

(1950) 03 MAD CK 0029

In the Madras High Court

Case No : Second Appeal No. 667 of 1947

Patur Venkataseshayya

APPELLANT

Vs

Dubagunta Subrahmanyam and Others

RESPONDENT

Date of Decision : 14-03-1950

Acts Referred:

Limitation Act, 1908 — Article 120, 62
Trusts Act, 1882 — Section 82

Citation : AIR 1951 Mad 547 : (1950) 1 MLJ 611

Hon'ble Judges : Raghava Rao, J

Bench : Single Bench

Advocate : K. Umamaheswaram and B. Srinivasamurthi, for the Appellant; D. Narasarajau and K.B. Krishnamurthi, for the Respondent

Judgement

Raghava Rao, J.—The appellant before me was the plaintiff in the original suit which has been dismissed by the trial Court as well as on

appeal. The suit was for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of a site in Mambalam

purchased by defendant I and the father of the plaintiff in the name of defendant I only. The properties sold are two items, one sold in August 1938

and the other in February 1939. The suit was laid on 8-12-1944. The Courts below have applied Article 62, Limitation Act, to the suit claim and

held it to be beyond time. They have also held that even if Article 120 applied the suit would be in time with reference to the plaintiff's share of the

proceeds of sale of February 1939 only and not with reference to the share of the proceeds of sale of August 1938, and that the reliance placed

by the plaintiff upon Exs. P-4 and P-4 (a) as saving the bar of limitation with reference to the sale proceeds of August 1938 was of no avail, for the

reasons that the alleged acknowledgments were in the nature of statements addressed not to the plaintiff but to a third party, and that they were not sufficiently clear as acknowledgments of a subsisting liability within Section 19, Limitation Act.

2. It is common ground that Article 120, Limitation Act, cannot apply to the case unless the applicability of Article 62 stands excluded. The choice

is between these two articles only, and there is no other article of the Limitation Act for me to consider. Mr. Umamaheswaram contends that the

view of the Court below that Article 62, Limitation Act, applied to the case is erroneous. His point is that this is not the case of a suit for money

had and received at all but for the enforcement of an equitable right which his client has to monies in the hands of a benamidar. If that is the true

jural relation between the parties underlying the suit claim, says counsel, the case falls directly within the ruling of a Full Bench of this Court in

Karna-murthi v. Ramanatha, I. L. R. 1946 Mad. 306 : A. I. R. 1946 Mad. 248 . The argument is sought to be controverted by the learned

counsel for the respondent on the ground that the relationship between the parties here is purely and simply that of co-sharers, and that there is no

fiduciary or quasi-fiduciary relationship on the part of the defendant towards the plaintiff such as would render Article 120, Limitation Act,

applicable.

3. Mr. Narasaraju contends that the word ""benami"" in relation to a case like the present is a misnomer, because this is not a case of the whole

property belonging to one standing in the name of another but only of property standing in the name of one person on behalf of himself and another.

In itself I do not find anything about the word ""benami"" which renders it apposite to the one case but not to the other. ""Benami"" after all means

nothing more than name lending and there may well be name lending in regard to a part of the property comprised in a deed as well as in regard to

the whole of it. Anyhow, whatever the appropriateness of that label may be in relation to the case on hand, there is no doubt but that this is a case

in substance, within the meaning of Section 82, Trusts Act, occurring in chap. IX headed ""of certain obligations in the nature of trusts"", of property

transferred to one person for a consideration paid or provided by another person as to part of such property undivided though it may be by metes

and bounds between the parties for whose benefit the transfer has taken place. I do not find any adequate reason for restricting the word

property"" which occurs in Section 82 to property as a whole and not holding it to be applicable to property in part. The relationship between the

parties before me is in essence this: that so far as the interests of the other persons who contributed their portions of the consideration for the

purchase of the properties are concerned, these interests are held by defendant I under the sale-deed in his favour as for the benefit of those other

persons. So also the proceeds of sale attributable so far as may be to such interests. The obligation sought to be enforced is, in my opinion,

therefore, obviously an equitable obligation traceable to a resulting trust as it is called in English law, the rule as to which is stated by Eyre C. B. in

