## APPELLATE CIVIL.

*Before Biswas J.*

1937

*Aug.* 11, 12, 23.

KALI PADA DE

*v.*

HARI DASI DASI.*

*Limitation—Trust, What is—Agent, if can be a trustee—"Specific purpose," Meaning of—Indian Limitation Act (IX of 1908), s. 10—Indian Trusts Act (II of 1882), s. 5.*

P and R were two brothers, who had some *ejmâli* properties. R had also separate properties. In 1917, R having fallen ill asked P's sons (P having died) to look after all the properties. R died in 1919, leaving his widow as his only heiress. P's sons continued to manage the properties after R's death. In 1920 P's sons instituted a suit for partition, claiming half share in all the properties including the separate properties of R. The suit was dismissed for default in 1924. P's sons brought a fresh suit for partition in 1925. In this suit, which was finally disposed of on February 2, 1933, an issue was raised as to whether the separate properties of R were *ejmâli* or not, and it was decided that they were not so, but were self-acquired properties of R. Thereupon P's sons gave up possession of these properties to R's widow.

In a suit for accounts by R's widow against P's sons in respect of the management of these self-acquired properties from 1917 to February 2, 1933, the question was whether the claim or any part of it was barred by limitation.

*Held* that the question of limitation depended on the character in which the defendants held possession.

As for the period from 1917 to the date of R's death in 1919,

*held*, possession was as agents of R, and the claim was consequently barred under Art. 89 of the Indian Limitation Act.

As for the subsequent period, namely, from R's death to February 2, 1933, accounts were claimed on the footing of a trust in favour of the plaintiff.

*Held*: (i) that to save limitation a trust must be found in terms of s. 10 of the Indian Limitation Act, in other words, it must be shown that the alleged trustees are persons "in whom property has become vested in trust for any specific purpose";

(ii) that the facts and circumstances of the case did not establish such a trust.

*Appeal from Appellate Decree, No. 1769 of 1936, against the decree of Bhuban Mohan Singha, Second Subordinate Judge of Hooghly, dated June 11, 1936, reversing the decree of Amulya Kumar Guha, Second Munsif of Chinsurah, dated Mar. 23, 1935.

Section 10 is not intended to comprise all fiduciary relations whatsoever, but the words "for any specific purpose" are intended as words of restriction and mean that the trust is for a purpose which has been specified by the person who has created the trust. Trusts which the law would imply from the existence of particular facts or fiduciary relations, but which have not been declared by any specific words, are excluded from the operation of s. 10.

*Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1); *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh* (2); *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3) and *Bibhutibhushan Datta* v. *Anadinath Datta* (4) referred to.

There is a well marked distinction between the relation of agency and that of trust. An agency may often involve a relation of trust and confidence, and property in the hands of an agent may sometimes be impressed with a trust for the benefit of the principal, and in such circumstances an agent may not be allowed to set up the Statute of Limitation in bar of a suit for accounts by the principal. But every agent standing in a fiduciary relation is not precluded from setting up such plea.

*Burdick* v. *Garrick* (5) discussed.

A trustee *de son tort* would come within the operation of s. 10 of the Limitation Act, but the existence of a trust must be first established before s. 10 may be applied against such person.

*Dhanpat Singh Khettry* v. *Mohesh Nath Tewari* (6) and *Arumilli Perrazu* v. *Arumilli Subbarayadu* (7) referred to.

Section 5 of the Indian Trusts Act, 1882, requires an instrument in writing to create a trust in relation to immovable property. But it would be an act of fraud if a defendant, though a trustee in fact, is still to escape his just liability as such, merely from the non-existence of an instrument in writing. Such a case is covered by the last paragraph of that section. This requires, however, that a trust must be first established.

APPEAL FROM APPELLATE DECREE perferred by the defendants.

The material facts of the case and arguments in the appeal appear sufficiently from the judgment.

*Bireswar Bagchi* and *Binayak Nath Banerji* for the appellants.

*Panchnan Ghosh*, *Banbehari Sarkar* and *Surendra Nath Basu* (*Sr.*) for the respondent.

*Cur. adv. vult.*

BISWAS J. This appeal arises out of a claim for accounts, the only question being that of limitation.

