

(1934) 12 BOM CK 0012
In the Bombay High Court

C. Kasivisvanathan Chettiar	Vs	APPELLANT
S.V.S. Chokalingam Chettiar		RESPONDENT

Date of Decision : 03-12-1934

Acts Referred:

Limitation Act, 1908 — Section 9

Citation : (1935) 37 BOMLR 837

Hon'ble Judges : Sydney Rowlatt, J;Atkin, J;Alness, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sydney Rowlatt, J.—This is an appeal from the judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (Settlement of Singapore), dated September 14, 1931, setting aside the judgment of Mills J. delivered on October 25, 1930, and giving judgment in favour of the respondent.

2. The suit was begun by writ issued on March 9, 1925, by S. Muthuraman Chettiar, suing as the administrator de bonis non of one S. V. S. Subramaniam Chetty deceased (herein called "the intestate").. The respondent was substituted as plaintiff, suing in the same capacity, by an order dated September 26, 1928.

3. As originally framed the suit was against E Kong Guan. The appellant was added as a further defendant by an order dated September 7, 1925. The claim against the appellant, with which alone this appeal is concerned, was to make him accountable for certain shares in a rubber estate called Leong Watt Hin Rubber Estate (afterwards converted into 1,250 shares in Leong Watt Hin Estate, Ltd.), and the primary question was whether such shares, which passed into the hands of the appellant under the circumstances to be hereinafter examined, were the private property of the intestate or the property of a firm in which he was a partner, his share therein having been subsequently acquired by the respondent. On this issue there were concurrent findings of fact in favour of the respondent which their Lordships intimated at the hearing that they would not disturb, and

the main question left is whether the claim was barred by limitation. It is so barred unless the property in question became vested in the respondent in trust for a specific purpose within the meaning of Section 9 of Ordinance No. 56 (Limitations) of the Ordinances of the Straits Settlements.

4. For some time prior to 1912 the intestate had been the managing partner in a firm of money lenders carrying on business at Malacca under the style of "vilasam" of P.M.S. He also carried on a private business on his own account under the vilasam of S.V.S. His interest in P.M.S. was in the form of a one-half share in a Hindu undivided family which owned a quarter share in P.M.S. The family vilasam was V.E.S.

5. Before 1912 the intestate had become interested with Guan, defendant No. 1, in the rubber estate already mentioned, which it is convenient to call, (as was done in the argument), "L.W;H."

6. In the early part of 1912, as the result of transactions which it is unnecessary to relate in detail, the position was as follows : The land was in Guan's name, but belonged to Guan and two other Chinese associated with him for the purpose of this venture, Guan's interest in it was to the amount of 13|20, afterwards changed to 13|22, the other two holding, after the alteration, 6|22 and 3|22 respectively. The intestate, as sub-partner with Guan, was entitled to five of his thirteen parts or shares. About August, 1912, the intestate, being in bad health, left Malacca for India, where he died on December 9 of that year, leaving a widow and son, Shanmugan, and two daughters. On May 2, 1913, the widow gave a power-of-attorney to one Kadappa to apply for letters of administration in the Straits Settlements and these were granted to him on August 1, 1913. Kadappa was at this time managing P.M.S. as a paid agent.

7. According to the evidence of Guan, Kadappa came to Malacca about May, 1913, and discussed with him the intestate's affairs, including the L.W.H. shares. In his examination-in-chief, Guan did not say whether this was before or after the grant of letters of administration. In his cross-examination, he said it was before. In his re-examination he said Kadappa told him later that he had taken out the grant. The substance of the conversation according to Guan's evidence was that Kadappa told him to wait for the arrival of the intestate's son (Shanmugan). In cross-examination he said " Kadappa told me to hand the shares over to Shanmugan and the Manager of P.M.S." In re-examination he gave Kadappa's words as; being " Then " (referring to Shanmugan's arrival) " we can settle." It was suggested in the argument before their Lordships on behalf of the appellant, on the strength of this evidence, that Kadappa had, by these words spoken to Guan, administered this asset and that was the end of the matter. Their Lordships are unable to take this view. Apart from the doubt as to the date of the conversation, it does not appear to their Lordships that what took place amounted to a final dealing with the asset from the administrator's point of view.