Dyer v. Dyer, (1788) 2 Cox. 92 : 30 E. R. 42 and reiterated by Farwell L. J. in his judgment in the Court of Appeal In re Venture, (1908) probate

218 : (77 L. J. p. 105), as follows :

The clear result of all the cases without a single exception is that the trust of a legal estate whether freehold, copyhold, or leasehold; whether taken

in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several, whether

jointly or successive, results to the man who advances the purchase money; and it goes on a strict analogy to the rule of common law, that where a

feoffment is made without consideration, the use results to the feoffer.

4. But then, it is contended by Mr. Narasaraju that the law as laid down in Mir Hussain Ali Vs. Mir Baquir Ali, , (Leach C. J. and Rajamannar J.)

directly governs the present case. To reproduce the facts of that ease from the head-note which correctly expresses them ;

The estate of a Mahomedan who died in 1917 included a casuarina plantation which was sold in 1921 in accordance with the wishes of the

majority of the heirs. The person who sold the property acting with the consent of the majority of the heirs handed over the sale proceeds to the

defendant with instructions to distribute the money among the heirs in accordance with their respective interests. The defendant paid some of them

but he did not pay the plaintiff. The plaintiff who stated that he did not become aware until 1940 of the fact that the money was in the hands of the

defendant, sued to recover his share in the sale proceeds.

On those facts, the Court held that the receipt of the sale proceeds by the defendant for the purpose of distribution among the heirs did not constitute an express trust and that Section 10, Limitation Act, was not applicable to the case. The Court further held, and that is the material part of the decision for the present case, that the suit was governed by Article 62 and not by Articles 89, 120 or 123, Limitation Act, and that the suit was barred by limitation. In such a case, it is laid down that the starting point of limitation is the date when the defendant received the money and that the date of the plaintiff's knowledge of it is immaterial. That was a case in which the defendant who received the proceeds of the sale from the heir who sold the property with instructions to pay over the proceeds to the co-heirs could well be regarded as a person who did so for the plaintiff's use as well as the use of the other heirs in the part in which they were entitled to the proceeds. The defendant in the present case does not occupy such a position, and the proceeds that he holds in the capacity of a co-sharer, pure and simpliciter.

5. The relevancy of a Full Bench ruling of this Court reported in *Yerukola v. Yerukola*, 45 Mad. 648 : A. I. R. 1922 Mad. 150, to such a case has also been debated before me at some length. There, three brothers, members of a joint Hindu family, became separated. Arbitrators were appointed to divide the properties by metes and bounds, but only some of them were so divided, and the rest remained in the hands of the different members, who collected outstandinga from debtors and rents from tenants. In a suit brought by one of the brothers against the others for partition and account, it was held that the properties remaining undivided were held by the brothers as tenants-in-common, that the article of the Limitation Act governing the claim for an account and share of the moneys and rents and profits collected was not Article 109 or 127, but Article 120, unless from the facts of the case, it could be inferred that the person receiving the moneys and rents and profits acted as the agent of the others, in which case Article 89 would apply. It was also further held that Article 62 was not applicable, as a suit, for money had and received would not lie by one tenant-in-common against another who had received more than his share, the appropriate remedy in such a case being an action for an account, in which all just allowances could be made.

6. Dealing with Article 62, Schwabe C. J. observes at p. 659 of the Report :

Article 62 relates to suits for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiffs use. These are

technical terms of the law of England used to cover a great variety of cases in which it can be said that the defendant has received money which

really belongs to the plaintiff. There is, however, one case in which that form of action would not lie in England and that is by one tenant-in-

common against another who has received more than his share.

