

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, Mr. Justice Varadachariar and Mr. Justice King.

1937,
December 3.

A. N. C. T. SUBBIAH THEVAR, TRUSTEE OF SREE
VEDAFURANEESWARASWAMI KOIL, NEMAM, AND
FOUR OTHERS (FIRST PLAINTIFF AND NIL), APPELLANTS,

v.

N. R. SAMIAPPA MUDALIAR AND FIVE OTHERS
(DEPENDANTS 1 TO 3, SECOND PLAINTIFF
AND NIL), RESPONDENTS.*

Indian Limitation Act (IX of 1908), arts. 36 and 120—Public trust—Loss sustained by the trust by reason of omission of a trustee to collect moneys due to the trust—Suit by a succeeding trustee or co-trustee against the trustee to make good the loss—Limitation—Art. 120 and not art. 36 applicable—Defaulting trustee being the sole trustee or a co-trustee with another who is also liable or co-trustee with another who is not liable—Distinction between the cases as regards the accrual of the right to sue.

Held by the Full Bench: (i) Article 120 of the first Schedule of the Indian Limitation Act, 1908, and not article 36, applies to a suit filed against a trustee or co-trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust.

Krishna Kudva v. Sri Venkataramana Temple(1) followed.

(ii) There can be no cause of action until there is a party capable of suing and until there is a cause of action there can be no question of the law of limitation coming into operation.

Murray v. The East India Company (2), *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navena Suppramanian*

* Appeal No 287 of 1932.

(1) (1934) 40 L.W. 275.

(2) (1821) 5 B. & Ald. 204; 106 E.R. 1167.

Chitty(1), *Charu Chandra Pramanik v. Nahush Chandra Kundu*(2) and *Mst. Bolo v. Mst. Koklan*(3) followed.

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(iii) If a sole trustee of a public trust commits a breach of trust, the loss cannot be made good, without voluntary action on the trustee's part, until there is a new trustee. The right to sue in such a case lies in abeyance until a new trustee is appointed, in which case, the period of six years' limitation would not commence until a new trustee is appointed.

(iv) If there are other trustees who are themselves not liable, the period of limitation starts running immediately the loss is occasioned, because they have in themselves the right to sue their co-trustee for the loss occasioned by him. If the co-trustees themselves had also made themselves liable for the breach of trust, then the position would be the same as in the case of a defaulting sole trustee.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvarur in Original Suit No. 36 of 1930.

This appeal coming on for hearing, the Court (VARADACHARIAR and KING JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

VARADACHARIAR J.—The only point arising for determination at this stage is the question of limitation on which the lower Court held against the plaintiffs and dismissed the suit *in limine*.

The plaintiffs and the third defendant were the trustees of a temple on the date of the institution of the suit. The first defendant was the managing trustee of the temple from 1921 up to September 1927; the second defendant is said to have been the trustee from 26th July 1914 to 8th February 1928; the third defendant was appointed trustee on 22nd May 1927 while the plaintiffs were appointed trustees only in June and July 1928. The suit was instituted on 15th September 1930 claiming that the defendants should be directed to pay certain amounts to the plaint temple in the following circumstances:— Two schedules, schedules A and B, were attached to the plaint.

(1) (1916) 20 C.W.N. 833 (P.C.). (2) (1922) L.L.R. 50 Cal. 49.

(3) (1930) I.L.R. 11 Lah. 657 (P.C.).