(1) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(2) (1921) L. R. 49 I. A. 37.
(3) (1878) I. L. R. 4 Cal. 455.
(4) (1933) I. L. R. 61 Cal. 119.
(5) (1870) L. R. 5 Ch. 233.
(6) (1920) 24 C. W. N. 752.
(7) (1921) I. L. R. 44 Mad. 656; L. R. 48 I. A. 280.

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The learned Munsif dismissed the suit as being out of time, but on appeal the decision was modified by the learned Subordinate Judge who made a decree for part of the period in suit. Defendants have preferred this appeal. There is no cross-objection by plaintiff.

Priya Nath De and Rajendra Nath De were two brothers and had some *ejmâli* properties. There were also separate properties of Rajendra. Priya Nath died, leaving two sons as his heirs, and they are the defendants in this suit. Rajendra fell ill in 1917 and came down to Calcutta for treatment, and in December 1919 he died, leaving his widow, the plaintiff, as his sole heiress. During this period, it is said, Rajendra was unable to look after the properties himself, and left the management to his nephews. The nephews continued in management after Rajendra's death. Their case is that they regarded all the properties as *ejmâli*. As a matter of fact, a few months after Rajendra's death, Priya Nath's sons instituted a suit (T. S. 70 of 1920) for partition of these properties. A preliminary decree was passed on September 29, 1921, but the suit was eventually dismissed for default on November 12, 1921, owing to the plaintiffs' failure to deposit the costs of the commissioner of partition. This order was confirmed on appeal by this Court on December 16, 1924 (in F. A. 52 of 1922), the question as to the right of any of the parties to bring a fresh suit for partition being left open. A fresh suit was afterwards actually instituted by one of the sons of Priya Nath (T. S. 19 of 1925), and one of the issues raised in it was whether some of the properties, being the properties concerned in the present suit, were the self-acquired properties of Rajendra. The trial Court found they were so, and this finding was affirmed on appeal (in T. A. 9 of 1929). The appellate judgment was passed on February 2, 1933, and this date is important as the defendants say that in consequence of this decision they gave up their

possession of these properties to the plaintiff on and from this date.

The position consequently is that the defendants were in possession of these properties, since adjudged to be the separate properties of Rajendra, right from the date of Rajendra's illness in 1917 down to the date of the final decree in the partition suit, February 2, 1933, aforesaid. The claim for accounts is in respect of the whole of this period.

In what character was such possession held? On that will depend the question of limitation. The possession might be that of trustees, in which case the question would be, if s. 10 of the Indian Limitation Act would apply; or it might be that of agents, bringing the case under Art. 89; or, as a third alternative, defendants might be regarded as trespassers, and Art. 109 made to apply. Plaintiff's case in the plaint was that the defendants were trustees appointed by her husband, and she asked for accounts on this basis: in the alternative, she made a case of wrongful possession and misappropriation of the usufruct. Defendants repudiated the character of trustees altogether, and asserted on the other hand that they were in possession throughout in the *bona fide* belief that the properties were *ejmâli*. This, of course, implied that to the extent of 8 annas defendants admitted the plaintiff's title.

The learned Munsif was of opinion that merely because Rajendra had asked the defendants to look after his properties, it did not follow that they were appointed trustees by him: s. 10 would not, therefore, apply. Nor could the defendants be regarded as trespassers, seeing that no mesne profits were claimed against them. If, then, they were agents of Rajendra, the agency terminated with his death, and as the suit was brought more than three years after that, it was clearly barred by limitation. In this view the Munsif dismissed the suit.

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On appeal, the learned Subordinate Judge thought it "proper" to hold that the defendants came to possess the lands from 1917 as agents of the plaintiff's husband. On the latter's death in 1919, a new agency was created between them and the plaintiff, but by reason of the partition suit which they instituted in 1920, claiming an 8 annas interest adversely to her, they must be deemed to have dropped this character and become trespassers as regards the said 8 annas from that point of time. As regards the remaining 8 annas, the new agency was held to continue till February 2, 1933, when, as already stated, the defendants admittedly gave up possession. On this basis, plaintiff would be entitled to accounts (1) from 1917 to 1919 (*i.e.*, till the death of Rajendra) as his agents, and (2) from 1919 to February 2, 1933, as agents of plaintiff in respect of 8 annas, and also (3) to mesne profits for the same period from 1919 to February 2, 1933, in respect of the remaining 8 annas, so far of course as the claim for any of these periods, in whole or in part, was not barred. As for (1), the learned Subordinate Judge held that this was obviously barred under Art. 89, but the claim under (2) was within time, the suit having been instituted within three years of the termination of the agency, while as regards (3), it was barred except for a period within three years preceding the suit, *i.e.*, for the period April 16, 1931 to February 2, 1933, the suit having been filed on April 16, 1934. He made a decree in favour of the plaintiff accordingly.

