

(1940) 10 MAD CK 0055
In the Madras High Court

Gaffar Khan

APPELLANT

Vs

Syed Noor

RESPONDENT

Date of Decision : 17-10-1940

Acts Referred:

Citation : AIR 1941 Mad 391 : (1941) ILR (Mad) 414 : (1941) 53 LW 54 : (1941) 1 MLJ 27

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal raises an interesting question of law relating to limitation. The appellant posed as a Doctor, but he had no qualifications. On the 25th February, 1934, the respondent had the misfortune to consult him and underwent an examination at the appellant's consulting room in Yunus Ali Street in Triplicane. He had with him at the time a wallet, containing Rs. 1,500 in currency notes. The wallet was in one of the pockets of the respondent's coat. For the purpose of the examination he had to take off the coat and he hung it up on a nail in the wall. The appellant took the opportunity to steal the wallet and the respondent did not discover the loss until the next day. When he did so he laid a complaint against the appellant. This led to the latter's arrest and conviction. The appellant was found guilty of the theft on the 24th July, 1934 and sentenced to a period of six months' imprisonment. On the 6th August, 1937, more than three years after the conviction the respondent instituted in the City Civil Court the suit out of which this appeal arises for the purpose of recovering from the appellant the Rs. 1,500 stolen from him and damages for being deprived of the use of the money. The appellant pleaded the Limitation Act, but his plea was rejected by the Principal Judge on the ground that the suit was one for the recovery of a debt and that the case came within the Full Bench decision of this Court in Rama Seshayya v. Sri Tripurasundari Cotton Press, Beswada (1925) 50 M.L.J. 520 : ILR 49 Mad. 468 .

2. In the first place, the appellant says that in view of the wording of the plaint

the suit "must be treated as one for the recovery of compensation for a wrong done to the plaintiff. In the second place, he says that even if the plaint can be treated as embodying a claim for the recovery of a debt the case does not fall within the Full Bench decision (*Rama Seshayya v. Sri Tripurasundari Cotton Press, Beswada* (1925) 50 M.L.J. 520 : ILR 49 Mad. 468 and that the appropriate Article would be Article 62, which would also mean that the suit was time barred. As so often happens the plaint is very loosely drawn, but the Court is prepared to assume that the claim set forth in the plaint is a claim on the debt and not a claim for the recovery of compensation, apart from a plea that the appellant should pay interest by way of damages on the money for the period during which the respondent was deprived of its use. The Principal Judge has rejected the respondent's claim for interest on the debt and has granted him a decree for merely Rs. 1,500 with costs. The respondent has not objected to the decision with regard to interest and therefore so far as this Court is concerned the suit is merely a suit for the recovery of Rs. 1,500. If the suit were to be regarded as a suit for damages it is common ground that it would be time barred.

3. In *Rama Seshayya v. Sri Tripurasundari Cotton Press, Beswada* (1925) 50 M.L.J. 520 : ILR 49 Mad. 468 a shareholder sued a company for the recovery of a dividend which had not been paid to him. The Court had to consider which of four Articles of the Limitation Act applied, namely, Article 62, 115, 116 or 120. The Court held that the Limitation Act does not contain an article applicable to a debt simpliciter and therefore the Residuary Article 120 was the only one applicable. Article 62 prescribes a period of three years for a suit to recover money payable by the defendant to the plaintiff as money received by the defendant for the plaintiff's use; but the Court did not consider that this article applied to a suit by a shareholder to recover a dividend payable to him by the company. If Article 62 does not apply in the present case, it is clear that Article 120 must apply on the same parity of reasoning as is set forth in the judgment in *Rama Seshayya v. Sri Tripurasundari Cotton Press, Beswada* (1925) 50 M.L.J. 520 : ILR 49 Mad. 468 .

4. In the present case the trial Judge considered that it would not be possible where a person has stolen another person's money to regard the money as being money had and received for the benefit of the victim, but the learned Judge did not consider the matter in the light of authority. A person who has suffered from the tortious act of another can always waive the tort and if money has been stolen from him he can sue for the recovery of the money on the basis that the money has been received to his use. This is a legal fiction, but it is a fiction which has found recognition for a great length of time. In *Neate v. Harding* (1851) 6 Ex. 349 : 20 L.J. Ex. 250, it was expressly held that it was open to a plaintiff to waive a tort and sue for money had and received. When the tort amounts to felony, the English law, however, requires the felon to be brought to justice before a civil suit is instituted, on the theory that the primary consideration is the vindication of the law. "(See *Chowne v. Baylis* 31 L.J. Ch. 757 and *Smith v. Selwyn* (1914) 3 K.B. 98. It is unnecessary for the Court to consider whether this rule should be applied in India, but it may be pointed out

that there is nothing in the Limitation Act which suggests the application, that in this country there is no distinction between a misdemeanour and a felony, and that in England the rule does not apply when the tort is a mere misdemeanour. But we will assume for the purpose of this case that it does apply, because the appellant has been convicted and was convicted more than three years before suit.

5. It is beyond reasonable argument that where a person has lost money by theft he can sue the thief for the recovery of the money, quite apart from the crime, but if he does, the suit must be framed as one for money had and received, in which case it is governed by Article 62, as this article expressly relates to suits for money had and received. Of course, if he likes he may sue for the recovery of damages by way of compensation, but here again the period of limitation will be three years, as both sides admit. As the respondent sued on the debt and as in the peculiar circumstances the suit must be regarded as a suit for money had and received it does not fall within *Rama Seshayya v. Sri Tripurasundari Cotton Press, Beswada* (1925) 50 M L.J. 520 : ILR 49 Mad. 468 but within Article 62, and therefore is clearly time barred.

6. The appeal will be allowed with costs in the trial Court; but in this Court each party will bear his own costs, the appellant having succeeded on the law, point, but having, failed "on the contention that there was no theft.