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**(1925) 01 PAT CK 0034**  
**In the Patna High Court**

Tofa Lal Das

APPELLANT

Vs

Syed Moinuddin Mirza and Others

RESPONDENT

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**Date of Decision :** 19-01-1925

**Acts Referred:**

Contract Act, 1872 — Section 72  
Limitation Act, 1963 — Section 5

**Citation :** 93 Ind. Cas. 129

**Hon'ble Judges :** Dawson Miller, C.J.; Foster, J

**Bench :** Division Bench

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## Judgement

Dawson Miller, C. J.

1. The plaintiff, who is the appellant in this appeal, was the patnidar of a share in two villages comprising part of the Khagra Estate situate in the Purneah District of this province and owned by two brothers Syed Mohiuddin Mirza and Syed Moinuddin Mirza each of whom owned a separate 8-annas proprietary share. Shortly before July 1921, when the present suit was instituted Syed Mohiuddin died and the persons impleaded as defendants in this suit are the surviving brothers Syed Moinuddin and the executor, the widow and the daughter of the deceased brother.

2. The suit was instituted to recover back with interest a sum of Rs. 5,312-8-0 paid by the plaintiff to his landlords as cess in excess of the amount for which he was legally liable for the Mulki years 1318 to 1325 and half of the year 1326 which comprise a period between the first half of 1910 and the second half of 1918 A. D. (sic) \*ia

3. The patni taluk which the plaintiff held was assessed in the Collectorate rolls in or just before the year 1910 at a valuation of Rs. 7,714 to take effect from the beginning of the year 1318 M.S. As the cess 1 demanded by the landlords and paid by the plaintiff had been calculated on a valuation of Rs. 17,714, the annual cess paid to the landlords based upon the; larger valuation was Rs. 974-1-6 whereas the proper amount payable on the actual valuation was Rs. 348-1-6 The

excess payment, therefore, was Rs. 625 for the first eight years and half of that amount for the last year by which time the mistake had been discovered.

4. The plaintiff alleged in his plaint and proved by his evidence that the larger sum was represented to him as the correct valuation by the landlords" Muharrir Manmohan Das, who produced a copy of the cess valuation roll showing the valuation as Rs. 17,714 and that he paid on that valuation. He also deposed that he did not himself receive from the Collector a copy of the valuation roll. It appears from the evidence given by the plaintiff and his son that he acted upon the representation made on behalf of the landlords and had no suspicion that the valuation was not correct. In this plaint he further alleged that the landlords' valuation roll had been fraudulently altered so as to make the valuation appear to be Rs. 17,714 instead of Rs. 7,714 and that they fraudulently induced the plaintiff to pay, on that valuation. A criminal proceeding was in fact instituted before the District Magistrate against the Manager of the Khagra Estate, Mr. P. W. Duff, in 1919 but as no criminal offence against him could be proved the proceedings were withdrawn and in the present suit the charge of fraud has not been persisted in. It is the fact, however, that the defendants' copy of the cess valuation roll shows the valuation as Rs. 17,714 and not Rs. 7,714 as appears in the Collectorate rolls. It should also be mentioned that in proceedings before the Collector on the 13th June 1919 at the instances of the plaintiff the Collector passed an order that the Khagra Estate should be informed that the correct valuation of the plaintiff's tenure in the cess roll was Rs. 7,714 and not Rs. 17,714 as appeared in the landlords' copy.

5. The defendants in their written statement denied the charges of fraud and maintained that the correct valuation was the larger figure and not the smaller and that the cess was payable upon a valuation of Rs. 17,714. They further pleaded that the suit was barred by limitation.