7. Then the learned Chief Justice after tracing the history of an action for account as between tenants-in-common in England proceeds to observe

at p. 660 of the report as follows :

This, in my judgment, is in itself a sufficient ground for holding that Article 62 has no application to this case, it being quite impossible to say that

any particular debt or rent or profit, or any part of either, was received for the use of any particular tenant-in-common. Indeed, on partition any of

the debts or rents or profits might be awarded in toto to any of the tenants-in-common, and further, in this case each of the tenants-in-common

was collecting part of the common properties or the income from it and no doubt incurring expenses in so doing. An action for an account would

be appropriate; an action for money had and received would, in my judgment, be quite inappropriate. This view was taken in *Subbarao v.*

Ramarao, 40 Mad. 291 : A. I. R. 1917 Mad. 948, in which it was held that Article 120 and not Article 62 applied in similar circumstances.

8. Referring to *Subbarao v. Ramarao*, 40 Mad. 291 : A. I. R. 1917 Mad. 948 again and to *Venkata Reddi v. Kuppu Reddi*, 13 M.L.W. 260 : A.

I. R. 1921 Mad. 553 of the Report the learned Chief Justice further observes that it was held there

that Article 62 does not apply to transactions in which the defendant is not under a mere duty to hand over the moneys which he has received but

has other duties as well in respect of it.

Of the passage quoted above the learned advocate for the appellant stresses the first as in his favour while the learned advocate for the respondent

emphasises the second and the third.

9. Then again in *Kumaragwami Sastri J.*'s judgment in the Full Bench case there are two passages in immediate succession to each other to be

found at p. 674 of the Report on the first of which reliance is placed by the learned counsel for the appellant, while on the second reliance is placed

by the learned advocate for the respondent. The first passage is as follows :

In *Umardaras Ali Khan v. Wilayat Ali Khan*, 19 All. 169 : 1897 A. W. N. 34 it was held that a suit brought by some of the heirs to recover from

the widow of a deceased Muhammadan a sum of money realised by her on account of a mortgage debt due to the deceased was governed by

Article 120 of the Second Schedule to the Indian Limitation Act.

The second passage runs as follows :

In *Venkata Reddi v. Kuppu Reddi*, 13 M. L. W. 260: A. I. R. 1921 Mad. 553, Article 120 was applied to a suit for partition as regards the

income derived from the joint properties. Wallis C. J. observed : "The next question is with regard to the period of limitation, within which the

plaintiff is entitled to recover the income from the defendants, in respect of the portions of the properties which ought to have fallen to his share, but

which were enjoyed by them. It has been contended that the case is governed by Article 62 which applies to a suit, i.e., for money payable by the

defendant to the plaintiff for money received by the defendant for the plaintiff's use. The scope of this article in cases like the present has been

considered in *Subbarao v. Ramarao*, 40 Mad. 291 : AIR 1917 Mad. 948 where it has been pointed out that it does not apply to transactions in

which the defendant is not under a mere duty to hand over the money which he had received, but has other duties as well in respect of it".

10. I have carefully considered the argument on either side in this particular, and I have further looked into the case in *Subbarao v. Rama Rao*, 40

Mad. 291 : A. I. R. 1917 Mad. 948 myself. That was a case in which the facts as stated in the head-note were as follows :

The plaintiff and the defendant were co-sharers in a Jaghir of which the latter was appointed by the Government as manager. The former sued the

latter in the District Munsif's Court for his share of the net income due for the year 1912, but the plaint was returned for presentation to the proper

Court as the valuation of the suit exceeded the pecuniary limits of the jurisdiction of the said Court; the plaintiff did not re-present the plaint in any

Court, but subsequently instituted the present suit in 1913 in the District Court for an account and recovery of his share of income due from the

years 1906 to 1907. The defendant pleaded that the suit was barred by limitation and by Order 2, Rule 2, Civil P. C.

