APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Odgers.

KRISHNA PATTAR AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS, 1921, November 15.

v.

LAKSHMI AND FIVE OTHERS (PLAINTIFFS AND DEFENDANTS 3 TO 7), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 10—"Express trust," when created.

A benamidar is not an "express trustee" within the meaning of section 10 of the Limitation Act, and a claim against him for mesne profits by the real owner is not saved from the bar of limitation by that section.

SECOND APPEAL against the decree of V. P. RAO, District Judge of South Malabar, in Appeal Suit No. 407 of 1918, preferred against the decree of T. V. NARAYANAN NAYAR, Subordinate Judge of Palghat in Original Suit No. 79 of 1916.

The facts are set out in the judgment.

The defendants preferred this Second Appeal.

C. V. Anantakrishna Ayyar for appellants.—There is no express trust created by the sale-deed. The conditions necessary for the creation of an express trust are wanting : see sections 3, 5, 6 and 7 of the Trusts Act. If at all, there is only an implied trust as understood by the Trusts Act. Section 10 of the Limitation Act does not apply to implied trusts : see *Raja of Rāmnād* v. *Pommusami Tevar*(1). *Gur Narayan* v. *Sheolal Singh*(2) shows that a benamidar is not a trustee but only an agent.

T. R. Venkatarama Sastri, with *C. V. Mahadeva Ayyar*, for the respondent.—This is a case of express trust

* Second Appeal 1465 of 1920.

(1) (1921) I.L.R., 44 Mad., 277. (2) (1919) I.L.R., 43 Calc., 566 (P.C.).

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created by the vendors and not a case of mere agency. Reference was made to *Soar* v. *Ashwell*(1), *Rochefoucauld* v. *Boustead*(2), *Burdick* v. *Garrick*(3), *Lyell* v. *Kennedy*(4), *Dhurabhai* v. *Bai Ruxmani*(5), *Sethu* v. *Krishna*(6). On the legal position of a benamidar reference was made to *Kuthaperumal Rajali* v. *The Secretary of State for India*(7). Where one man has possession of another's property the legal character in which he holds it is determined by his *animus*: see *Varada Pillai* v. *Jeevarathnammal*(8). The defendants acted as trustees.

The Court delivered the following JUDGMENT:

This Second Appeal arises from a suit brought by the plaintiff to recover certain lands with mesne profits for 25 years. No objection was raised by the defendants to the plaintiff's claim for the lands and they have been decreed to her and there is no appeal about them. But as regards the profits, defendants denied their liability and pleaded limitation. To avoid the plea of limitation plaintiff's case was that defendants 1 and 2 were holding the lands and collecting the profits as her trustees and she relied on section 10 of the Limitation Act.

The Subordinate Judge who tried the case held that no express trust was made out, that defendants were only constructive trustees, and that three years' limitation was applicable to the claim for profits, apparently under Article 109. He further held that, as pleaded by the second defendant, the profits for the last 9 years had been accounted for to the plaintiff, and dismissed her claim in toto for past profits. The District Judge reversed that decree, holding that an express trust was made out and that section 10 applied, and that even if it did not, the

(1) [1893] 2 Q.B., 390.
(2) [1897] 1 Ch., 196.
(3) (1870) 5 Ch. App., 233.
(4) (1889) 14 App. Cas., 437.
(5) (1908) I.L.R., 32 Bom., 394.
(6) (1891) I.L.R., 14 Mad., 61.
(7) (1907) I L.R., 30 Mad., 245.
(8) (1920) I.L.R., 43 Mad., 244 (P.C.).

defendants were plaintiff's agents in law, and under Article 89 the plaintiff's claim was in time as the demand for accounts was only made just prior to the suit. He gave a decree as sued for, without passing a preliminary decree for accounts under Order XX, rule 16, Civil Procedure Code, and without taking any notice of the plea that the profits had been accounted for. Defendants 1 and 2 have appealed to us.

The first question for decision is whether an express trust is made out or not, as it is material to decide it in considering the application of section 10. The only facts from which we are asked to find an express trust are these: The plaint lands were purchased with plaintiff's money and, in the sale-deed taken by defendants 1 and 2 in their own names, there is a recital that the purchase was on behalf of the plaintiff. Defendants were receiving the rent of the lands subsequently and it is the second defendant's case that he gave credit to the plaintiff for them in the accounts. From these facts it is difficult to infer the existence of an express trust or of anything other than a constructive trust. To create a trust with reference to immoveable property the Indian Trusts Act (II of 1882) which applies to this case requires a registered instrument signed by the author of the trust or the trustee, where no question of a will or of fraud arises, and there must be a clear indication of an intention to create a trust: see sections 5 and 6 of the Act. The only registered instrument we have in the case is Exhibit 1, the sale-deed. It is signed only by the vendors and cannot therefore be used to support a case of express trust by declaration by defendants 1 and 2, nor can it be relied on to show that the vendors created the trust, as was argued before us, because there is nothing to show that they intended to create any trust. The words in Exhibit 1 do not support any such contention; in fact,

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after reciting that the purchase was on behalf of the plaintiff, Exhibit 1 goes on to say that the lands should be enjoyed by the plaintiff and her heirs ; it says nothing about defendants managing the lands and paying over the profits to the plaintiff. It is extremely improbable that strangers like the vendors under Exhibit 1 would intend to create any trust for plaintiff. Though no doubt it is possible to take a conveyance in the form of a deed of trust, there is nothing to show that that was done here. Exhibit 1 is an ordinary deed of benami purchase which recites its benami character. To constitute a benami purchase, it is not necessary, as the District Judge thinks, that there should be anything secret about it ; and unless it is intended for a fraudulent purpose there is no reason why the deed should not disclose the character of the transaction.