8. In 1913, the appellant, who was already a partner in P.M.S., went to India and acquired the share of the intestate's family in that firm. He was now the predominant partner and in 1914 returned to Malacca and took over the management. On April 5, 1914, Kadappa gave a power-of-attorney to the appellant to act in the administration of the intestate's estate and as his attorney and in his name to perform a numerous class of acts, being those necessarily called for in an administration. The power gave the appellant power to appoint a substitute. Kadappa left Malacca for India in 1914 and died there in 1917. It was held at the trial of the present suit that this power-of-attorney was invalid. No argument founded on such a contention was seriously pressed on the hearing of this appeal, and in view of the appellant's actions, the question is an academic one.

9. In 1915, Shanmugan came to Malacca. It appears that according to the Hindu law applicable to the estate of the intestate Shanmugan or the son was beneficially entitled to the whole, subject to maintenance of the widow and daughter till marriage. In the colony, however, the estate vested in the administrator, who alone could deal with it. This being the state of affairs, the appellant and Shanmugan on July 16, 1915, made an agreement, evidenced by receipts exchanged between them, that they should divide the intestate's five shares; in L. W. H. equally, each taking two-and-a-half shares. The appellant was to quote the language of both receipts which is in this respect the same-" to take all actions to" obtain agreement, &c," and he was to account to Shanmugan for his half. At the time of making this agreement, the appellant must have known that these shares belonged to the intestate's estate which he was administering.

10. Following on this arrangement of July 16, 1915, a meeting took place between Guan, the appellant, Shanmugan and one P. V. Palaniappa Chetty, when the three latter concurred in requesting Guan, firstly, to hand over to Shanmugan the scrip of certain shares which had belonged to the intestate, but with which this appeal is not concerned, and secondly, as regards the five shares in the L.W.H. property, that they should be transferred to P.M.S., Kasi, that is, to the appellant under the vilasam of the partnership P.M.S. From that time, Guan said that he considered the owner of these five shares to be P.M.S.

11. In 1915, the property L.W.H. began to yield profits and there was a distribution among the partners in October of that year. The proportion attributable to the five shares of the intestate was paid to the appellant as P.M.S. Kasi, who also received all subsequent profits and, when the property was transferred to a company, all the dividends on the shares representing the intestate's interest.

12. On June 5, 1916, the appellant purported to exercise the power of substitution expressed to be conferred upon him by the power-of-attorney given to him by Kadappa and appointed one Muthiah Chettiar as his substitute for the purpose of the administration of the estate of the intestate.

13. There was evidence that, notwithstanding this substitution, and even after the death of Kadappa which occurred on November 24, 1917, terminating, beyond all question the power-of-attorney given by him, the appellant acted as Kadappa's attorney and made an application to the Court in that character in connection with the sale of some land. In the view of their Lordships, however, a termination of the appellant's agency under power-of-attorney whether in 1913, by the substitution of Muthiah, or in 1917, by the death of Kadappa, does not affect the situation, inasmuch as the appellant had already, namely, at the interview with Guan and Shanmugan in 1915, been recognized by Guan as the person to whom he was to account for the intestate's interest in the: L. W. H. property. In pursuance of that arrangement (so Guan deposed),. Guan subsequently, namely, by an indenture of July 5, 1916, formally transferred that interest to the appellant.

14. At the end of 1917, a few days before the death of Kadappa, the L. W. H. property was transferred to a company, called the Leong Watt Hin Estate Co., Ltd., and the appellant received, by direction of Guan, 1,250 shares in: that company as representing the intestate's interest.

15. Although by the agreement entered into with Shanmugan in July, 1915, the appellant had agreed to hold one half of the five shares for the account of Shanmugan, he did not account to him for any part of the profits he received. Early in 1924, Shanmugan came from India to Malacca and asked the appellant for the money due to him on the two and a half shares. The appellant told him that his partners in P.M.S. claimed all the five shares as belonging to that firm and he suggested that Shanmugan should sue the partners. In the end, Shanmugan accepted from the appellant \$18,000 and released his claim. This according to the appellant's evidence was a private transaction of his own with which his partners in P.M.S. were not concerned.

16. On November 1, 1924, the intestate's widow gave a power-of-attorney to one Muthuraman Chettiar to apply for letters of administration to the estate of the intestate and on December 20 these were granted to him de bonis non.

17. On March 9, 1925, Muthuraman commenced the present suit against Guan as sole defendant, the appellant being added as defendant No. 2 by order dated September 7, 1925. Later in the proceedings the widow having died, the respondent took out letters of administration de bonis non as attorney of the daughters and was substituted as plaintiff.

