LETTERS PATENT APPEAL.

Before Mookerjee, Walmsley and Pearson JJ.

1922

Feb. 16.

BIMAN CHANDRA DATTA

v.

PROMOTHA NATH GHOSE.*

Limitation—Fraud—Limitation Act (IX of 1908), s. 18, Sch. I., Arts. 62, 120—Applicability of s. 18—Knowledge—Burden of proof.

In a suit for money 'had and received,' where the true state of facts was fraudulently concealed by the defendant :—

Held, that Art. 62 of the Limitation Act applied and not the residuary Art. 120.

Juscurn v. *Pirthichand* (1), *Mahommed Wahib* v. *Mahommed Ameer* (2), *Raghumani* v. *Nilmani*, (3) *Sankunni* v. *Bobinda* (4) referred to.

Where the plaintiff had been kept from knowledge, by the defendant, of the circumstances constituting the fraud, plaintiff can rely upon section 18, to escape from the bar of limitation.

Section 18 of the Limitation Act is not precisely identical with the provisions of section 26 of the Real Property Limitation Act, 1833 (3 & 4 Will. IV c. 27) which makes time run from the date when the fraud is, or with reasonable diligence might have been first known or discovered.

Bibi Solomon v. *Abdool Azeez* (5) dissented from.

Rolfe v. *Gregory* (6); *Bulli Coal Mining Co.* v. *Osborn* (7), *Rohimbhoy* v. *Turner* (8) approved.

The true position is that where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who in such circumstances desires to invoke the aid of section 18 must establish that there has been fraud, and that by means of such fraud, he has been kept from the knowledge of his right to sue, or of the title whereon

* Letters Patent Appeal, No. 59 of 1920, in Appeal from Appellate Decree No. 2297 of 1917.

(1) (1918) L. R. 46 I. A. 52 ; I. L. R. 46 Calc. 670.
(2) (1905) I. L. R. 32 Calc. 527.
(3) (1877) I. L. R. 2 Calc. 393.
(4) (1912) I. L. R. 37 Mad. 381.
(5) (1881) 8 C. L. R. 169.
(6) (1864) 4 De G. J. & S. 576, 579.
(7) [1899] App. Cas. 351, 363.
(8) (1892) I. L. R. 17, Bom. 341 L. R. 20 I. A. 1.

it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud.

Natha Singh v. *Jodha Singh* (1), *Narayan Sahu* v. *Mohunth Damodar Das* (2); *Jatindra Mohan* v. *Brojendra Kumar* (3), *Avancha* v. *Avancha* (4) and *Lukhpat* v. *Jang Bahadur* (5) followed.

APPEAL by Biman Chandra Dutta, the plaintiff.

This appeal arises out of a suit for recovery of money. The Court of first instance decreed the suit. The District Judge on appeal reversed that decision and dismissed the suit. On second appeal to a Division Bench of this Court, Mr. Justice Teunon was of opinion that the decree of the Court of first instance should be restored; Mr. Justice Newbould held, on the other hand, that the decree of the District Judge should be maintained.

Hence this appeal by the plaintiff under clause 15 of the Letters Patent from the judgment of the Division Court which was heard by Mookerjee, Walmsley and Pearson JJ.

The facts of the case are fully set out in the judgment of Mookerjee J.

Babu Sarat Chandra Roy Choudhuri, *Babu Lalit Mohan Banerjee* and *Babu Apurba Chandra Mookerjee*, for the appellant.

Babu Samatul Chandra Dutta, *Babu Dhirendranath Ganguly* and *Babu Pares Chandra Mitra*, for the respondent.

Cur. adv. vult.

MOOKERJEE J. This is an appeal under Clause 15 of the Letters Patent from the judgment of two

(1) (1884) I. L. R. 6 All. 406.
(2) (1912) 16 C. W. N. 894.
(3) (1914) 19 C. W. N. 553.
(4) (1913) 25 Mad. L. J. 531.
(5) (1916) 40 I. C. 37.

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learned Judges of this Court who were equally divided in opinion in an Appeal from Appellate Decree preferred in a suit for recovery of money. The Court of first instance decreed the suit. The District Judge reversed that decision and dismissed the suit. On second appeal to this Court, Mr. Justice Teunon was of opinion that the decree of the Subordinate Judge should be restored. Mr. Justice Newbould held, on the other hand, that the decree of the District Judge should be maintained. The result was that under paragraph 1 of sub-section (*2*) of section 98 of the Civil Procedure Code, the decree of the District Judge stood confirmed.

