

**(1936) 10 MAD CK 0051**  
**In the Madras High Court**

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|---------------------------------------|------------|
| Ganesam Pattabhirama Reddy and Others | APPELLANT  |
| Vs                                    |            |
| Bathena Subbarami Reddi               | RESPONDENT |

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**Date of Decision :** 14-10-1936

**Acts Referred:**

**Citation :** AIR 1937 Mad 675 : 173 Ind. Cas. 33

**Hon'ble Judges :** Venkataramana Rao, J

**Bench :** Division Bench

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**Judgement**

Venkataramana Rao, J.—These four connected second appeals arise out of two suits instituted by the plaintiff for an account of the management of his properties by the family of defendants 1 and 2 as guardian of his property. Section A. Nos. 1750 of 1931 and 13 of 1932 arise out of O.S. No. 80 of 1927 on the file of the Sub. Court, Nellore, and S.A. Nos. 1751 of 1931 and 12 of 1932 arise out of O.S. No. 61 of 1927 also on the file of the Sub-Court, Nellore. The case for the plaintiff is that his parents died when he was very young and defendant 1 and his undivided brother, late Narayana Reddy, who were very closely related to him, took possession of his property and were in management of the same. On 9th February 1914 Narayana Reddi, defendant 1's brother, was appointed guardian of the property of the plaintiff. He died in August 1917 and defendant 1 was appointed guardian on 5th February 1919, and he managed the property till he was discharged by an order of Court on 28th August 1924. O.S. No. 61 of 1927 relates to the period during which the late Narayana Reddi managed his property and O.S. No. 80 of 1927 relates to the period from 1917 to 1924 when defendant 1 was in management. The main question in S.A. Nos. 1750 and 1751 of 1931 is as regards the rate of interest which the plaintiff is entitled to get in respect of the moneys which the late Narayana Reddi and defendant 1 were held liable to account. The learned District Munsif awarded interest at 12 percent, and the learned Subordinate Judge confirmed it. The view of the learned Subordinate Judge was that Section 23, Trusts Act, will not apply to the case of a guardian. But he found that the moneys of the plaintiff were mixed up with the moneys of the defendants' family and lent out by them at

considerably high rates of interest, and following the decision in Hari Krishna Chcttiar Vs. Govindarajulu Naicker, he held the plaintiff should be given 12 per cent, simple interest. Mr. Patanjali Sastri on behalf of the defendants contends that this view of the learned Subordinate Judge is wrong. It seems to me his contention is right. As Sir James Bacon, V.C. in *Sleeman v. Wilson* (1872) 13 Eq 36, observes:

If a person appointed guardian, in that character possesses himself of any of his ward's property, of that property he becomes a trustee, although he is only a trustee by construction, and not appointed by name.

2. u/s 95, Trusts Act, a constructive trustee must perform the same duties and is subject to the same liabilities so far as may be as a trustee under the Act. Further, Section 37, Guardians and Wards Act, makes it clear that the liability of a guardian is that of a trustee. In *Viswanathan v. Brahmanadhan* AIR 1917 Mad 455, which is a case of a guardian and ward, Sir John Wallis, Order J. applied Section 23, Trusts Act. The decision in *Hari Krishna Chcttiar Vs. Govindarajulu Naicker*, is not an authority for the contrary view. Venkatasubba Rao, J. who was a party to the said decision applied Section 23 of the Act to a case of Mahomedan brothers where the elder brother acted as guardian of the younger: vide *Peer Mohideen Rowther Vs. Asia Bivi and Others*, . I am therefore of opinion that Section 23, Trusts Act, will apply to the case. Mr. Patanjali Sastri contends that the clause of the section which is applicable to the case would be Clause (f) and the lower Court had no jurisdiction to award more than 6 percent, compound interest with half yearly rests on the findings arrived at. Before examining the soundness of this contention it will be necessary to state a few facts. Defendant 1 and his late brother Narayana Reddi were members of an undivided Hindu family who owned considerable Immovable property and they were also money lenders by profession. Their primary occupations were therefore both agricultural and money lending. During the lifetime of the plaintiff's father, he had dealings with the family of defendant 1 which consisted in advances of moneys to them at 7? per cent, simple interest. What defendant 1 and his late brother Narayana Reddi did was practically to continue that course of dealings. They debited their ward's account with the moneys as and when received and credited them in their family account treating the sums so credited practically as loans advanced by the minor to their family. After so crediting and mixing the said moneys with their moneys, they spent the joint funds both for their common family expenses and also for money lending. It appears that a large extent of those moneys was utilized in the money lending business but it is not possible to predicate which portion of the money and how much was lent out in the course of the said business. No separate accounts were kept and it was not possible to earmark the profit derived from the investment of the minor's money.

