

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Oldfield.*

KATTA THOLASINGAM CHETTY (DEFENDANT), APPELLANT,

v.

VEDACHELLA AIYAH AND FOUR OTHERS (PLAINTIFFS),
RESPONDENTS.*

1917,
July,
17 and 19.

*Limitation Act (IX of 1908), sec. 10, whether applicable to suits in
respect of property which has not been received by a trustee.*

The insertion in section 10 of the Indian Limitation Act, 1908, of the words "or the proceeds thereof, or for an account of such property or proceeds" has not had the effect of exempting from the ordinary rules of limitation suits against trustees for failure to reduce the trust property into possession.

New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik (1885) I.L.R., 9 Bom., 373 at p. 399, followed.

APPEAL against the judgment of COUTTS TROTTER, J., in Civil Suit No. 576 of 1913.

The following summary of facts is from the material portions of the judgment of COUTTS TROTTER, J. :—

This suit was instituted by the worshippers of Sri Venugopala Krishnaswami temple in Coral Merchant Street, Georgetown, against the defendant as Dharmakarta in relation to his conduct as Dharmakarta of that temple and asking for various reliefs against him. Among the allegations made against the defendant were several breaches of trust with regard to the properties of the temple and one in particular was that the defendant had allowed item No. 11 mentioned in the schedule to the plaint which had been dedicated to the temple by a deed of gift in 1892 to remain in the possession of the donors until the rights of the temple were lost by the law of limitation. The defendant in his written statement pleaded that, though about 1903 he attempted to get possession of the property, as the manager, one Madamorayya Mudaliar whose name was also included in the instrument of gift, was colluding with the relations of the donor and would not part with the possession of the documents

* Original Side Appeal No. 64 of 1916.

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relating to the house or join the defendant in any action, he could not obtain possession of the same. The defendant further alleged that he was taking steps to recover the property for the temple.

The learned Judge, on a consideration of the evidence before him, came to the conclusion that the said property had been allowed to pass into the hands of others irrevocably by the gross misconduct of the defendant and held that he was liable to account both for the corpus and the income of the property and referred the matter to the Official Referee for accounts and enquiries and further gave direction to the Official Referee that the defendant would be at liberty to argue and satisfy him if he could that he was not accountable for the income but only for the corpus. The defendant preferred this appeal against the decision of *COUTTS TROTTER, J.*, and contended that the claim for the loss of property, if any, was barred by limitation.

T. R. Venkatarama Sastriyar, V. S. Govindachariyar and *V. S. Kallabhiran Ayyangar* for the appellant.

C. P. Ramaswami Ayyar and *M. Subbaraya Ayyar* for the respondents.

WALLIS, C.J.

WALLIS, C.J.—In this case a trustee was ordered to be removed by Mr. Justice BAKEWELL and an account was directed to be taken against him. That decision was confirmed on appeal and the case went to the learned Official Referee. But the learned Official Referee was of opinion that certain questions of fact involved should be decided by the Court itself, and the case, therefore, came before Mr. Justice COUTTS TROTTER sitting on the Original Side and we have now to deal with an appeal from his decision.

The question argued before us on appeal relates to item 11, certain house property to which the trust became entitled in the time of the former trustee, some ten years before the accession to the office of trustee of the defendant in this suit so that the defendant had two years in which he could have taken steps for recovery of the property. It is stated by the learned Judge, and the case proceeds upon that basis, that neither the present defendant nor his predecessor did anything to recover the property and therefore it became lost to the trust by reason of the law of limitation. There is not much said about limitation in the judgment under appeal, but the learned Judge

observed at the close of the judgment that it would be open to the defendant when the case went back to the Official Referee to show if he could that he was not accountable for the income but only for the corpus.

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Before us it has been argued that on the facts stated and under the present law of limitation the remedy against the trustee is barred both as to the corpus and income, the suit having been instituted some nine years after the property was finally lost to the trust by the operation of the statute of limitation.