6. The learned Subordinate Judge of Purneah before whom the case came for trial found that the correct valuation was that pleaded by the plaintiff. As the charge of fraud had been abandoned, he found that the charge had not been substantiated. On the question of limitation he found that Article 62 of the Limitation Act, as contended by the defendants, was applicable and that Article 96, as contended by the plaintiff, did not govern the case and that the claim was barred in respect of any cess paid more than three years before the commencement of the suit. It followed, therefore, that the only sum recoverable was the sum of Rs. 312-8 paid on the 19th November 1918, the claim for the earlier payments made more than three years before the commencement of the suit, being barred by limitation. He accordingly passed a decree for Rs. 312-8-3 together with interest at 12 per cent. per annum from the date of payment to the date of the suit amounting to Rs. 99-8-0 making Rs. 412 in all and allowed 6 per cent, per annum interest upon the decretal amount from the date of the decree to the date of realisation.

7. From this decree the plaintiff has appealed and contends that Article 96 of the

Limitation Act and not Article 62 as found by the learned Subordinate Judge is applicable. Article 62 relates to a claim for money is received by the defendant for the plaintiff's use and prescribes a limitation period of three years from the date when the money is received. Article 96 applies to a suit for relief on the ground of mistake and the period of limitation therein prescribed is three years from the date when the mistake becomes known to the plaintiff. It follows, therefore, that if the latter Article is applicable the plaintiff is entitled to recover the whole sum claimed as the mistake was not discovered until within three years from the date of the suit. Apart from, the question as to which Article applies on the assumption that the excess payments were made by reason of a mistake on the part of the plaintiff, it has been contended On behalf of the defendants that the relief claimed in the plaint is based not upon mistake but upon fraud and that the case of fraud has failed. The relief claimed in the plaint is framed as follows: "The plaintiff prays for the following reliefs: (a) A decree may be passed in favour of the plaintiff against the defendants for the refund of Rs. 9,606-4-0 as principal and interest as per account given below on account of the excess amount realized from him by the defendants" estate."

8. Clauses (b) and (c) relate to costs and any other relief to which the plaintiff may be deemed entitled. It is true that in the body of the plaint where the facts are set out it is alleged that the landlords fraudulently realised from the plaintiff the excess amount every year and that the defendants are liable to refund the same. At the same time para. 2 of the plaint alleges that the manager and amlas of the landlords showed the karpardaz and son of the plaintiff a valuation roll with an entry of Rs. 17,714 as the valuation on account of their patni mahal and after having assured them collected from the plaintiff cesses according to the said valuation and the plaintiff continued to pay cesses according to the valuation as represented and assured by the manager and amlas of the landlords, and in para. 4 it is alleged that the plaintiff's suspicion having been aroused he obtained a copy of the valuation roll on the 12th April 1919 and on perusal of it, it transpired that the correct valuation was Rs. 7,714 and that he afterwards claimed back the balance overpaid. The actual relief as claimed is not stated to be based either upon mistake or fraud but must be taken as based upon the facts alleged in the body of the plaint. In substance the, plaint makes out a case of mistake induced by the representations of the defendants or their servants and whether these representations were fraudulent or not, the ground upon which the plaintiff is entitled to recover, if at all, is that the payment was made under a mistake of fact as to his liability. Even in cases of fraud the foundation of the claim is based upon mistake, for if the alleged fraud did not deceive the plaintiff he would not have any cause of action. It is true the charge of fraud has failed but the case of mistake has been amply proved and, in my opinion, the plaint is comprehensive enough to cover the relief claimed on that ground.

9. It remains to consider which Article of the Limitation Act governs the present case. It is well-established that where the relief claimed is covered by two Articles of the Schedule, one being of general import and the other of special

import applying to the particular facts of any case, the latter shall govern. Article 62 undoubtedly covers many more cases than those of money paid, under a mistake of fact. It is a general Article covering all cases covered by the well-known action in English Law for money had and received by the defendant for the plaintiff's use. It would apply to cases of money received upon a consideration which happens to fail or of money rightfully received by the defendant for the plaintiff's use but wrongfully detained as also for money obtained through extortion, deceit or oppression as well as to the case of money paid by mistake. Some of these cases are undoubtedly provided for by later Articles in the Schedule-Instances will be found in Article 87 which relates to suits by the assured to recover premia paid under a policy voidable at the election of the insurers. Article 89 which provides for suits by a principal against his agent for moveable property received by the latter and not accounted for and Article 97 which relates to suits for money paid upon an existing consideration which afterwards fails. In each of these cases the commencement of the period of limitation is different from that provided in Article 62 and the provision made with regard to the special cases would govern rather than that provided as to the commencement of the period of limitation in Article 62. If Article 96 provided specifically for the case of a suit to recover money paid under a mistake and nothing more, there could be no doubt that that Article rather than Article 62 would govern the present case. Article 96, however, is itself an Article of general import and covers all cases in which relief is sought on the ground of mistake. It would, for example, cover the case of a suit for rectification of a document on the ground of mutual mistake and other reliefs relating to moveable as well as Immovable property.