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Schedule A mentions items of amounts due to the temple up to fasli 1332 which remained uncollected up to the date of the suit. Schedule B mentions amounts said to have accrued due to the devasthanam subsequent to the commencement of fasli 1332, and remaining uncollected up to the date of the suit. The plaint refers to the difficulties experienced by the plaintiffs in getting possession of the account books relating to the trust after they were appointed to the office and proceeds to say in paragraph 7 that on a scrutiny of the accounts and documents handed over by the first defendant it was found that the various amounts specified in schedules A and B had not been collected and that as many of them had become barred the temple had been put to loss thereby. There was a further allegation that in respect of items which had become barred even before the defendants took office, the defendants would be liable to the temple by reason of their failure to take steps against their predecessors in office to recover damages under that head. It is to this claim that the defendants pleaded the bar of limitation under article 36 of the Limitation Act. The learned Subordinate Judge held that the plea was well founded and was supported by the decision in *Subramania Aiyar v. Gopala Aiyar*(1) and accordingly dismissed the suit. Hence this appeal.

It cannot be denied that the decision in *Subramania Aiyar v. Gopala Aiyar*(1) does support the defendants' contention. But there is very little discussion of the question in that judgment and no reference has been made in that judgment to *Ranga Pai v. Baba*(2) which clearly proceeded on the footing that an action like the present would be governed by the six years' rule, apparently under article 120, though the article is not specifically referred to. We might add that there are several reasons which in our opinion make it unreasonable to hold that article 36 applies to a case like the present. The words "malfeasance, misfeasance, and non-feasance" may not perhaps be said to be inappropriate words to be applied to a trustee; but it hardly seems to us right to speak of a claim like the present on behalf of the trust as a claim for *compensation*. We may in this connection refer to the first column of article 98 which uses the very language found in illustration (a) to section 23 of the Trusts Act, namely, that the trustee is in such

(1) (1909) I.L.R. 33 Mad. 308.

(2) (1897) I.L.R. 20 Mad. 398.

cases liable to make good to the trust estate the amount lost by reason of his breach of trust. Referring to the third column of article 36, we may also point out that it will be scarcely reasonable to expect the very trustee who has been guilty of breach of trust to take steps against himself to recover damages for the benefit of the trust, whereas, if the third column of article 36 is to be applied, the suit would become barred on the expiry of two years from the date of misfeasance, malfeasance or non-feasance irrespective of the fact that the same trustee may continue in office. Again, comparing the third column of article 36 with the third column of article 98, it will be noticed that, where a claim like the present is made against the estate of a *deceased* trustee, limitation starts from the date of the trustee's death, and if loss has not resulted on that date, from the date of the loss. It could scarcely have been intended that, when a breach of trust has been committed by a trustee by negligence to collect trust funds, limitation could start immediately on the date of the breach of trust if the action to recover the amount of the loss should be brought during his lifetime, but there should be a fresh starting point from the date of his death or from the date of the loss, when the loss is sought to be made good out of his general estate. These considerations lead us to think that it could not be the intention of the Legislature that the general language of article 36 should be applied to a well-known category of cases in the law of trusts.

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It is true that there is no article (corresponding to article 98) which specifically deals with actions for breach of trust brought during the lifetime of the trustee or ex-trustee. But the absence of such an article will only lead to the application of article 120 to such actions and will not justify the Court putting an unreasonable interpretation on article 36. In *Shirinbai Dinshaw v. Navroji Pestonji*(1) the learned Judges were of opinion that a suit similar to the present would be governed by article 120. It has not been seriously contended before us that the present case is governed by section 10 of the Limitation Act; vide *Tholasingam Chetty v. Vedachella Aiyah*(2). The only question therefore is whether the case is governed by article 36 or by article 120.

(1) A.L.R. 1936 Bom. 30.

(2) (1917) I.L.R. 41 Mad. 319.