11. On those facts it was held by the Court (Abdur Rahim and Srinivasa Ayyangar JJ.) that the suit was not barred either way, and so far as the

bar of limitation is concerned, the learned Judges held that the suit was one for an account which was governed by Article 120 and not Article 62,

Limitation Act. It will be seen from a careful study of the judgment of Abdur Kahim J. in that case that the learned Judge, referring to Article 62,

observes that the action contemplated thereby is a well known form of action and that the article applies in cases where a definite sum of money

has been received by the defendant, which the law says he must hold for the use of the plaintiff. Then again, it will be seen from the judgment of

Srinivasa Aiyangar J. in that case that the learned Judge first defines the jural relationship between the parties as follows :

The jural relationship between the plaintiff and the defendant is not disputed. Both of them are beneficially interested and are owners beneficially of

a certain jaghir. But the defendant is the person who is constituted the manager. As manager he is entitled to collect the rents and revenue of the

jaghir and bound to account finally for the collections and disbursements. The plaintiff cannot claim a share in each individual collection nor can he

claim any particular sum fit the time of collection from the defendant. All that he is entitled to is an account technically so-called. Whether that

account is to be rendered once a year or when demanded makes no difference.

12. Then again referring to Muhammad Habibullah Khan v. Safdar Husain Khan, 1 ALL. 25 : 1884 A. W. N. 219 it is said by the learned Judge

that that case seems to be precisely in point and that he would follow it, although he thought the jural relationship between the plaintiff and the

defendant was scarcely that of a resulting trust.

13. From the questions made by me from that case it seems to me perfectly clear that while where an account is asked for which is itself the

essence of an equitable action the case must undoubtedly be treated as falling within Article 120 and as being outside Article 62 it does not follow

that where an account is not called for the suit must necessarily be treated as one falling within Article 62 and therefore not being within Article

120. The essence of the matter to my mind appears to be the precise jural

relationship between the parties. Where, as here, on account of the relationship a resulting trust can be postulated it follows that any claim based upon such relationship must be treated as excluded from Article 62 and must be brought under Article 120. It is true as pointed out for the respondent that where there are not many items of collection by the defendant which constitute the subject-matter of the action, the term ""account"" may not seem to be quite so fit and necessary an expression to employ in relation to the relief asked for as otherwise it may be. The inapplicability or applicability of Article 120 in my opinion cannot and does not, however, depend upon whether there is only one item or there are more items than one constituting the subject-matter of the relief asked for.

Nor can it be said that in every case in which after the collection is made nothing more need be done by the defendant than to pay up the share of the amount to which the plaintiff is entitled, the action for such share stands necessarily attracted by Article 62. As I have already observed, the obligation sought to be enforced in the present action is obviously an equitable obligation traceable to a resulting trust as it is known to English law, and the case must be treated as governed by Article 120. The fact that *Subba Rao v. Rama Rao*, 40 Mad. 291 : A. I. R. 1917 Mad. 948 has been referred to in terms of approval by the learned Judges of the Full Bench who decided *Yerukola v. Yerukola*, 45 Mad. 648: AIR 1922 Mad. 150 or that it has been distinguished in the manner in which it has been done by Wallis C. J. in the case in *Venkatareddi v. Kuppu-reddi*, 13 M.L.W. 260: AIR 1921 Mad. 553 does not, in my opinion, justify the contention on behalf of the respondent that the present case is governed by Article 62. In addition to the case of *Muhammad Habibullah v. Safdar Hussain*, 7 ALL. 25 : 1884 A.W.N. 219 discussed by Srinivasa Aiyangar J. in *Subba Rao v. Rama Rao*, 40 Mad. 291 : AIR 1917 Mad. 948, I may also, draw attention to the case in *Umar-daraz Ali Khan v. Wiliat Ali Khan*, 19 ALL. 169: 1897 A. W. N. 34 already referred to in the passage quoted from *Kumaraswami Sastri J.*'s judgment in the Pull Bench case in *Yerulcola v. Yerukola*, 45 Mad. 648 : AIR 1922 Mad. 150 .

14. Article 120 being the article therefore applicable to the case on hand, I am next to consider the argument of Mr. Umamaheswaram that the claim is in time in respect of the pro-ceeds of sale of August 1938 as well as of

February 1939, because the suit is within six years from the date of

his client's knowledge of the sales which according to learned counsel gives his client the right to sue and is therefore the terminus a quo of col. 3

of Article 120. In support of this, reliance is placed by learned counsel upon the ruling of the Privy Council in O. Rm. O.M. Sp. Firm vs.

