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and the mohalladar. The record of the custom is some evidence of its existence, and doubtless it was entered in the administration papers of 1833 and 1867, because the settlement officer was bound to prepare a complete record of the mahal, and to include in it all village-customs, and extra cesses and collections. As the claims in these suits are based upon ancient usage and not upon contract, the Full Bench ruling clearly applies, and this being so, one cannot say that art. 62, sch. ii of the Limitation Act governs them, still less does art. 132 apply to these cases. The "*haqq*s" referred to in the explanation and described as fees are fixed charges upon immoveable property, of which payment could be enforced by the sale of the property so charged. It is not contended here that a zamindar could recover his one-fourth share of the sale-proceeds of a house when sold by a suit to bring the house to sale by enforcement of any lien upon it. I need not, however, dwell at length upon the question of limitation, inasmuch as I am quite ready to accept the ruling of a Division Bench of this Court on the point in *Sheo Dehal v. Thakur Mathura Prasad* (1). The learned Judges in that case applied art. 118, sch. ii of Act IX of 1871, to a case of this nature, holding that there was no limitation expressly provided for such suits. I would therefore say that art. 120, sch. ii of Act XV of 1877, which represents art. 118 of the former Act, governs the limitation in these suits, and if so, all these are within time, as the limitation is six years from the time when the right to sue accrues.

STRAIGHT, J.—I concur in Mr. Justice Spankie's judgment. I was in some doubt at one time upon the question of limitation, and was disposed to think the case within art. 62, though I never had any doubt that art. 132 was inapplicable. But, upon further consideration of the matter and the decision of this Court already referred to, I think art. 120 properly applies.

Before Mr. Justice Oldfield and Mr. Justice Straight.

DURGA PRASAD (DEFENDANT) v. ASA RAM (PLAINTIFF). *

Constructive Trust—Limitation.

B and *D*, father and son, were jointly entitled to the moiety of certain property, *B*'s brother, *E*, and *K*, *E*'s son, being jointly entitled to the other moiety.

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* Second Appeal, No. 425 of 1879, from a decree of Babu Aubinash Chandar Banarji, Officiating Subordinate Judge of Farukhabad, dated the 14th February 1879, modifying a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 30th November, 1878.

(1) S. A. No. 1681 of 1874, decided the 23rd August, 1875, unreported.

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B and *D* were transported for life. Thirty years afterwards (*B* having meantime died) *D* returned from transportation, and asserted his right to a moiety against a person deriving his title from *E* and *K*, who had taken possession of the whole. *Held*, looking to all the circumstances of the case, that *E* and *K* had taken possession subject to a constructive trust in favour of *B* and *D*, and that accordingly *D* was entitled to assert his right, and no limitation could affect it.

ONE Bhawani Prasad and his adopted son, Kannu Lal, were jointly entitled by inheritance from one Lachi Ram, deceased, to a moiety of a certain building used as a shop. Bhawani Prasad's brother, Balkishen, and Balkishen's son, Durga Prasad, were in like manner jointly entitled to the remaining moiety. In the year 1840 Balkishen and Durga Prasad were transported for life, their wives being alive at the time. On the death of Durga Prasad's wife, Balkishen's wife having already died, Kannu Lal mortgaged the entire shop to one Asa Ram, such mortgage being dated the 30th May, 1873. Asa Ram sued on his mortgage and obtained a decree for the sale of the property on the 8th November, 1876. The shop was sold in the execution of this decree on the 23rd April, 1879, and was purchased by Asa Ram himself. Asa Ram not being able to obtain possession of the entire shop, his title to it being disputed by Durga Prasad, who had in the end of 1877 returned from transportation under a free pardon, he brought the present suit in the year 1878 to establish his title and for possession of the entire shop. Durga Prasad alleged in his written statement that he and his father had, on being sentenced to transportation for life, transferred their moiety of the shop to Bhawani Prasad, in trust to pay the income thereof to their respective wives or the survivor of them, and that Bhawani Prasad or his son Kannu Lal had so paid such income up to the date of his (Durga Prasad's) wife's death, which occurred some nine or ten years before the suit. The plaintiff in his written statement admitted the defendant's original right to the moiety in dispute, but contended that such right was extinguished, as since the defendant's transportation Bhawani Prasad and after him Kannu Lal had held the moiety adversely to the defendant. The Court of first instance held that Bhawani and after him Kannu Lal had acquired the property in dispute as trustees, and that they had so held it, paying Durga Prasad's wife the income up to her death, and that as twelve years had not elapsed from the death of his wife, the defendant's right was not extinguished. On appeal by the plaintiff the lower appellate Court, finding that no express trust had been created, that the defendant's wife had not received the income

of the property, and that she had died in 1860 or 1861, held that the defendant's right was extinguished.

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The defendant appealed to the High Court, contending that the property had been held by Bhawani Prasad and Kannu Lal in constructive trust for him, and his right was therefore not extinguished.

Mr. *Amir-ud-din*, for the appellant.

Munshi *Hanuman Prasad* and *Lala Harkishen Das*, for the respondent.