As there is no cross-objection by plaintiff, no question arises in this appeal as regards the periods for which the claim has been disallowed by the learned Subordinate Judge.

As regards the decree for mesne profits made by the learned Subordinate Judge, the learned advocate for the plaintiff respondent is frankly unable to support the basis on which it was made. A case of mesne profits had not in fact been made in the

plaint. The plaint asked for accounts on the footing of trustees: the alternative case of wrongful possession and misappropriation was really on the basis of breach of trust. If defendants are to be made liable in respect of 8 annas of the properties for any period for which mesne profits has been allowed, Mr. Ghosh concedes it must be on some other basis than that of trespassers. He does not in fact distinguish between defendants' possession of this 8 annas and their possession of the remaining 8 annas.

The appellants' main contention is that plaintiff must be pinned down to the case she made in the plaint, that of trustees, and as this case, they argue, fails on the findings of the Courts below, the suit must fail. It is necessary, accordingly, to examine the findings.

This is how the Munsif expressed himself:—

> It is true that the defendants came to possess the suit lands as they were asked by Rajendra to look after his properties. *This would not by itself constitute trust.* They were admittedly not to receive any salary or any other pecuniary advantage, though they afterwards misappropriated the usufruct. Rajendra did not ask them to render any account. Consequently, unless they were appointed trustees, the suit cannot be governed by s. 10 of the Limitation Act. It does not transpire from the evidence if the plaintiff treated the defendants as trustees in her defence in the partition suit. If the defendants were trustees, they were not entitled to bring the partition suit to claim any share in those lands for themselves. Thus these suits repudiate such allegations of trusteeship.

I do not think it can be said that the learned Munsif meant to come to a finding of fact on the question: as he put it himself, the question was whether the facts which he found did constitute a trust.

The learned Subordinate Judge said that as for the finding about possession, he entirely agreed with the Munsif. Somewhat inconsistently, however, he went on to refer to para. 12 of the written statement as supposed to contain an admission of the defendants that they were "entrusted" to look after the

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properties. Later on, he proceeded to observe as follows:—

> I believe the plaintiff's case (and as also found in the partition suit) that the defendants being entrusted with the management were in possession since 1324 B. S. (corresponding to 1917) to 1933 February. . . . . Such possession began as a possession of an agent. The plaintiff by using the word trustee seems to mean that the defendants were entrusted with the management. Their position in such circumstances was that of an agent. Even if the plaintiff be pinned to the statement in the plaint that the defendants possessed as trustees, still it would not affect her. There would not be any material difference. The beneficial owner may sue the trustees for accounts when the trust terminates, if the property was in the hands of the trustees. But in consideration of the position and the circumstances I think it proper to hold that the defendants came to possess the land from 1324 as agents of the plaintiff's husband.

From the way in which the learned Subordinate Judge expresses himself it is somewhat difficult to make out if he definitely negatives the case of trust, unless it be that his use of the word "entrusted" is not meant to have any significance. This much, however, is clear that his reference to para. 12 of the written statement was not intended to spell out a case of trust from the admission said to be contained therein. There is in fact no such admission: it is only an admission of the fact that the defendants had taken possession at the request of Rajendra and continued in possession after his death.

It seems to me that the true view to take is to hold that there is no finding one way or the other as to trust. Neither of the Courts below speaks with a certain voice on the point, and it cannot be said, therefore, that the case of trust fails on the findings, as the appellants contend.

But apart from the findings, is it possible to maintain that a trust has been established? It is needless to point out that if a trust is to be found, to save limitation it must be found in terms of s. 10 of the Indian Limitation Act, in other words, it must be shown that the defendants are persons "in whom "property has become vested in trust for any specific "purpose."