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If article 120 is to be held applicable, the further question will arise what is the starting point. The general expression, "right to sue accrues", has been held in several cases to be an expression that must be construed in the light of the substantive law. There can be no doubt that in several English cases and in *Shirinbai Dinshaw v. Navroji Pestonji*(1) limitation has been held to commence to run from the date of the breach of trust. Whatever may be the appropriateness of this view in the case of private trusts where the beneficiary may be expected to enforce his own rights, there are obvious difficulties in applying this view to public trusts where, as long as the trustee remains in office, there may be no other person entitled to sue the trustee to make good the loss occasioned by the breach of trust, unless some member of the public takes steps to institute a suit under section 92, Civil Procedure Code, and have a receiver appointed in whom the right of action may be vested. Here again the third column of article 98 would rather suggest that the date of the cessation of the trusteeship, whether by death or otherwise, may be a reasonable starting point, but there is no authority which specifically supports that view. Even if the starting point under article 120 is held to be the dates of the various breaches complained of, the decree of the lower Court dismissing the entire suit cannot be sustained, because, according to the plaint allegations, some of the breaches of trust might have happened within six years of the institution of the suit. It is therefore necessary for the purpose of the case to decide whether article 36 or article 120 is the proper article applicable to a suit filed against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect monies due to the trust. In view of the conflict between *Ranga Pai v. Baba*(2) and *Subramania Aiyar v. Gopala Aiyar*(3) we would refer the question to a Full Bench; we would also invite the opinion of the Full Bench on the question whether, if article 120 is applicable, what is the starting point.

ON THE REFERENCE :

V. Rajagopala Ayyar and *T. V. Ramiah* for appellants.—
Owing to the default of a trustee, loss has been occasioned to a

(1) A.I.R. 1936 Bom. 30.

(2) (1897) I.L.R. 20 Mad. 398.

(3) (1909) I.L.R. 33 Mad. 308.

public trust. The right to sue the trustee to make good the loss occasioned to the trust arises when the demand for accounts by a co-trustee or a succeeding trustee, as the case may be, is made on the defaulting trustee; alternatively, when there is a co-trustee who is competent to sue or when a succeeding trustee comes into existence. Article 36 of the Indian Limitation Act uses the word "compensation" which is inapplicable to the claim by a trustee against his co-trustee who has got to make good the loss occasioned to the trust. Article 98 of the Indian Limitation Act is applicable to a case where the claim is made against the estate of a deceased defaulting trustee. The article uses the words, "make good . . . out of the general assets of a deceased trustee". So article 98 is not applicable to the present case. It uses the language employed in illustration (a) to section 23 of the Indian Trusts Act. So article 120 is the article applicable to the present case.

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In *Subramania Aiyar v. Gopala Aiyar*(1) article 36 was held to be applicable. There is no discussion in the same. It completely ignores the case of *Ranga Pai v. Baba*(2). The phrase "right to sue" has been construed in *Mst. Bolo v. Mst. Koklan*(3) and *Annamalai Chettiar v. A.M. K. C.T. Muthukaruppan Chettiar*(4).

[KING J.—How does *Annamalai Chettiar v. A. M. K. C. T. Muthukaruppan Chettiar*(4) support you?]

The right to sue accrues only when the succeeding trustee takes charge and comes to know of the loss to the trust. In *Krishna Kudva v. Sri Venkataramana Temple*(5) article 120 was held to be applicable. To the same effect is *Shirinbai Dinshaw v. Navroji Pestonji*(6). The cause of action comes into existence only when there is a party capable of suing; see *Charu Chandra Pramanik v. Nahush Chandra Kundu*(7) and *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navena Suppramanian Chitty*(8).

K. Rajah Ayyar and *R. Sundaralingam* for respondents.—
Article 120 is the residuary article. It can come into operation

(1) (1909) I.L.R. 33 Mad. 308.

(2) (1897) I.L.R. 20 Mad. 398.

(3) (1930) I.L.R. 11 Lah. 657 (P.C.).

(4) (1930) I.L.R. 8 Ran. 645 (P.C.).

(5) (1934) 40 L.W. 275.

(6) A.I.R. 1936 Bom. 30.

(7) (1922) I.L.R. 50 Cal. 49.

(8) (1916) 20 C.W.N. 833 (P.C.).

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only when there is no other article applicable to the present case. Article 98 makes provision only for a special class of cases when the claim is made against the estate of the deceased defaulting trustee. This article is not applicable. Article 36 is the article applicable. It is only when the case could not be brought under article 36 that the Court would be justified in applying article 120. *Subramania Aiyar v. Gopala Aiyar*(1) decided that article 36 was applicable.