The following judgments were delivered by the Court :

OLDFIELD, J.—The plaintiff claims to obtain possession of the property which is the subject of this suit as having belonged to one Kannu Lal, whom he represents by purchase of his interests in execution of a decree. The particular portion to which this appeal has reference is the half of a shop called in the proceedings the western shop. This is claimed by the appellant Durga Prasad in his own right. It appears that he and his father Balkishen were transported for life thirty-seven years ago, and the former has returned under a pardon granted at the time of the Delhi Darbar; and he avers that when he and his father left the country, they made over the property to Bhawani Prasad and Kannu Lal, his adopted son, in trust, and they collected and gave the rents to their wives, and the wife of Durga Prasad received them till her death, nine or ten years ago. It is admitted that the property belonged to Durga Prasad and his father up to the time of transportation. The lower appellate Court has found, however, that there is no proof of any express trust being made of it to Bhawani Prasad and Kannu Lal when they left, or of the appellant's wife receiving the rents, and that she died seventeen or eighteen years ago, and that Bhawani Prasad and Kannu Lal have held the property adversely to the appellant, and have acquired a title by length of possession.

This finding cannot be sustained. If the facts be as found by the lower appellate Court that Bhawani Prasad and Kannu Lal never made over the rents to the wives of Durga Prasad or his father, and themselves took possession of the property on transportation of

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the owners, although there may have been no actual and express trust, yet there are circumstances which the lower appellate Court has overlooked, which amount to fraudulent conduct on their part, such as would by equitable construction convert their holding into that of trustees. The parties were nearly related to each other, living in what may be assumed to be terms of close intimacy and mutual confidence, and the appropriation of the absent relations' property could only have been carried out by a shameful abuse of the friendly and confidential terms on which they had lived, and by taking advantage of the enforced absence of the owners, who had no means of asserting their right. But the Subordinate Judge has failed to notice some evidence which shows that the wives of Durga Prasad and his father were in possession until their deaths, and that Bhawani Prasad and Kannu Lal never disputed their title, nor that of the appellant, and only asserted their right when they believed appellant to have died in transportation. This appears by proceedings taken in 1867 by Bhawani Prasad, when he claimed the property, admitting that Durga Prasad's wife had succeeded Durga Prasad, and claiming to succeed her at her death, and it is clear from a perusal of the judgment in that case that the claim proceeded on an assumption that Durga Prasad was dead. Thus Bhawani Prasad and Kannu Lal appear never to have asserted or intended to assert any title adverse to Durga Prasad. The appeal must be allowed with costs in both Courts, and the decree of the lower appellate Court modified by exempting the half of the western shop from the decree in plaintiff's favour.

STRAIGHT, J.—It appears to me that in this case the Court is properly called upon to exercise its powers of equitable interference to the fullest extent. The appellant, Durga Prasad, was, at the time of his conviction and sentence, some 30 years ago, admittedly entitled, jointly with his father Balkishen, to a half share of the western shop, part of the property now in suit. Both the wife and mother of Durga Prasad were then alive, and so long as they lived it is beyond dispute that they enjoyed the income derived from this half share, which, so I gather from the findings, was paid over to them, first by Bhawani and afterwards by Kannu Lal. I do not think it is in the least material to the view I hold as to the mode in which this case should be treated, whether the wife of Durga Prasad did

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or did not die within the twelve years preceding the institution of this suit. According to my judgment the whole point is, whether from all the circumstances and the relationship between them, the Court is justified in holding that a constructive trust existed in Bhawani and Kannu Lal for and on behalf of Durga Prasad and Balkishen, from the day their imprisonment commenced. A person may declare a trust either directly or indirectly: indirectly by evincing an intention, which the Court will effectuate through the medium of an implied trust, Lewin, 6th ed., p. 95. Again, "Constructive trusts are those which the Court elicits by a construction put on certain acts of parties." Is the Court then, looking to the whole of the facts of this present case, entitled to come to the conclusion that a constructive trust is established? I am very clearly of opinion that it is, and that we are bound so to hold upon the plainest principles of equity, which in my view should be most liberally applied in a case where otherwise grave hardship and injustice would arise. By his imprisonment Durga Prasad was placed under a disability, just as much as a person "beyond the seas," or "lunatic," or "under age," and was thus deprived of the power of looking after his own interests, or asserting his rights, and during such time as it lasted it is obvious that Bhawani Prasad first and Kannu Lal, so far as his share in the property was concerned, occupied towards him a fiduciary position, of which the latter seems to have taken advantage in fraud of his "*cestui que trust.*" Till Durga Prasad obtained his release it would have been impossible for him to know what had happened, his wife was dead and he does not seem to have had any children to complain of the misappropriation of Kannu Lal or any means of gathering information of his misconduct. "No time will cover fraud so long as it remains concealed, for until discovery (or at all events until the fraud might with reasonable diligence have been discovered) the title to avoid the transaction does not properly arise," Lewin, 6th ed., p. 710. No limitation therefore can affect the rights of Durga Prasad, and he is entirely justified in setting them up against the plaintiff's claim to the extent of his own interest. I therefore agree in Mr. Justice Oldfield's order both as to the shape in which this appeal is to be allowed and as to his order on the question of costs.

Appeal allowed.