P.L.N.K.M. Nagappa Chettiar . The first para. of the head-note to the report of the Privy Council decision no doubt points out that the decisions

in India have established a rule of limitation under Article 120 by which the plaintiff in cases to which the rule applies cannot be debarred of his

remedy unless with the knowledge of his rights he has been guilty of delay. The true spirit of this part of the head-note is liable to be misunderstood

unless attention is also directed to what is said in the second para. namely :

Therefore where an action is brought on the ground of fraud, misconduct or mistake on the part of the defendant, the right to sue is deemed to

accrue under that article at the time when the plaintiff comes to know of the fraud, misconduct or mistake in question and time will begin to run

against him only from the date of knowledge.

15. Here we are not concerned with any case of fraud, misconduct or mistake on the part of the defendant. The proposition in its generality which

is sought to be extracted by the learned counsel for the appellant from that part of the judgment which has reference to the first para. of the head-

note cannot be countenanced, as the judgment of Sir George Rankin has to be read and appreciated as a whole in connection with the facts of the

case which have reference to the second para. of the head-note. The proposition relied on has to be taken in conjunction with and cannot at all be

divorced from the facts and circumstances of the case which led to the observation of his Lordship at p. 405 which alone enters into the first para.

of the head-note to the ruling.

16. Reliance is next placed by the learned advocate for the appellant on the ruling of a Full Bench of this Court reported in Rama-seshayya v. Sri

Tripurasundari Cotton Press, Bezwada, 49 Mad: 468 : A. I. R. 1926 Mad. 615 , which contains the observation at p. 479 that :

It is quite true that in cases where the party aggrieved is ignorant of the facts the time will only begin to run, not when the money was in fact

received by the defendant, but when the plaintiff first became aware of it.

17. The soundness of the observation has been discussed in Hussain Ali v. Baquir Ali 1946-2-M. L. J. 422 : A. I. R. 1946 Mad. 116 to which

reference has already been made by me in the foregoing. Leach C. J. in delivering the judgment of the Court in this latter case observes thus at p.

425 of the Report :

That case was decided by a Full Bench and the other members of the Court concurred in the judgment delivered by the learned Chief Justice. If

for the purposes of that case it was necessary for the Court to consider and decide the question whether knowledge was a factor we should be

bound to follow the judgment of Coutts-Trotter C. J. but it is obvious that it was not necessary for the Court to consider this question, and the

passage in the judgment on which the plaintiff relies can only be regarded as constituting an obiter dictum. The judgment gives no indication on

what the assertion was made and nothing has been said in the course of the arguments which convinces us that it is right. As the Privy Council has

on more than one occasion had to point out, the Court is not concerned with the hardship of the case. It must have regard only to the wording of

the statute.

18. I respectfully agree with these observations, and although in the case in which they were made Article 62 was the article held to be applicable

which is not the one that can apply to the present case. I am of opinion that the same considerations cannot but enter into the application of Article

120, which is the relevant article here, to the case on hand.

19. Nor am I impressed by the argument that the bar of limitation in regard to the claim for the plaintiff's share of the proceeds of sale of August

1938 stands saved by the acknowledgment to be found in Exs. P-4 and P-4 (a). I have carefully considered the language of the alleged

acknowledgment, and I have come to the conclusion that although the Courts below may have been wrong in the view taken by them that an

acknowledgment addressed to a third party is of no avail to save limitation, they are right in their view that the language does not contain anything

so unequivocal as is a requisite for an effective acknowledgment under the Limitation Act.

20. The result is that the decrees of the Courts below must be modified by decreeing to the plaintiff a half of the suit claim with interest being his

share of the proceeds of sale of February 1939, with reference to which alone the present suit must without doubt be treated as in time if Article

120 is to be applied, as I have held that it must be, to the present case. The parties will pay and receive proportionate costs right through. No

leave.