The facts material for the decision of the question of law raised before us lie in a narrow compass. One Jatindra Mohan Dutta died, leaving as his heir a childless widow, Pranab Kumari Dasi. The widow sold her ornaments through her maternal uncle Pramatha Nath Ghose and made over the sale proceeds to him to be deposited on her behalf in the Hazaribagh Bank. The deposit was made on the 18th December 1909 and the account was opened in the books of the Bank in the name of "Pramatha Nath Ghose on behalf of Srimati Pranab Kumari Dasi," Pramatha Nath Ghose, who is the defendant in this litigation, was, consequently, the only person who could operate on the account. Pranab Kumari Dasi died on the 21st November 1910 and a sum of about Rs. 800 stood to the credit of the account on that date. On the 22nd December 1910, Pramatha Nath Ghose withdrew the money from the Bank. The plaintiff, who is the brother of Jatindra Mohan Dutta, the deceased husband of the lady, is her admitted heir-at-law. He commenced the present suit on the 6th October 1915 on the allegation that the money belonged to his sister-in-law, that it had been misappropriated

by the defendant and that on the 25th March 1915 he ascertained from the Bank the facts of the transaction. The defendant repudiated the claim as entirely unfounded, and denied that the money deposited in the Bank was the property of his niece. He further contended that the suit was barred by limitation. The Subordinate Judge held that the money belonged to Pranab Kumari Dasi and had been misappropriated by the defendant. The Subordinate Judge further held that the suit was governed by Article 120 of the Schedule to the Limitation Act which prescribes a period of six years from the date when the right to sue accrues. He adopted the view that the residuary article applied, because Article 62 invoked by the plaintiff was inapplicable. The Subordinate Judge also expressed the opinion that even if Article 62 had been applicable, the plaintiff would have been entitled to the benefit of Section 18 by reason of the fraud committed by the defendant. On appeal, the District Judge held, in concurrence with the primary Court, that the claim was well-founded on the merits. On the question of limitation, however, he held that as the plaintiff had knowledge of the deposit and the withdrawal early in 1912, the suit was barred under Article 62. In this Court, Mr. Justice Teunon and Mr. Justice Newbould have disagreed on the point which has formed the only subject of controversy before us.

We are of opinion that the suit falls within the scope of Article 62, which provides that every suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use must be instituted within three years from the date when the money is received. The form of suit indicated by this Article is applicable where the defendant has received money, which, in justice and

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equity, belongs to the plaintiff, under such circumstances as in law renders the receipt of it a receipt by the defendant to the use of the plaintiff. In the words of Sir Lawrence Jenkins, the Article most nearly approaches the formula of "money had and received, by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and Procedure:" *Juscurn* v. *Pirthichand* (1) reported as *Hukumchand* v. *Pirthichand*, *Mahommed Wahid* v. *Mohammed Ameer* (2), *Raghumani* v. *Nilmani* (3), *Sankunni* v. *Bobinda* (4). In this view, the plaintiff is driven to rely upon Section 18 to escape from the bar of limitation.

Section 18, in so far as it applies to the case before us, provides that where any person having a right to institute a suit, has by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person injuriously affected thereby. It may be observed that this is not precisely identical with the provisions of section 26 of the Real Property Limitation Act, 1833, which makes time run from the date when the fraud is, or with reasonable deligence might have been, first known or discovered. This distinction was possibly not brought to the notice of the Court in *Bib. Soloman* v. *Abdul Aziz* (5). The principle is, perhaps, best stated in the words of Westbury, L. C., in *Rolfe* v. *Gregory* (6): "when the remedy is given on the ground of fraud, it is governed

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(2) (1905) I. L. R. 32 Calc. 527.
(3) (1877) I. L. R. 2 Calc. 393.
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(5) (1881) 8 C. L. R. 169.
(6) (1864) 4 DeG. J. & S. 576, 579.

by this important principle, that the right of the party defrauded is not affected by lapse of time, or generally speaking, by anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed." This was quoted with approval by Lord James in delivering the opinion of the Judicial Committee in *Bulli Coal Mining Company* v. *Osborn* (1) where he added: "the contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection, is opposed to common sense as well as to the principles of equity." To this must be added further the valuable statement by Lord Hobhouse in *Rahimboy* v. *Turner* (2): "when a man has committed a fraud and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit." The true position then is that where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who, in such circumstances, desires to invoke the aid of section 18, must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud: as

(1) [1899] App. Cas. 351, 363. (2) (1892) I. L. R. 17 Bom. 341; L. R. 20 I. A. 1.