The learned Subordinate Judge has held that the defendants came into possession as agents of

Rajendra. Mr. Ghosh on behalf of the plaintiff accepts this finding, but says that this was not a case of simple agency, but of agency coupled with a fiduciary relationship, and he relies strongly on the case of *Burdick* v. *Garrick* (1) in this connection. There is a well marked distinction between the relation of agency and that of trust, but it need not be disputed that agency may often involve a relation of trust and confidence, and that property in the hands of an agent may sometimes be impressed with a trust for the benefit of the principal, and it need not be further disputed that an agent may not in such circumstances set up the Statute of Limitation in bar of a suit for accounts by the principal. The case cited by Mr. Ghosh is undoubtedly authority for this. But the alleged trust in the present case was in respect of immoveable property, and Mr. Ghosh is consequently faced with an initial, and what on the face of it looks like an almost insuperable, difficulty which Mr. Bagchi puts in his way by virtue of s. 5 of the Indian Trusts Act, 1882, which was extended to the presidency of Fort William in Bengal by notification No. 855 J. published in the "Calcutta Gazette" of March 5, 1913, Part I, p. 360.

This section provides:—

> No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Admittedly, in this case there was no instrument in writing. Mr. Ghosh seeks to get out of this difficulty by reference to the last paragraph of this section, which says:—

> These rules do not apply where they would operate so as to effectuate a fraud.

I agree that this would be an effective answer, if the existence of a trust could be otherwise deduced: for in that case what else would it be but an act of

(1) (1870) L. R. 5 Ch. 233.

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fraud, if the defendants, though trustees in fact, were still to escape their just liabilities as such merely from the non-existence of an instrument in writing? It makes it necessary, therefore, to see if the facts and circumstances here really establish a trust, which means, as already pointed out, a trust such as s. 10 of the Indian Limitation Act contemplates.

It may be, as was suggested by Markby J. in *Kherodemoney Dossee v. Doorgamoney Dossee* (1), that the word "vested" in s. 10 is to be taken, when speaking of a person standing in a fiduciary relation, not in the sense of "owned," but in the sense of "held "in possession," though it seems to me that this view can no longer be maintained after the clear pronouncement of the Judicial Committee in *Vidya Varuthi Thirtha v. Balusami Ayyar* (2). But Markby J. also pointed out in that case that s. 10 was not intended to comprise all fiduciary relations whatsoever. The learned Judge further proceeded to explain the meaning of the words "for any specific "purpose." In a way every trustee must be a trustee for a specific purpose in the sense that a purpose can be indicated to which the property held by the trustee must be applied by him. But the words in his opinion were intended as words of restriction, and by "specific purpose" must be meant a purpose which has been specified by the person who created the trust. Reference may be made in this connection to the decision of the Judicial Committee in *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh* (3), where, interpreting s. 10 of the Limitation of Suits Ordinance (VI of 1896) of the Straits Settlement, expressed in identical terms as s. 10 of the Indian Limitation Act, Lord Buck-master said:—

> A specific purpose, within the meaning of s. 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed.

(1) (1878) I. L. R. 4 Cal. 455.
(2) (1921) I. L. R. 44 Mad. 831; L. R. 48 I. A. 302.
(3) (1921) L. R. 49 I. A. 37, 43.

This confirms the view expressed by Markby J. in *Kherodemoney Dossee's* case (*supra*) that the Indian legislature did not think it desirable, after a certain lapse of time, to enforce trusts which had to be gathered from the terms of a conversation and had not been declared by any specific words. (See p. 470 of the report). See also the recent decision of this Court in *Bibhutibhushan Datta v. Anadinath Datta* (1). On the authorities I think it can be safely affirmed that such trusts as the law would imply from the existence of particular facts or fiduciary relations are excluded from the operation of s. 10. The very case on which Mr. Ghosh relies, *Burdick* v. *Garrick* (*supra*), would show that not every agent standing in a fiduciary relation is precluded from setting up the bar of limitation to a suit for an account by his principal. In that case the agent was appointed by a power of attorney, under which he was authorised to receive and invest, to buy real estate, and otherwise to deal with the estate: under no circumstances had he the least right to apply the money to his own use, or to keep it otherwise than to a distinct and separate account. It is in these circumstances that Lord Hatherley L.C., said at p. 240:—

> But in the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal but for the purpose of being employed in a particular manner, in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstance differs from one in an ordinary fiduciary person I am unable to see. That being so, the Statute of Limitations appears to me to have no application in the case.