10. In *Mathura Nath Kundu v. Steel* 12 C. 533 : 6 Ind. Dec. (N.S.) 362., a suit by a tenant to recover from the landlord a sum of money paid in excess of the amount demandable for cess, the High Court at Calcutta applied Article 96 : but in that case it does not appear to have been contended that Article 62 was applicable. In *Hanuman Kamat v. Hanuman Mandur* 19 C. 123 : 18 I. A (sic):6 Sar. P.C. J. 91 : 9 Ind. Dec. (N.S.) 527. the claim was to recover purchase-money on the ground of failure of consideration. Their Lordships held that if there never was any consideration from the beginning the price paid was money had and received within Article 62 but they were inclined to think that the consideration did not fail at once so as to render the contract void but only when the purchaser could not obtain possession of the property and that the consideration then failed so that the case appeared to them to come within Article 97. It was not necessary, however, to decide definitely which of these Articles should be applied as in either case the suit was barred. In *Dharamchand v. Corelal* (3) 47 Ind. Cas. 886., a case decided in the Court of the Judicial Commissioner of Nagpur, the claim was to re-cover the purchase-price paid for a house and it was held that in such a case it was only where the sale was void ab initio that Article 62 applied but where the consideration subsequently failed Article 97 being more specific would govern. But no case has been drawn to our

attention in which it was directly determined whether Article 62 or Article 96 should be preferred in a suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due. It has been determined by the High Court at Madras that relief Bought on the ground of fraud within the meaning of Article 95 is governed by that Article and not by Article 62 or Article 97. See *Punnayil Kuttu v. Raman Nair* 31 M. 230 : 18 M.L.J. 19 : 4 M.L.T. 80.

11. On the whole I am of opinion that the intention of the Legislature was that in cases where the relief is based on mistake the period of limitation should run from the time when the mistake was first discovered even if some other Article in the Limitation Act should be wide enough to include the cause of action. Otherwise in many cases the relief would be barred before the plaintiff could possibly be aware that he had a right to sue. The remedy in such a case as the present is provided by Section 72 of the Contract Act which enacts that a person to whom money has been paid or anything delivered by mistake or under coercion must re-pay or return it, and it seems to me reasonable to suppose that it was not the intention of the Legislature in passing the Limitation Act to take away that remedy in the case of money paid under mistake merely because the mistake remained undiscovered for three years from the date of payment. Moreover, consider that in giving effect to a Statute of Limitations if two Articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right, to sue should generally, and apart from other equitable considerations, be preferred. This applies, I think, with particular force to a case like the present where, if Article 62 should be held to govern, the plaintiff through no laches or deley on his part would be deprived of his remedy before he could reasonably become aware that he had a remedy at all.

12. It was argued, however, that the plaintiff ought to have been aware all along that the correct valuation was the lower figure because his copy of the cess valuation roll must have disclosed it. As against this the plaintiff deposes that he never received a copy of the revised valuation roll in 1910 but accepted the correctness of the defendants' copy whilst the defendants' witness Manmohan Das alleged that the plaintiff had a copy of his own and that the valuation there mentioned was also the larger figure. Neither of the copies was produced in evidence but whichever, version be correct there can be no doubt that the plaintiff was acting under a bona fide mistake in making the excess payment. Nor is there any reason to suppose that the plaintiff, if he was aware of the correct valuation, as he must have been if he received a correct copy of the register, would voluntarily pay cess based upon a larger figure.