3. The view taken by the lower appellate Court was, though the moneys were allowed to be mixed up with those of defendant 1 and his deceased brother and lent out in their names along with their moneys, it cannot be said that every pie

of the plaintiff's money was lent out for interest and at sometime or other the defendants might not have been able to invest the plaintiff's money and the plaintiff can only be entitled to a reasonable rate of interest and having regard to the rate of interest obtained by the defendants in their money lending transactions, 12 percent, simple interest would be the proper rate. What Mr. Patanjali Sastri contends is that, as the defendants have mixed up the moneys of the minor in their money lending business, and as the plaintiff has not claimed the net profits of the business, the only alternative is to grant 6 percent, compound interest as laid down in Section 23(f) and he relies very strongly on the decision in *Viswanathan v. Brahmanadhan* AIR 1917 Mad 455. But before Section 23, Clause (f), Trusts Act, can be made applicable, there must be clear proof that the trust property or the proceeds thereof was employed in the trade or business, when profits attributable to such employment can be given. But as I have already indicated the state of the accounts did not show that the moneys of the minor were employed as such in the money lending business. There was first a loan by the family and then a mixture of those moneys borrowed with their own moneys and indiscriminately utilized by the family. Under such circumstances it cannot be said that moneys of the minor were invested in the business within the meaning of that clause. Therefore in my opinion the said clause will not apply. Then the question is, what is the rate of interest which the plaintiff would be entitled to? u/s 23 a trustee committing a breach of trust is liable to account for interest actually received or to account for simple interest at the rate of 6 percent, per annum in cases where he may be fairly presumed to have received interest but it is open to the Court to award a higher rate of interest. The equitable principle on which this section is based is explained by James, L.J. in *Vyse v. Foster*, (1873) 8 Ch A 309:

4. This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon.

5. Major portion of the minor's money aforesaid must have been utilized in money lending business and there is evidence that considerable portions of the money utilized by the defendant's family in the money lending business were lent out at rates of 7? percent., 9 percent, and 10 percent, and in most cases they were realized with triennial rests. There are cases where they have received interest ranging from 12 to 36 percent, but it has been pointed out in the Commissioner's report that not much gain would have been made by them in those transactions as they were merely accommodation loans borrowed from the merchants and lent out to customers and as soon as the money was received from the customers they were repaid to the persons from whom such sums were borrowed. Therefore the rates of interest which can be reasonably taken into consideration will be 7? percent, to 12 percent. As aforesaid the question is, what

is the gain which the trustee could have made and what portion of the gain can be attributable to the plaintiff's money. If an account of the net profits were taken, the loss sustained, the expenses incurred and other outgoings discharged in the business would have been taken into account including bad debts. These considerations also should not be overlooked in the consideration of the question what interest could fairly be presumed to have been received by the trustee. I am on the whole of opinion that 10 per cent, simple interest would be the proper rate to award. The decree of the lower Court would be modified by substitution of 10 per cent, simple interest instead of 12 per cent, simple interest. This disposes of Section A. Nos. 1750 and 1751 of 1931.

6. S.A. Nos. 12 and 13 of 1932 are by the plaintiff. The main point urged by Mr. Sommayya in these second appeals is that the lower Court did not make a distinction in regard to the period of accounting. He stated that the period of Narayana Reddi should be treated as separate from that of defendant 1 and the amount which was available at the time of Narayana Reddi's death should be taken as capital and interest should have been separately calculated thereon. But as pointed out by the learned Subordinate Judge, though Narayana Reddi was the appointed guardian it was the family that assumed the management of the guardianship, defendant 1 was again appointed guardian and there was no break of continuity in the management. I think the order of the lower Court in this respect appears to me to be equitable and correct. There was another point raised by Mr. Somayya that interest at 6 per cent, was awarded from 28th August 1924, the date of discharge, whereas interest at the rate of 12 per cent, should have been awarded up to the date of plaint and thereafter 6 per cent, should have been awarded. Sufficient reasons having been given by the learned Judge in para. 11 of his judgment for giving interest only at six per cent, from 28th August 1924, I see no reasons to differ from his view. These second appeals are therefore dismissed. In all these second appeals I direct each party to bear his or their own costs. Leave refused in all appeals. (The rest of the judgment is not necessary for the purpose of this report.)