suit was brought more than a year after the dismissal of the claim petition, it is barred, and that plaintiff is not entitled to get any relief in this suit. I do not think that this position is tenable. In the first place there was no attachment over the properties " ;

and then follows the passage already cited.

He adds :—

> . . . . . the present suit is not barred by limitation under Article 11 of the Limitation Act."

Their Lordships think this judgment was right.

The High Court appears to have been moved to a reversal of the judgment of the Subordinate Judge on this question of limitation by the consideration that although the property was not attached, yet for some time both parties had assumed that it was. What happened was that when a suit for declaration that the present properties were liable to be sold in Court auction subject to the plaintiff's mortgage lien, it was in the course of the

proceedings discovered that the property had, as already explained, never been attached. The Temporary Subordinate Judge thereupon made an order dated the 15th August, 1914, as follows :—
" I allow the plaintiff to withdraw the suit with permission to bring another based on the mortgage bond in question, but correctly framed."

The present suit was accordingly brought. Viewed merely as a mortgage suit it is, of course, in time. But this new suit is said to be barred by the fact that it is out of time, because of the order of attachment, which subjects those bound by it to a limitation of twelve months from the order, that is to say, in this case from a thing which was a nullity.

No case of estoppel can arise. It is not pleaded : and it would be somewhat difficult for a case to be figured in which out of the fact of mutual error there had in effect been a twofold result, namely, (1) that a statutory requirement had been jumped over, and (2) that a limitation as from the date of a nullity had begun to run against one of the parties to the error. The Board, for the reasons stated, is of opinion that the suit is not barred by limitation.

In view of the differences of opinion in the Courts below with regard to the merits of the case, their Lordships have thought it right to examine for themselves the entire documents and evidence. The strength of the respondents' argument is undoubtedly this, that upon the 19th March, 1910, during the dependence of the suit for debt in which on the 14th an application was made for attachment and on the 18th a conditional order of attachment was made—on the 19th March suddenly the mortgage sprang into being, a mortgage founded upon old standing and accumulated debt, and also upon various obligations verified or alleged to be verified by hundis, all of which hundis also sprang into being on the very same date.

It is not unnatural that circumstances such as this should raise in the mind of Judges trying the case a determination to be satisfied with the authenticity of the mortgage and also of the grounds upon which it was founded. Nor is it to be altogether wondered at that a certain suspicion should attach to a transaction in which debts are suddenly amassed, consolidated into one, and a mortgage granted in the nick of time so as to accomplish the complete defeat (for in the circumstances that is what it appears to come to) of the action for debt then pending against the mortgagors. Further, it is no doubt true that, on looking to the relationship of parties and to the mortgage being granted in favour of the brother of one of the two mothers who were guardians of children in minority, the Court would be justified and indeed bound to make such a scrutiny.

But on the other hand, if the debts for which the mortgage was granted cannot be displaced as *bona-fide* debts, and if the mortgage in its authenticity and its execution cannot be impugned, then the consolidation at the particular period was a piece of

family policy not contrary to law, although open to full scrutiny in judicial proceedings. To the former of these views the Subordinate Judge inclined, to the latter the High Court.

After their investigation referred to, their Lordships are unable to resist the conclusion that the examination in minute detail by the High Court reached a sound result.

One of the controlling circumstances of the case on fact is that the main item of debt contained in the mortgage—amounting to over Rs. 18,000—takes its beginning in 1896 in an item of over Rs. 8,000 as verified by an entry in the books of the money-lending firm when it consisted of the two brothers Muthiah Chetti and Raman Chetti. That entry, however, is followed year by year in the books or extracts therefrom produced in the course of the proceedings, and year by year the interest and compound interest are added until the sum contained in the mortgage of Rs. 18,000 is reached. The respondents do not seem to have addressed themselves to the task of challenging such entries as vouchers of a real debt.

The next outstanding feature of the case is that with regard to the hundis there was by the nature of the case outside evidence obtainable, and a searching challenge could have been made which does not appear to have been attempted, the truth being that in the proceedings before the Trial Judge too much reliance appears to have been placed on suspicion only, the suspicion already referred to arising out of the conjuncture of dates. The High Court, however, pursuing its scrupulous examination, has deleted an item as unvouched amounting to Rs. 1,800 alleged to be a cash payment, and in the decree to be pronounced the mortgagees' rights will be limited accordingly.

Upon the whole, their Lordships think that the High Court's careful judgment on the merits is sound and they will humbly advise His Majesty accordingly.

The suit not being barred by limitation, the case will be remitted to the High Court for the purpose of making the appropriate decree in favour of the plaintiff and to take such proceedings as are necessary to carry out that part of the High Court's judgment of the 1st September, 1921, which is hereby approved.

Their Lordships will humbly advise His Majesty to allow the appeal and to remit to the High Court to be proceeded with as above stated. The respondents will pay the costs in the Courts below and of this appeal.

In the Privy Council.

A. T. K. P. L. M. MUTHIAH CHETTI

v.

PALANIAPPA CHETTI AND OTHERS.

DELIVERED BY LORD SHAW.

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