13. It was also argued that the cess was in fact paid under legal process and, therefore, could not be recovered back until the decree or order compelling payment had been set aside. The argument rests solely upon an answer given by

the plaintiff in cross-examination that his rents were usually realised under the patni sale law. What the exact significance of this statement may be is left in doubt, but the point was never taken either in the pleadings, or before the Judge in the Trial Court, nor was any issue framed with regard to it before the trial. There is, in my opinion, no evidence sufficient to justify a finding that the excess payments made in this case were made under legal compulsion. I am of opinion that the claim is governed by Article 96 of the Limitation Act and that the suit is not time-barred.

14. A preliminary point was taken on behalf of the defendants that the appeal had abated as against the representative of Syed Mohiuddin Mirza and that as the cause of action did not survive against his brother, the defendant No. 1, the suit could not proceed and was defective for non-joinder of parties. When the suit was instituted Dr. A. C. Taylor, the 2nd defendant, was the executor of the late Syed Mohiuddin's estate and was properly impleaded as his legal representative. His widow and daughter, the 3rd and 4th defendants respectively, were also joined on the ground that they were his heirs. On the 27th October 1922 after the decree had been passed in the Trial Court and pending the appeal to this Court Dr. Taylor died. Within 90 days of that date, namely, on the 8th January 1923, before another executor or administrator had been appointed, the plaintiff applied to the Registrar of this Court to substitute in place of Dr. Taylor the 3rd and 4th defendants, who were already on the record, as the legal heirs of the deceased Syed Mohiuddin and an order was passed on the 10th January as follows:

Let it be noted that the heirs of the deceased respondent No. 2 are already on the record.

15. Subsequently, sometime before the 4th May 1923, Mr. T. N. Patridge was appointed administrator of the estate in place of Dr. Taylor but no application to substitute him in place of the former executor was made and Syed Mohiuddin, it is contended is not properly represented in this appeal, which has accordingly abated as against his legal representatives. The proper person to substitute failing the appointment of a successor to Dr. Taylor to administer the estate, it was argued, was the legal representative of the late executer and not the widow and daughter and even after Mr. Patridge's appointment no application was made to bring him on the record. It was contended on behalf of the defendant No. 1 that the whole appeal failed for defect of parties in the absence of the legal representatives of Syed Mohiuddin as the right to sue did, not survive against the defendant No. 1 alone. This argument, however, cannot prevail, for it is conceded that each of the brothers held a separate half share in the estate. We held, therefore, that the appeal could proceed at least against the 1st defendant to recover his half share of the excess payments. We accordingly directed the appeal to continue. The defendants Nos. 3 and 4 have not appeared to contest the appeal but we intimated that we should like to hear what Mr. Patridge had to say on the question of abatement if the appellant took steps to bring him before

the Court without delay. An application to set aside the abatement was subsequently filed at the end of last term before judgment was delivered and we reserved our judgment on the merits of the appeal until Mr. Patridge, the successor to Dr. Taylor, should have been served and given an opportunity of appearing and being heard on the application. He has now appeared and opposes the application. He contends that the appeal abated as against the estate of Mohiuddin which he now represents and that the abatement should not be set aside. It should be mentioned that the present suit was tried and heard together with a rent suit in which Dr. Taylor as executor of Mohiuddin was plaintiff and the present appellant was defendant. The appellant appealed to this Court from the decree in both those suits which were determined by the same judgment in the Trial Court. The appeals were by order of the Registrar declared analogous and were heard together. We have delivered a separate judgment in the rent appeal. The widow and daughter were not plaintiffs in that suit. But on the death of Dr. Taylor an application was made to substitute them in his place as respondents in the appeal on the ground that they were the heirs and legal representatives of Mohiuddin. For some reason service of notice of the application was not effected upon them and on Mr. Patridge's appointment a few months later the application was renewed and he was substituted as respondent in place of Dr. Taylor in the appeal in the rent suit.

