APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Hannay.

1914. October 13 and 21.

BAIZNATH LALA (PLAINTIFF), APPELLANT,

v.

RAMADOSS (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), arts. 62 and 120—Suit for money on the ground of wrongful rateable distribution, governed by article 62 and not by article 120 of the Limitation Act—Section 14 of the Limitation Act—Time taken to file and to prosecute a revision petition against order of wrongful distribution not to be deducted under section 14.

A suit for money under section 73, clause (2), Civil Procedure Code, on the ground that the plaintiff and not the defendant was entitled to receive the same in proceedings in execution of a decree for rateable distribution is governed by article 62 and not by article 120 of the Limitation Act (IX of 1908), the cause of action arising on the date of wrongful payment to the defendant.

In computing the period of limitation for the filing of such a suit the plaintiff is not entitled to deduct under section 14 of the Limitation Act the period of time taken by him to file a revision petition in the High Court or the time during which he was prosecuting the revision petition against the order of wrongful distribution.

Vishnu Bhikaji Phadke v. *Achut Jagannath Ghate* (1891) I.L.R., 15 Bom., 438, followed.

Ramaswamy Chetty v. *Harikrishna Chettyar* (1911) 21 M.L.J., 705, not followed.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of North Arcot, in Appeal No. 255 of 1911, preferred against the decree of P. AYYASWAMI MUDALIYAR, the District Munsif of Tirupati, in Original Suit No. 402 of 1910.

The facts of the case appear from the judgment.

C. V. Anantakrishna Ayyar for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondent.

AYLING AND HANNAY, JJ.

JUDGMENT.—The questions for decision in the second appeal are (1) whether the lower Courts are right in holding that article 62 and not article 120 of the schedule to the Limitation Act applies to the facts of this case, (2) whether even if article 62 applies the suit is still in time by virtue of a deduction to which the plaintiff claims to be entitled with reference to section

* Second Appeal No. 2026 of 1912.

14 of the Limitation Act, and (3) whether the lower Courts should have allowed the plaint to be amended so as to enable plaintiff to raise the second point.

The plaintiff, who is the appellant before us, brought the suit from which this second appeal arises under section 73 of the Code of Civil Procedure, his application for rateable distribution as against the defendant in respect of certain assets in Court deposited by a third party against whom both plaintiff and defendant had obtained decrees having been refused by the District Court of North Arcot on 18th October 1905. The defendant drew the money in question from Court on 19th October 1905. The plaintiff filed a revision petition in the High Court to set aside the order of the District Court on 21st December 1905. That petition was dismissed on 12th December 1906. The present suit was filed on 11th December 1909. If article 120 applies to the case the suit is in time in any view but if article 62 is to be applied it will be barred unless the plaintiff can show he is entitled to deduct the excess period by virtue of section 14 of the Limitation Act.

Now, article 120 can only be applied when there is no other article of the Limitation Act applicable. In support of the view that article 62 is the proper one to apply, *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*(1), *Shankar Sarup* v. *Mejo Mal*(2), *Mahomed Wahib* v. *Mahomed Ameer*(3) and *Shanmuga Pillai* v. *Minor Govindasami*(4) have been relied on both here and in the lower Court. The first case is direct authority on the point. The suit in that case was brought under section 295 of the Code of 1882, which corresponds to section 73 of the present Code and it was held that such a suit falls under article 62, *Moses* v. *Macferlan*(5) being referred to evidently as authority for the position that the suit was one for money received for the plaintiff's use. The decision in *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate*(1) is referred to with approval by the Privy Council in *Shankar Sarup* v. *Mejo Mal*(2), upon the question whether a suit under section 295 is a suit to set aside the order of the Court, passed under that section and

(1) (1891) I.L.R., 15 Bom., 438. (2) (1901) I.L.R., 23 All., 313 at p. 322.
(3) (1905) I.L.R., 32 Calc., 527 at p. 531. (4) (1907) I.L.R., 30 Mad., 459.
(5) (1760) 97 E.R., 676.