18. By the statement of claim delivered on February 10, 1926, the plaintiff claimed as against the appellant a transfer of the 1,250 shares in the L.W.H., Ltd., an account of the dividends received and damages. There was no allegation of fraud. The appellant, by his defence delivered on June 20, 1926, pleaded limitation, and by supplemental defence delivered on October 11, 1926, pleaded, inter alia, that the right to the five shares in the original L.W.H. venture now represented by 1,250 shares in L. W. H., Limited, had been the property of P. M.

S., and further, that any question regarding them, had been settled by the agreement of July 16, 1915. On October 12, 1926, he served a third party action on Shanmugan, claiming to be indemnified by him against the plaintiff's claim by virtue of the arrangement in 1918 by which the appellant had bought out Shanmugan for \$18,000.

19. In 1927, Shanmugan commenced an action in India against the appellant, claiming the 1,250 shares in L.W.H., Ltd., and alleging that the agreements of 1915 and 1924 were obtained from him by misrepresentation and fraud. He raised the same contention in his pleading, delivered on February 6, 1929, as third party in the present action. The suit in India is still pending. The Judge's notes at the trial of the present suit contain a statement that it had " been stopped pending this present case," but whether it has been formally stayed does not appear.

20. The suit was tried before Mills J. in September and October, 1930. No oral evidence was called for the plaintiff, the present respondent. For the defendants oral evidence was given by, among others, Guan and the appellant. At the close of the case of defendant No. 2 (the present appellant) his counsel admitted that he could make no case for indemnity against the third party Shanmugan, and the Judge ruled there and then that the third party claim be dismissed. Shanmugan was never called to substantiate his charges of fraud. Nor had his counsel put those charges to the appellant on cross-examination.

21. On October 25, 1930, Mills J. delivered a written judgment in which he found that the five shares in the L. W. H. venture were the private property of the intestate. As regards the responsibility of the appellant for the L.W.H. shares, he dealt with the matter as follows: He held that the power-of -attorney from Kadappa to the appellant was void, as not authorised by the power-of-attorney given by the widow to the former and that the appellant, though accountable for the shares, was so only as an alienee without value given. He held, therefore, that the suit against him Was barred by limitation not having been brought within six years from July 15, 1915. He was of opinion that the appellant, in dealing with the shares on that date, was not acting as a trustee nor was he in the position of a person receiving trust property and dealing with it in a manner inconsistent with trusts of which he was cognizant, because he did not receive the trust property as such, but throughout the negotiations, which culminated in the arrangement of July 16, 1915, acted solely in his capacity as partner and manager of the firm P.M.S. and supported the claims of the firm in opposition to the claims of the deceased man's estate. The learned Judge said that he confined himself to findings absolutely necessary for the determination of the issue in order that the parties to the Indian litigation might not be embarrassed by comments or dicta.

22. The respondent appealed to the Court of Appeal and the appellant cross-appealed against the dismissal of his third party claim against Shanmugan. This cross appeal was, however, abandoned by counsel and Shanmugan was released

from the proceedings in the course of the arguments. Shanmugan is not a party to the present appeal.

23. The learned Judges in the Court of Appeal concurred with the finding of the trial Judge that the interest in the L.W.H. venture was the private property of the intestate, but held that the appellant, in dealing with that interest, had acted as a trustee by virtue of the power-of-attorney given to him by Kadappa and that he was not protected by limitation.

24. The learned Judges further expressed the opinion that the appellant had been guilty of fraud at every stage of his transactions with the family of the intestate. The order of the Court directed an account of all moneys received by the appellant or his agents in respect of the L. W. H. shares and an account from November 20, 1917, of all moneys received or which ought to have been received by the appellant or his agents in respect of the 1,250 shares in the L.W.H. Company, and an enquiry to ascertain what had been the highest value, which a share in the L.W.H. Company had reached prior to the date of the judgment. The Court further directed that in taking the account, the appellant should be debited with punitive interest at the rate of six per cent, per annum. :It was further, by consent of the third party, declared that the appellant was entitled to set off to the extent of Shanmugan's interest, the \$18,000 paid to the third party under the arrangement of January 7, 1924, against what should be found due from him. Further consideration was adjourned with liberty to apply.

25. Upon the question of limitation, their Lordships agree with the conclusion arrived at by the Court of Appeal.

26. The point turns upon Section 9 of Straits Settlements Ordinance No. 56 (Limitations) which is as follows;:-

Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal personal representative or assigns, not being assigns for valuable consideration, for the purpose of following in his or her hands such property, shall be barred by any length of time.