There is a further difficulty in holding that Exhibit 1 amounts to a trust created by the vendors, as one of them is a minor who cannot create a valid trust under section 7 of the Act.

It was next argued by the plaintiff's vakil that even if defendants 1 and 2 were not made express trustees at the outset, they must be held to have become such, because they acted as trustees for over two years and they cannot be heard to aver the contrary. It is difficult to see how any question of adverse possession or estoppel arises. A sufficient answer to the argument is that the defendants at no time did anything to change their legal position with reference to these lands. As constructive trustees they would be bound to account for the profits under section 95 of the Act, and their doing so cannot make them express trustees ; and they did nothing else.

The learned vakil for the plaintiff cited some English cases : *Soar* v. *Ashwell* (1), *Rochefoucauld* v. *Boustead*(2),

(1) [1893] 2 Q.B., 390. (2) [1897] 1 Ch., 196.

Burdick v. *Garrick*(1) and *Lyell* v. *Kennedy*(2), as showing that the term "express trustee" in English Law included not only persons expressly appointed trustees but also persons standing in various fiduciary relations who were incapable of pleading limitation. In the first case cited, a Solicitor acting for the trustees and holding trust moneys in his hands was held to be in the position of an express trustee and he was not allowed to plead limitation. Lord Justice BOWEN enumerates the cases where such extension of the term "express trustee" has been made in England but the defendants here fall under none of those categories. It is doubtful how far such extensions can be considered to be cases of express trustees in this country, for as remarked by the learned Chief Justice in *Rajah of Rāmnād* v. *Pommusami Thèvar* (3) the Indian Trusts Act which governs us restricts the scope of the term "trustee" more closely than in England and considers constructive and resulting trusts as not trusts but as obligations in the nature of trusts (see Chapter IX).

The case of *Rochefoucauld* v. *Boustead*(4), cited above, was the case of an express trust created by certain letters, and it was held that it satisfied the Statute of Frauds, but that even if it were otherwise, parol evidence could be allowed to make up the deficiency in proof in spite of section 7 of the Statute, on the ground that the Statute should not be allowed to be used to perpetrate a fraud, the defendant there claiming the property as his own. No such case arises here, and the two other English cases cited are equally beside the point here. The case of *Bhurabhai* v. *Bai Ruxmani*(5) refers to a sum of money to create a trust with reference to which a registered instrument was not necessary. It is thus

(1) (1870) 5 Ch. App., 233.
(2) (1889) 14 App. Cas., 437.
(3) (1921) I.L.R., 44 Mad., 277.
(4) [1897], 1 Ch., 196.
(5) (1908) I.L.R., 32 Bom., 394.

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distinguishable from the present case and it is unnecessary for us to consider whether we should follow it or not.

For the above reasons it seems to us that the contention that there was an express trust in this case must be rejected. The case is one of a constructive trust or of an obligation in the nature of a trust, as the Trusts Act calls it, falling under Chapter IX. Now, section 10 of the Limitation Act has never been held to apply to such cases. It is true that in section 10 the term "express trustee" is not used in the section itself but only in the marginal note, but the language of the section referring as it does to "persons in whom property has become vested in trust for any specific purpose" is explicit enough to show that it refers only to express trustees. It is not contended before us that it would cover the case of a constructive trustee. The plea that section 10 saves limitation in the present case must therefore be rejected.

The District Judge has also held that the case of express trust failing, the parties may be looked upon as holding the position of principal and agent and Article 89 may be applied, in which case he thinks the suit is in time because the account was demanded and refused only shortly before suit. He overlooks the fact that there is another starting point for limitation under the Act, viz., the termination of the agency, and it has been argued before us that if there was any agency, created in the case it was terminated long prior to the suit and the claim for profits would be barred under that article and that the defendants were not able to show it because no plea of agency was set up in the case. It is clear from the pleadings that no such case was set up by the plaintiff; there was no issue about it and there was no reference to it in the first Court. In these circumstances the question of agency should not have been allowed to be raised in the appellate Court for the first time. To

allow it now will require a fresh trial on facts, and we are therefore of opinion that the plea should be excluded from consideration.

In the result we must hold that the bar by limitation is a proper plea in the case with regard to the profits claimed. It is not necessary to decide whether the 3 years' rule or the 6 years' rule applies to it, as in either case the plaintiff fails as the finding by the Subordinate Judge that profits for the last 9 years have been accounted for has not been displaced by the District Judge and we have not been addressed any argument about it.

In the result, the decree of the lower appellate Court must be reversed and the decree of the first Court restored with appellants' costs here and in the Court below to be paid by the plaintiff.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

GATTINENI PEDA GOPAYYA AND 2 OTHERS (CLAIMANTS), APPELLANTS,

v.

THE DEPUTY COLLECTOR OF TENALI (REFERRING OFFICER), RESPONDENT.*

1921, November 16.

Land Acquisition Act (I of 1894), secs. 3, 9, 18, 24 (1) and 25—Applicant—Person interested—Hindu widow—Claimant before acquiring officer—Surrender by widow to reversioner after award—Application by reversioner for reference to Civil Court—Claim by reversioner for larger amount of compensation than amount claimed by widow—Legal representative—Estoppel—Competency of Court to award larger amount—Purpose of acquisition—Element in valuation.

* Appeal No. 284 of 1920.