[THE CHIEF JUSTICE.—If your contention is correct, a cause of action that was barred during the lifetime of a defaulting trustee would be revived against his estate under article 98.]

[VARADACHARIAR J.—Do you know of any legal principle under which death gives rise to a different cause of action against the legal representative?]

[KING J.—If article 36 is applicable to cases of trusts also would you expect to find article 98 in the statute?]

There is really no conflict between *Subramania Aiyar v. Gopala Aiyar*(1) and *Ranga Pai v. Baba*(2). *Bhim Singh v. Liquidator, Union Bank of India*(3) is followed in *Narasimha Ayyangar v. Official Assignee of Madras*(4). Cases under section 235 of the Indian Companies Act have been held to come under article 36.

[VARADACHARIAR J.—There a long line of cases in all the High Courts dissenting from that view. Such cases could not come under article 36 because the cause of action is not one arising independently of contract.]

Cur. adv. vult.

LEACH C.J. The Opinion of the Court was delivered by LEACH C.J.—This reference embraces two questions, which may be stated as follows:—(i) Does article 36 or article 120 of the first schedule of the Indian Limitation Act, 1908, apply to a suit filed against a trustee or ex-trustee to make good loss sustained by the trust by reason of his omission to collect moneys due to the trust? (ii) If article

(1) (1909) I.L.R. 33 Mad. 308.

(2) (1897) I.L.R. 20 Mad. 398.

(3) (1926) I.L.R. 8 Lah. 167.

(4) (1931) I.L.R. 54 Mad. 153.

120 is applicable, when does limitation commence to run ?

Article 36 relates to suits for compensation for malfeasance, misfeasance or non-feasance independent of contract and not specially provided for in the schedule of the Act. It fixes a period of two years from the date when the malfeasance, misfeasance or non-feasance takes place. Article 120 is the residuary article. It fixes a limitation period of six years in respect of suits for which no period of limitation is provided elsewhere in the schedule and time begins to run when the right to sue accrues. It has been necessary to refer the questions set out above to a Full Bench because there are conflicting decisions of this Court with regard to the first question, and the second question follows if article 120 applies, because in some cases for more than six years there may be no one in a position to sue. In the case of *Ranga Pai v. Baba*(1) SHEPHARD and DAVIES JJ. applied article 120. In the case of *Subramania Aiyar v. Gopala Aiyar*(2) BENSON OFFG. C.J. and KRISHNASWAMI AYYAR J. considered that article 36 governed a suit of the nature of the one under discussion. In *Ranga Pai v. Baba*(1) the plaintiffs and the defendants together with one Subbaraya Pai were the trustees of a temple. Subbaraya Pai died in 1884, but, for some years before his death, he was left in exclusive management of the temple affairs. He was succeeded in the management by the defendants who remained in management of the temple until 1891, when their co-trustees filed the suit to

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(1) (1897) I.L.R. 20 Mad. 398.

(2) (1909) I L.R. 33 Mad. 308.

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exclude them from the trust and to compel them to make good sums lost as the result of breaches of trust alleged to have been committed by them. The question whether section 10 of the Limitation Act applied was discussed and the Court was of the opinion that it did not. It was, however, held that the defendants were liable for the loss occasioned by them within six years before the date when the suit was instituted. Article 120 of the Limitation Act was not specifically referred to, but, as the Court decided that the period of limitation was six years, it follows that it considered that this article applied.