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Lord Hobhouse points out, it is not sufficient for the defendant to show that the plaintiff had some clues and hints which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud. These principles have been repeatedly applied as for instance in *Natha Singh* v. *Jodha Singh* (1), *Narayan Sahu* v. *Mohant Damodar Das* (2), *Arjun* v. *Gunendra* (3), *Jatindra Mohan* v. *Brojendra Kumar* (4) and *Lokenath* v. *Chintamoni* (5). The cases most nearly in point are the decisions in *Avancha* v. *Avancha* (6) and *Lakhpat* v. *Jung Bahadur* (7), where the plaintiff had, without knowledge of the defendant, recovered from a stranger money jointly payable to the plaintiff and the defendant, and had concealed from the defendant the fact of such realisation. The only question is, what is the position of the parties in the present case when tested in the light of these principles.

It has been conclusively established in this litigation, notwithstanding the allegation of the defendant to the contrary, that the disputed money belonged not to him but to his niece and had been fraudulently misappropriated by him. The true character of the transaction between him and his niece was specially within his knowledge, and he has taken full advantage of her death to set up a false claim, with impunity if he could. The fraud of concealment of the true state of facts has been persevered in by him, not only up to the time of the present suit but also during its progress. The burden consequently lies heavily upon him to establish, not that the plaintiff had clues and hints which, if vigorously and acutely followed by

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(2) (1912) 16 C. W. N. 894.
(3) (1913) 18 C. W. N. 1266.
(4) (1914) 19 C. W. N. 553.
(5) (1912) 16 I. C. 547.
(6) (1913) 25 Mad. L. J. 531 ; 14 Mad. L. T. 325.
(7) (1916) 40 I. C. 37.

him, might perhaps have led him to a complete knowledge of the fraud, but that the plaintiff had clear and definite knowledge of the facts which constituted the fraud, at a time anterior to the period of limitation. From this point of view, the defendant is in an inextricable difficulty. In the first place, he did not set up such a defence, in his written statement, for the obvious reason that such a defence, even if taken as an alternative, would have seriously imperilled the success of his substantial defence that the claim was unfounded and he himself had committed no fraud. In the second place, he did not adduce evidence to substantiate such an alternative defence. He is thus inevitably constrained to rely upon isolated fragments from the evidence adduced by the plaintiff to enable him to discharge the burden of proof. It is not surprising that examined from this standpoint, his position proves untenable. He contends that the plaintiff had knowledge of the deposit and withdrawal early in 1912; but this is clearly insufficient. The account stood in his name coupled with the statement that the deposit had been made on behalf of his niece. He alone could consequently operate on the account. The withdrawal by him was thus not necessarily an act tainted by fraud. Indeed, he has nowhere asserted that he entertained a fraudulent intention at that time to misappropriate the sum: in fact, he alone would have to withdraw the sum from the Bank before he could make it over to the rightful owner. We have thus no allegation by the defendant, much less any proof by him, as to the precise time when he committed the fraud. Apart from this, he has throughout concealed the fraud and has not only assured the plaintiff but has also maintained in Court that the money belonged to him and not to his niece. On the other hand, the plaintiff has given his sworn

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testimony that it was not till the 25th March 1915 that he obtained from the authorities of the Bank definite information as to the details of the transaction. There is thus no escape from the conclusion that the plaintiff is *primâ facie* entitled to the benefit of Section 18, while the defendant has neither alleged nor proved facts which would exclude the operation of that provision. This raises finally the question, whether the defendant should now be allowed an opportunity to set up and establish such a defence; the answer, in our opinion, must be in the negative. The position he would have to take up would be contradictory to what has been hitherto his defence; and he cannot now reasonably ask to be permitted to assert that he has been guilty of fraud and that the plaintiff has been in full possession of the material facts for more than three years prior to the suit.

We hold accordingly that this appeal must be allowed, the decree of the District Judge set aside, and that of the trial Court restored with costs throughout.

WALMSLEY J. I agree.

PEARSON J. I agree. *Appeal allowed.*

S. M. M.