

APPELLATE CIVIL.

Before Jack J.

KALI PADA BHATTACHARJYA

v.

KALI KUMAR PAL.*

1937
Dec. 16, 20.

Limitation—Money entrusted for investment—Money suit, bona fide instituted as mortgage-suit—Second Appeal—Indian Limitation Act (IX of 1908), s. 10; Art. 62—Code of Civil Procedure (Act V of 1908), s. 102.

Where money was entrusted by the plaintiff to the defendant expressly for investment and the latter failed to do so,

held that a suit to recover the money is governed by s. 10 of the Limitation Act and Art. 62 has no application.

A suit which is *bona fide* framed as one to enforce a mortgage and in the alternative for recovery of money received on behalf of the plaintiff (the amount of which is below Rs. 500) is not governed by s. 102 of the Code of Civil Procedure, and a Second Appeal is not barred from a decree passed in it, although it is found that the only claim which could be established by the plaintiff was the money claim.

APPEAL FROM APPELLATE DECREE by defendant
No. 3.

The facts of the case and the arguments in the appeal are sufficiently stated in the judgment.

Prokash Chandra Pakrashi for the appellant.

Chandra Sekhar Sen for the respondent.

Cur. adv. vult.

JACK J. This appeal arises out of a suit on a simple mortgage brought against the mortgagors, defendants Nos. 1 and 2.

*Appeal from Appellate Decree, No. 1591 of 1936, against the decree of Ramesh Chandra Sen, Third Subordinate Judge of Dacca, dated April 30, 1936, affirming the decree of A. S. M. Salek, Third Munsif of Narayanganj, dated Nov. 30, 1935.

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The plaintiff is an illiterate person, a potter by profession. He says that he made over Rs. 300 to his sister with a view that when Kali Pada Bhattacharjya, defendant No. 3, a money-lender, had an opportunity for investing the amount, the sister should make it over to Kali Pada. As he was going on a tour for the purpose of his business, he thought it better to leave the money with his sister. The sister made over the money to Kali Pada at the beginning of Jaistha, 1337 B. S., for investment. On his return home Kali Pada enquired about the investment and on enquiry Kali Pada told him that he (Kali Pada) had invested the money, Rs. 150 with defendant No. 1, Rs. 100 with one Affiruddi and Rs. 50 with one Julmat on registered bonds. He handed over Julmat's bond to the plaintiff, but said that the other bonds, being registered, had not been taken back from the registration office. The plaintiff says that he made repeated demands for these registered bonds until after three years from the date of the loan when Kali Pada informed him that the bonds were with him and gave two receipts to the plaintiff for these two bonds. When the plaintiff then tried to verify the transactions he was told that the bonds were executed in favour of Kali Pada. The plaintiff thereupon assembled a *baithak* in Srâban, 1341 B. S. At the *baithak*, Kali Pada denied the two receipts and denied also his taking of Rs. 300 from the plaintiff. He said that he had taken only Rs. 50 and invested the amount with Julmat. This sum of Rs. 50 is not the subject-matter of the present suit. The plaintiff claims that he is entitled to recover the amount of the loan from the mortgagors defendants Nos. 1 and 2 or otherwise he is entitled to recover the money from defendant No. 3 (in case it be found that defendant No. 3 is the owner of the mortgage-money) by a money decree for the amount of loan Rs. 150 with compensation of the like amount. The suit was decreed in part by the trial Court against defendant No. 3 for Rs. 267 but it was dismissed on contest

against defendant No. 1 and *ex parte* against defendant No. 2. An appeal to the lower appellate Court was dismissed. Defendant No. 3 has appealed to this Court.

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In this Court it is contended that the suit should have been dismissed against defendant No. 3 on the ground of limitation, and that the Court of appeal below ought to have held that s. 10 of the Indian Limitation Act has no application to the facts of the case and also that s. 18 of the Indian Limitation Act has no application. The appellant claims that Art. 62 of the Indian Limitation Act applies, this being money payable by the defendants for money received on behalf of the plaintiff. For money so received by defendant No. 3, the period of limitation would be three years from the time the money was received and as the suit was brought after three years it was barred by limitation. For the respondents, on the other hand, it is contended that if this suit is regarded as a money suit, under the provisions of s. 102 of the Code of Civil Procedure, there is no Second Appeal. Further, inasmuch as defendant No. 3 was entrusted with the money for the purpose of investment, s. 10 of the Limitation Act applies and, in any case, s. 18 applies, inasmuch as the plaintiff has been kept away by fraud from the knowledge of his rights. As regards the applicability of s. 102 of the Code of Civil Procedure, I think that in the terms of the plaint the suit must be regarded as a mortgage-suit, although there is an alternative prayer that if the claim on the mortgage be not valid he will be entitled to recover the money. On the findings of the Court below there appears no doubt that the only claim which could be established by the plaintiff is the money claim. But the suit has been *bona fide* framed as a mortgage-suit and s. 102 does not apply.

On the findings of the Courts below it is quite clear that this sum of Rs. 300 was entrusted by the plaintiff with his sister for investment on his behalf. The entrustment was made by a verbal agreement, but it appears that none the less it was an express trust,

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as it was for a specific purpose of investment. Therefore, the case comes under s. 10 of the Indian Limitation Act. As found by the lower appellate Court, the defendant was putting off the plaintiff on various false excuses and finally there was a *baithak* in which the defendant denied the receipts and it was after this denial that the present suit has been brought. The Courts below found that these receipts were really executed by the defendants and that they were intended to make the plaintiff believe that the defendant had duly invested the amount, but this would not be sufficient ground for extending the time under s. 18 of the Limitation Act.

However, I think that the circumstances show that there was an express trust which, under the provisions of s. 10 of the Limitation Act, would not be barred by time. I, therefore, find that the suit is not barred by limitation and that the decisions of the Courts below are correct.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

A. A.