16. The appellant contends in the first place that as the appeals were made analogous it was not necessary to effect substitution, in both appeals. I am unable to accede to this argument. The effect of an order declaring that appeals are analogous is merely that they shall be heard together. It has not the effect of consolidation and an order passed in one does not govern the other unless expressly stated.

17. It is next contended that the appeal has not abated and, even if it should be held that it has, there was sufficient cause within Section 5 of the Limitation Act for not applying to set aside the abatement sooner. The provisions of that section are applicable by Order XXII, Rule 9 (3) to an application under the earlier part of the same rule to set aside an abatement.

18. Now there can be no doubt that the appellant was not guilty of any laches in applying for substitution after Dr. Taylor's death. He was certainly in a difficulty as no one had been appointed to succeed Dr. Taylor. He applied in proper time to substitute the heirs and the order of the 10th January 1923 was passed. In his petition he says that he was misled by the order of the 10th January 1923 which he considered as tantamount to acceptance by the Court of the heirs of Syed Mohiuddin as the proper persons to represent him after the executor's death, and as those parties are still alive, the appellant did not think it necessary to bring Mr. Patridge on the record even after his appointment as administrator of Mohiuddin's estate. I confess that there is considerable force in this argument. I will assume that the heirs were not the proper legal representatives and that pending the appointment of Dr. Taylor's successor, the proper person would have

been his executor if he had one or his legal representative whoever he might be. Nevertheless by Order XXII, Rule 4, Sub-rule.(1) when one of two defendants dies and the right to sue does not survive against the surviving defendant, the Court shall, on an application made in that behalf, cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. By Sub-rule(2) of that rule, any person so made a party may make any defence appropriate to his legal character as legal representative of the deceased defendant. By Sub-rule (3), where within the time limited by law no such application is made under Sub-rule (1), the suit shall abate as against the deceased defendant. No question was raised as to whether the heirs were the legal representatives of Mohiuddin. If it had been it was the Court's duty under Order XXII, Rule 5, to decide that question. The appellant contends that the order of the 10th January 1923 was an order substituting the heirs as the legal representatives and the proper persons to defend the suit under Order XXII, Rule 4. The order does not in terms decide that they are the legal representatives but merely notes that the heirs of Mohiuddin are already on the record. The object of this was no doubt to intimate that service of notice upon them of the application for substitution was not necessary. The appellant took this as a direction of the Court on an application under Rule 4 that the heirs were the proper legal representatives. I think it is clear that the appellant was misled, and not unnaturally misled, as to the legal effect of this order. It cannot be said that he was guilty of laches in the matter as he did in fact take steps in the rent suit to bring Mr. Patridge on the record after Dr. Taylor's death, and it may be assumed that had he not been misled by the order of the 10th January 1923, he would have taken similar steps to bring Mr. Patridge on the record in the present suit also. Whatever may be the legal effect of that order, I think that the appellant was misled by it and should be entitled u/s 5 of the Limitation Act to have the abatement, if there was an abatement, set aside. Mr. Patridge has now been brought before the Court and it cannot be, said that the interest which he represents, that is, the estate of Mohiuddin, has been in any way prejudiced by what has happened. He has been given an opportunity of arguing the appeal on the merits, but the learned Vakil who represents him and who argued the case fully on behalf of the 1st defendant does not desire to add anything on his behalf in addition to the arguments he has already put forward. In these circumstances I think the proper order to make is that Mr. Patridge should be substituted as respondent in place of the widow and daughter of the late Syed Mohiuddin Mirza in this appeal and that the abatement, if it has taken place, should be set aside.

19. The result is that the decree of the learned Subordinate Judge will be varied by ordering that the respondents Syed Moinuddin Mirza and Mr. Patridge as administrator of the estate of the deceased Syed Mohiuddin Mirza are liable severally for a moiety of the sums paid in excess of the amounts of cess due for the years 1318 to 1325 M. S. amounting to Rs. 5,000. In the circumstances these sums will carry no interest up to the date of this decree but interest at 6 per cent. per annum will be payable on the amount awarded hereunder from this



date up to the date of realisation. -(1)

(2)

(4)