BAIZNATH LALA v. RAMADOSS. AYLING AND HANNAY, JJ.

it was held that it was not such a suit and that therefore article 13 of the Limitation Act would not apply. It was only upon that point that the case was referred to and the decision of that point was sufficient for the purposes of the case. Their Lordships expressed no opinion as to whether the proper article to apply was article 62 or article 120 and the case (though so far as it goes it supports the lower Court's view) cannot be regarded as direct authority upon that point. *Mahomed Wahib* v. *Mahomed Ameer*(1) and *Shanmuga Pillai* v. *Minor Govindasami*(2) were not cases of suits under section 73 of the Code. But the true nature of the class of suits described in article 62 of the Limitation Act is considered in the former decision and Sir SUBRAHMANYA AYYAR, J., in the latter case expresses his agreement with the views laid down by the learned Judges of the Calcutta High Court. The conclusion arrived at in the Calcutta case was that the description of the suits mentioned in article 62 as suits for money received by the defendant for the plaintiff's use pointed to the well-known English action in that form and that consequently the article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff. This view has been followed by the Allahabad High Court in *Baghwan Das* v. *Karam Husain*(3) and by this Court in *Sankunni Menon* v. *Govinda Menon* (4). We agree with the opinion of Mr. Justice MUKHERJI in the Calcutta case that the intention of the defendant at the time of receipt of the money to receive it for himself and not for the plaintiff is not the test by which the question whether the money was in fact received for the plaintiff's use has to be decided. As observed by the Privy Council in *Shankar Sarup* v. *Mejo Mal*(5) "the scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the rights of the parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by such a suit as the present." If on such a readjustment being made the plaintiff in a suit under section 73 is found to be entitled to a portion of the

(1) (1915) I.L.R., 32 Calc., 527 at p. 531. (2) (1907) I.L.R., 30 Mad., 459.
(3) (1911) I.L.R., 33 All., 708 at p. 726. (4) (1912) 22 M.L.J., 485.
(5) (1901) I.L.R., 23 All., 313 at p. 322 (P.C.).

assets which have been paid to the defendant, we are of opinion that the latter must be regarded as having received the portion so paid to him "for the use of the plaintiff." In this connection we may refer to the extract from Blackstone's commentaries cited by Mr. Justice HARRINGTON in *Mahomed Wahib* v. *Mahomed Ameer*(1): "This species of action lies when one has had and received money belonging to another without any valuable consideration given on the receiver's part, for the law construes this to be money had and received for the use of the owner only." We think these words fitly apply to the facts of the present case.

The appellant relies upon *Gurudas Pyne* v. *Ram Narain Sahu*(2) and *Ramaswamy Chetty* v. *Harikrishna Chettyar*(3). As regards the former it has been pointed out both in *Mahomed Wahib* v. *Mahomed Ameer*(1) and *Bhagwan Das* v. *Karam Husain*(4) that the money received by the defendant in that case did not belong to the plaintiff but a third party and that the plaintiff had a mere equitable claim to follow that money in the hands of the defendant. It was in these circumstances that article 62 was held inapplicable by the Privy Council. It is plain that the facts of that case were quite different from the present, therefore. In the second case—*Ramaswamy Chetty* v. *Harikrishna Chettyar*(3)—the plaintiff claimed as assignee of a decree but at the time when the money claimed by him was realized by the defendant, the plaintiff's suit to establish his rights as assignee had been dismissed. The Court in these circumstances held that as at the time when the defendant realized the money, the plaintiff could not himself have collected the amount by reason of the dismissal of his suit to establish his title as assignee, the defendant could not be said to have received the money for his use in any sense. With all respect we are unable to follow that decision. The plaintiff in the case was eventually found entitled to share in the assets realized by the defendant and that being so, we do not see why the mere fact that the plaintiff's suit to establish his rights as assignee had been dismissed at the time when the money was realized by the defendant should suffice to take the case out of the purview of article 62.