Judged by this test, I have no doubt the plaintiff in the present case must be held to have failed to prove a trust such as would remove the bar of limitation from her way.

This is plaintiff's own evidence:—

> From this time, *i.e.*, two years before his death, my husband asked the defendants to look after his properties and affairs at home. Since then the

(1) (1933) I. L. R. 61 Cal. 119.

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defendants did it. The defendants paid our rent for two or three years but did not pay me anything or any crop.....They were to realise rent and paddy and then paying rent would also send us paddy.

In other words, here were agents whose duty it was to remit moneys received to the principal, and it could hardly be said that there was a vesting in them or a vesting for a specific purpose within the meaning of s. 10.

Mr. Ghosh recognised the weakness of his case under s. 10, and at one stage of the argument frankly stated that this section would not apply. His main endeavour in fact was to accept the position that defendants were agents of Rajendra, and show that as they continued in possession even after his death they must be deemed to have stood in a fiduciary relation to the plaintiff. Even so, he would have to bring his case under s. 10 in respect of the period subsequent to Rajendra's death, to escape the bar of limitation. The case of implied agency in respect of this period made by the Subordinate Judge cannot obviously stand. Apart from the fact that a case of agency had not been made in the plaint and, what is more, no issue was raised on the question which was after all a question of fact, it is clear, on the plaintiff's own evidence, such a case cannot be sustained. The case of agency failing, I do not think I can accept Mr. Ghosh's contention that, as the defendants continued in possession after the death of Rajendra, the relation of trustees automatically arose. Trustees *de son tort* would come within the operation of s. 10 of the Limitation Act [see *Dhanpat Singh Khettry* v. *Mohesh Nath Tewari* (1)], but the existence of a trust must be first established before s. 10 may be applied against trustees *de son tort*: such persons would really come within the ambit of "legal representatives" mentioned in that section, which by s. 2 (*11*) of the Code of Civil Procedure

(1) (1920) 24 C. W. N. 752.

includes persons intermeddling with the estate of the deceased. Even if it be supposed that a fiduciary relationship was created under the circumstances after Rajendra's death, such a relationship could by no stretch of language be deemed a trust for a specified purpose within the meaning of s. 10.

Before parting, I may perhaps usefully recall the following words of the Judicial Committee in *Arumilli Perrazu* v. *Arumilli Subbarayadu* (1), though not used in connection with s. 10 :—

> Their Lordships desire once more to repeat the warning they have often given against attempting to apply without qualification in India the rules applicable to strict accounts between trustees and *cestuis que trust* that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply.

This shows that the deduction which Mr. Ghosh attempted to draw from the case of *Burdick* v. *Garrick* (*supra*) for the purpose of establishing a trusteeship after Rajendra's death from the fact of defendants' continued possession cannot be supported.

The conclusion, therefore, I am led to upon an examination of the whole case, is that the plaintiff cannot invoke s. 10 of the Indian Limitation Act in her aid. This is no doubt a suit for accounts, and such a suit is now expressly within the words of s. 10 as it stands under the Limitation Act of 1908 : all the same, I might perhaps add, as was pointed out by the Judicial Committee in the case already referred to, *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh* (*supra*), one useful test for determining whether any particular trust is within the provisions of this section or not is to see if a suit for the purpose of following the trust property in the hands of the trustee would be to restore it to the trust. Obviously in the present case the plaintiff does not pretend that the trust should be restored.

(1) (1921) I. L. R. 44 Mad. 656 (663) ; L. R. 48 I. A. 280 (287).

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As the case of trust thus fails, and as neither a case of implied agency nor of wrongful possession can be sustained, the result is that the suit must wholly fail. The appeal is accordingly allowed, the judgment and decree of the Subordinate Judge are set aside, and those of the Munsif restored. In the circumstances, there will be no order for costs in any of the Courts.

*Appeal allowed.*

A.C.R.C.