In *Subramania Aiyar v. Gopala Aiyar*(1) the suit was instituted by the plaintiff as the trustee of a temple for recovery of a sum of money representing the loss to the temple occasioned by breaches of trust committed by the father of the defendant, he having been the preceding trustee. The suit was dismissed on the ground that it was barred by the law of limitation. On appeal it was argued that article 98 was applicable, but the argument was rejected as the Court was of the opinion that the suit against the father was time-barred under article 36 and, therefore, no suit would lie against his son. Another case bearing on the first question embodied in the reference and quoted to us is that of *Shirinbai Dinshaw v. Navroji Pestonji*(2), where a Division Bench of the Bombay High Court held that a suit against trustees for alleged breaches of trust was governed by article 120 and time began to run from the date of the breach. In none of these cases

(1) (1909) I.L.R. 33 Mad. 308.

(2) A.I.R. 1936 Bom. 30.

however, was there any real discussion of the questions now under consideration. In *Ranga Pai v. Baba*(1) and *Shirinbai Dinshaw v. Navroji Pestonji*(2) the learned Judges took it for granted that article 120 did apply and in *Subramania Aiyar v. Gopala Aiyar*(3) the discussion was limited to the application of articles 36 and 98. I may here mention that my learned brother, VARADACHARIAR J., sitting alone, held in *Krishna Kudva v. Sri Venkataramana Temple*(4) that a suit by a trustee of a temple against a previous trustee to recover moneys misappropriated by him was governed by article 120 and not by article 61 or article 62 of the Limitation Act and that no cause of action accrued to anybody as long as the defaulting trustee continued to be in office. This decision really embodies the answers to the questions under reference.

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Article 36 applies to torts not specially provided for, and if it stood alone there would be little to indicate that it was not intended to apply to breaches of trust of the nature of those we have now in mind. But there is article 98, and when the two articles are considered together there are strong indications that the Legislature did not intend article 36 to apply to trustees. In the first place, in article 36 the word "compensation" is used, which is the appropriate word to apply in connection with a suit to remedy an injury to a person or a person's property. Article 98 speaks of suits "to make good" the loss, which are more appropriate than the word "compensation" when the loss is not a personal

(1) (1897) I.L.R. 20 Mad. 398.

(2) A.I.R. 1936 Bom. 30.

(3) (1909) I.L.R. 33 Mad. 308.

(4) (1934) 40 L.W. 275.

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one. Then it must be remembered that when the prescribed period of limitation has commenced it continues until the sands have run out. Something may happen to start a fresh period of limitation, but that is another matter. If article 36 were to apply to an act of non-feasance on the part of a trustee, it would mean that if the trustee lived he would be free from all liability in two years, but if he died before the two years had elapsed his estate would continue to be liable for another three years. This could never have been the intention of the Legislature and leads in itself to the conclusion that article 36 does not include wrongs committed by trustees in respect of trusts. As article 36 does not apply, the only article which can apply to a suit like the one out of which this reference arises is article 120 and we answer the first question accordingly.

With regard to the second question, it will be observed that article 120 declares that limitation shall start to run when the right to sue accrues. There can be no cause of action until there is a party capable of suing and until there is a cause of action there can be no question of the law of limitation coming into operation; see *Murray v. The East India Company*(1), *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navena Suppramanian Chitty*(2), *Charu Chandra Pramanik v. Nahush Chandra Kundu*(3) and *Mst. Bolo v. Mst. Koklan*(4). It follows that if a sole trustee of a public trust commits a breach of trust the loss cannot be made good, without voluntary

(1) (1821) 5 B. & Ald. 204; 106 E.R. 1167.

(2) (1916) 20 C.W.N. 833 (P.C.). (3) (1922) I.L.R. 50 Cal. 49.

(4) (1930) I.L.R. 11 Lah. 657 (P.C.).

action on the trustees's part, until there is a new trustee. The right to sue in such a case would have to lie in abeyance until a new trustee was appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned, because they will have in themselves the right to sue their co-trustee for the loss occasioned by him. Of course, if the co-trustees have also made themselves liable for the breach of trust the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the *cestui que trust* would ordinarily have the right to sue from the date of the breach of trust. It will, therefore, depend on the circumstances when the time will commence to run and we answer the second question in this sense.

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