27. The cardinal fact in the case is that the appellant in dealing with this asset of the intestate's estate acted in the character of attorney to the administrator. The arrangement between the appellant and Shanmugan on July 16, 1915, was entered into to deal with the question whether the interest in the L.W.H. venture had been the intestate's private property, as Shanmugan was alleging, or not. To any settlement of that question the legal personal representative of the intestate was a necessary party. Shanmugan could not bind the estate, and unless it was to be bound by the participation in the transaction of the appellant in the character of attorney for the administrator, that transaction would not furnish a title enabling the appellant to obtain from. Guan, as he did, first an assignment of the intestate's interest in L.W.H. and afterwards the shares in the limited

company.

28. What took place, therefore, was a verbal assignment by the appellant, as attorney of the administrator, to himself, of property known to be his principal's. He was in a fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator. This is not a case in which a stranger has possessed himself of trust property under circumstances which make him bound by the trust and in which it is then necessary to inquire into his exact position with reference to the section under discussion or to the English doctrine of express trusts. The appellant here dealt with the property in a fiduciary capacity antecedent to such dealing and the purpose for which it became vested in him must be found in the purpose for which that capacity was conferred upon him. The position is the same as if the administrator himself had vested the property in the appellant for the purpose of the administration instead of the appellant vesting it in himself by virtue of his powers as attorney. In the course of the arguments, their Lordships were necessarily referred to the decision of the Court of Appeal in England in *Soar v. Ashwell* [1893] 2 Q.B. 390. Whatever limits may have to be observed in the application to the construction of this section in the Limitations Ordinance of the Straits Settlements of the English decisions as to express trusts, the reasoning of the Master of the Rolls and Bowen L. J. in that case affords ample support for the particular step in the present argument which consists in referring the possession of the appellant to his antecedent fiduciary capacity.

29. It remains to consider whether the purpose for which the property became vested in the appellant was specific. If he is regarded in the light of a trustee for the administrator, the answer is obviously in the affirmative. But even if it was to administer the estate and account for the residue to the next-of-kin, the purpose was also specific. It was suggested in the argument on behalf of the appellant that the judgment of this Board delivered by Lord Buckmaster in *Khaw Sim Tek V. Chuah Hooi Gnoh Neoh* (1921) L.R. 49 IndAp 37 : 25 Bom. L.R. 121 was an authority for the broad proposition that distribution under an intestacy is never a specific purpose. Their Lordships are not of that opinion. They concur in the explanation of that judgment given in *Lam Kim Song v. Cheang Kok Sang* [1929] S.S.L.R. 62, namely, that it only deals with the case where a specific trust has been declared on its face exhausting the fund, but that trust being void in law, the fund has to be dealt with as upon an intestacy in contradiction of the purpose named.

30. There remain certain subordinate questions. It is unfortunate that to bring Shanmugan into the suit, recourse was had to the misconceived procedure of a third party notice. The position was that if as between the appellant and Shanmugan the arrangements of July 16, 1915, and January 7, 1924, stand, the appellant has an equitable defence to the extent of the sum to which Shanmugan will be beneficially entitled out of the money for which the appellant is accountable. If, on the other hand, those arrangements are avoided for fraud,

there is an equitable defence only to the extent of the \$18,000 which Shanmugan received under the latter arrangement. This latter result has been, in fact, achieved by the order of the Court made by consent of the parties though not relevant to the pleadings. It seems, however, to their Lordships that the issue of fraud on which it depends, has never been regularly tried. It was only introduced by the pleading delivered by the third-party and he was discharged from the action without being called upon to support his allegations, on the ground that the third-party procedure was inapplicable. The issue is, however, relevantly raised in the action now pending in India, and, under the circumstances, the proper order in the present suit is that execution (except for costs and the amount of any expenses properly incurred by the plaintiff and his predecessors as administrators de bonis nan), be stayed until the suit in India has been determined. The widow being dead and the daughters now apparently married, it appears prima facie that Shanmugan is the only person interested. The order must provide that the stay will become perpetual failing due prosecution of the litigation in India and there must be liberty to apply.

31. With regard to the inquiry directed by the order of the Court of Appeal to ascertain the highest value reached by a share in the L.W.H., Ltd., it appears from the written judgments delivered, that it was left to be determined upon further consideration before a single Judge whether the respondent could elect to take the value of the shares instead of the shares themselves and how that value was to be estimated. Their Lordships understand this question has been determined on further consideration and on appeal by the Court of Appeal. These orders are not before their Lordships in this appeal.

32. Their Lordships will duly advise His Majesty that the appeal be dismissed subject to a variation of the order of the Court of Appeal by the introduction of a stay of execution as already described.

33. There will be no order as; to the costs of the appeal.