The question of the interpretation of section 10 as amended in the Act of 1908 is one of considerable importance and we have had it fully argued before us. As is well known, the statutes of limitation were not applied in England to claims against trustees. There was a provision in the Judicature Act(1) which specially excepted from their operation suits for following trust property, and that section of the Judicature Act was very closely reproduced as section 10 of the Limitation Act of 1877. It provided—

“ No suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time. ”

There was some variance of opinion as to the scope of this section, and there were some cases which held that a claim for an account of property which had actually come into the hands of the trustee was not saved from the bar of limitation unless the property still continued in the hands of the trustee in one case it was said ‘in specie’ whereas a more liberal view was taken in some other cases that the section saved from the bar of limitation claims to property which had come into the hands of the trustee and for which he had become accountable. But we have not been referred to any case, and I am not aware of any, in which it was held that the bar of limitation under the old section was saved as regards cases where it was sought to render a trustee accountable not for property which had come into his hands, but for property which but for his wilful default or

(1) (1873) 36 and 37 Vic., Cap. 66, sec. 25 (2).

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neglect would have come into his hands. Mr. Justice SCOTT in *The New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik*(1), expressly ruled that such claims were within the operation of the ordinary law of limitation. The next thing we observe is that the English legislature in 1888(2) departed from the policy till then followed as regards trustees, and afforded them the benefit of the operation of the statutes of limitation except in two specific cases, that is to say, except where a claim was founded on fraud or a fraudulent breach of trust, or—these are the important words—was

“to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use.”

So that, unless the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use, the ordinary provisions of the Limitation Act are to apply in England. It is important to observe that the policy of the English legislature as shown in that provision clearly was to introduce a fresh protection for trustees by relieving them from an indefinite liability to account except in cases of fraud or fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by the trustees or previously received by them and converted to their own use.

That brings us now to the recent amendment of the Act of 1877 by section 10 of the Limitation Act of 1908 which amendment was effected by inserting in that section, after ‘following in his or their hands such property’, the words ‘or the proceeds thereof or for an account of such property or proceeds’.

Now it has been contended by Mr. Ramaswami Ayyar for the respondent that the effect of introducing the words ‘or for an account of such property or proceeds’ has been to make trustees liable for an indefinite time and without bar of limitation for breaches of trust consisting in failure to get in the trust property.

If this be the true construction, the Indian legislature has gone far beyond the authority of any Indian case in direct opposition to the recent legislation in England. It is impossible

(1) (1885) I.L.R., 9 Bom., 373 at p. 399.

(2) 51 & 52 Vict., Cap. 59, sec. 8.

in my mind to attribute to them such an intention unless most clearly expressed. It may be said that the words 'suit for an account' may cover a suit for an account of the proceeds the trustee had received or might have received but for his wilful default or neglect, that is to say, an account on the footing of wilful default or neglect. But to give that meaning to the words 'suit for an account' as introduced into section 10 of the Indian Limitation Act, 1908, would be entirely to alter the whole scope of the section and to run counter to the whole tendency of modern legislation. I cannot therefore accept that contention. It follows that the present claim both for failure to get possession of the corpus and income of the trust property falls within the operation of the ordinary law of limitation. If that be so, it is not suggested that the suit is not barred. In the result, on this ground the appeal must be allowed with costs of this appeal and with any extra cost incurred in the proceeding before the learned Judge which is now under appeal payable out of the temple funds.

OLDFIELD, J.—I agree.

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S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

MUTHIA NAICK AND TWO OTHERS (ACCUSED NOS. 1, 2 AND 5),
PETITIONER,

1917.
July 19.

v.

THE KING-EMPEROR (RESPONDENT) *

Criminal Procedure Code (Act V of 1898), sec. 345—Composition of an offence with one of several accused persons, effect of.

The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others.

Chandra Kumar Das v. The Emperor (1902) 7 C.W.N., 176, dissented from.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898) praying the High Court to revise

* Criminal Revision Case No. 187 of 1917,
Criminal Revision Petition No. 149 of 1917.