(1) (1905) I.L.R., 32 Calc., 527 at p. 531.
(2) (1884) I.L.R., 10 Calc., 860 (P.C.) (3) (1911) 21 M.L.J., 705.
(4) (1911) I.L.R., 33 All., 708 at p. 726.

BAIZNATH LALA v. RAMADOSS.

AYLING AND HANNAY, JJ.

In the result, therefore, we think the lower Court was right in holding that article 62 should be applied to the facts of the present case.

The second point depends upon the question whether the plaintiff would be entitled by virtue of section 14 of the Limitation Act to deduct the time between the order of the District Court disallowing his petition for rateable distribution and the disposal of his Revision Petition by the High Court (i.e., from 19th October 1905 till 12th December 1906) or only the time from the presentation of the Revision Petition until its disposal (i.e., from 21st December 1905 till 12th December 1906). The plaintiff relies upon the decision in *Raj Krishto Roy* v. *Beer Chunder Joobraj*(1) in support of the first alternative. We think that case is not in point here. It was a case where the plaintiff's suit was dismissed for want of jurisdiction and the plaintiff then tried unsuccessfully to remedy his failure by appeal. In these circumstances it was held that as the law allows a fixed time for appeal in order to allow the unsuccessful party to consider whether he will appeal or no, if a party appeals within the time so fixed, he ought to be considered as proceeding with due diligence between the decision of the suit and the filing of the appeal. Here there was no question of appeal. Though the plaintiff had a right of suit under section 73 of the Code, he elected to proceed by revision in the High Court and the law does not fix any period within which petitions for revision are required to be brought. In these circumstances it seems to us that the case cited is not in point and that it cannot be said that the plaintiff was prosecuting a proceeding at all while he was merely making up his mind to apply for revision. In this view the time which expired between the order of the District Court and the filing of the Revision Petition in the High Court (viz., from 19th October 1905 till 21st December 1905) cannot be excluded, as the plaintiff contends, under section 14 of the Limitation Act. It is conceded that if this period be not excluded, the suit is still out of time. We think, further, that the respondent is entitled to rely upon the contention that in any event plaintiff cannot be said to have prosecuted the Revision Petition in good faith within the meaning of section 14 of the Limitation Act inasmuch as it has

(1) (1866) 6 W.R., 308.

been frequently held by this and other High Courts that the High Court will not exercise its revisional powers when there is any other remedy open. Here the plaintiff had his remedy by suit.

It is unnecessary in these circumstances to consider the third point raised regarding amendment of the plaint.

The second appeal is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

1914. October 8, 9 and 23.

SRI RAJAH VATASAVAYA VENKATA SIMHADRI JAGHAPATHI RAJU BAHADUR GARU, DYING SUBSEQUENT TO THE SUIT—HIS WIFE SRI RAJA VATASAVAYA VENKATA SUBHADRAYAMMA JAGHAPATHI BAHADUR GARU (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM), RESPONDENTS.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM, FIRST DEFENDANT), APPELLANT,

v.

SRI CHINTALAPATHI CHINA RAYAPARAJU GARU *et al*, RESPONDENTS. †

Madras Water-Cess Act (VII of 1865)—Water-cess—Zamindari lands—Excess area, whether liable to pay water-cess—(Madras) Land Encroachment Act (III of 1905), effect of.

Where a right to take water is proved, even though no express agreement on behalf of Government not to levy any charge is proved, an engagement under Act VII of 1865 will be implied and no cess can be levied.

Per SANKARAN NAIR, J.—Act III of 1905 did not take away any rights that existed at the time the Act was passed and the Government are not by reason of that Act coupled with Act VII of 1865 entitled to impose any cess upon those landholders who were before the Act not liable to pay cess for their using the water.

Kandukuri Mahalakshmamma Garu v. *The Secretary of State for India* (1911) I.L.R., 34 Mad., 295 and *Venkataratnammah* v. *Secretary of State* (1914) I.L.R., 37 Mad., 366, followed.

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* Appeal No. 2 of 1912. † Appeals Nos. 22, etc., of 1912, etc.