*Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Lindsay.*

JAISTH MADHO ACHARIYAJI AND OTHERS (DEFENDANTS) *v.* THAKUR SRI GAT ASHRAM NARAINJI (PLAINTIFF).* 1927 *June*, 24.

*Act No. IX of* 1908 (*Indian Limitation Act*), *section* 10; *schedule* 1, *article* 62—*Limitation—Suit on behalf of an idol to recover money alleged to have been misappropriated by the* mutawalli *or manager.*

*Held* that a suit brought in the name of an idol installed in a Hindu temple to recover money alleged to have been wrongfully diverted to his own use by the manager or *mutawalli*, instead of having been employed in the service of the idol, is not a suit against a trustee in whom property has become vested in trust for any specific purpose, within the meaning of section 10 of the Limitation Act, but is a suit for money payable by the defendant for money received by the defendant for the plaintiff's use.

*Vidya Varuthi* v. *Balusami Ayyar* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Sir *Tej Bahadur Sapru* and Munshi *Narain Prasad Ashthana*, for the appellants.

Mr. *B. E. O'Conor*, for the respondent.

MEARS, C.J., and LINDSAY, J. :—The question to be decided in this appeal is one of limitation, namely, whether the suit was governed by article 62 of the first schedule to the Limitation Act, as contended by the appellant, or by section 10 of the Limitation Act as found by the court below.

Article 62 provides a period of three years' limitation for a suit to recover money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. Section 10 of the Act contemplates a

*First Appeal No. 357 of 1924, from a decree of Shambhu Nath Dube, Subordinate Judge of Muttra, dated the 13th of September, 1924.

(1) (1921) I.L.R., 44 Mad., 831.

1927

JAISTH MADHO ACHARIYAJI v. THAKUR SRI GAT ASHRAM NARAINJI.

suit brought against a person in whom property has become vested in trust for any specific purpose, or his legal representatives or assigns, for the purpose of following such property or the proceeds thereof or for an account of such property or proceeds; and it is declared that a suit for any of these purposes shall not be barred by any length of time.

In order to decide this question it is necessary to consider the nature of the suit and the legal position of the contesting defendant Jaishth Madho Achariyaji who is the appellant before us.

The plaintiff in the suit was the deity styled "Thakur Sri Gat Ashram Narainji Maharaj" installed in the temple at Muttra known as the Gaya Ashram Tila and the suit was brought on his behalf by a lady named Sundar Kunwar professing to act as the superintendent and guardian of the idol.

This lady and the eight defendants who were impleaded were described in the plaint as *mutawallis*.

As originally framed, the suit was one for rendition of accounts of the income and expenditure of the temple property, but by subsequent amendment it became a suit for the recovery of a specified sum of money due to the temple for a period beginning with the 15th of November, 1906, from the first defendant Jaishth Madho Achari.

The case for the plaintiff was that the temple was entitled to a one-half share of the income of a village named Khasrai Bhajanpura. The contesting defendant pleaded that the share of the temple was one-fourth, not one-half, and that he was entitled to appropriate a one-fourth share to his own use.

This defence prevailed and the suit was dismissed but, on appeal to this Court, the decree was reversed. It

was held that the temple had a right to a half share of the income from the village just mentioned.

This Court sent the suit back for disposal and it was then, for the first time, that the contesting defendant raised the plea of limitation with which we have now to deal. The plea was that by reason of article 62 of the first schedule to the Limitation Act the defendant could not be made liable for any sum accruing due prior to three years before the date of the suit.

The Subordinate Judge repelled this plea, being of opinion that the defendant was a trustee in whom (along with the other *mutawallis*) property had become vested for a specific purpose. He held that the suit could not be barred by any length of time.

The history of the temple is set out shortly in the judgement of the court below. It appears to have been built by one Pran Nath Sastri who died in the year 1830. How the property which constitutes the endowment was acquired is not clear; but the temple has been supported out of the revenues of some villages in the Gwalior State, and has for many years been in receipt of an annual payment from the proprietors of the Awagarh estate in these provinces. For some time indeed the temple properties were managed by one of the Rajas of Awa.

In the paper-book of First Appeal No. 401 of 1921, which was prepared when the present suit was previously under appeal to this Court, is to be found a report made by the Special Manager of the Awagarh Estate which discloses the origin of the annual contribution made by the estate to the temple. One of the Rajas, Pirthi Singh, allotted the revenue of two of the estate villages, Khasrai and Bhajanpur, for the maintenance of the temple. By some arrangement made subsequently, a sum fixed at Rs. 1,650 per annum was treated as the equivalent of the revenue and came to be paid regularly in certain shares to the temple and the priests. No document

1927

JAISTH MADHO ACHARIYAJI v. THAKUR SRI GAT ASHRAM NARAINJI.

creating a trust was ever prepared but in the year 1850, under an award and an agreement, the temple was declared to be entitled to receive one-half of this annual sum, the other half being distributed among the Acharis, i.e., the descendants of Pran Nath Sastri.

A copy of this deed of agreement is in the paper-book of First Appeal No. 401 of 1921 (page 23) as also a copy of a subsequent agreement executed by the Acharis—dated the 2nd of November, 1874 (page 25) by which they bound themselves to pay into the temple treasury, in certain defined shares, a sum representing one-half of the total income received from the endowed property.

The report of the Special Manager shows that since the year 1867 the Awagarh estate made the annual contribution of Rs. 1,650, handing it over to the Acharis in accordance with the terms of the award just mentioned, until payment was withheld owing to disputes among the Acharis. After some interval the payments were resumed and the money has since been regularly made over to the Acharis who are the descendants of Pran Nath Sastri.

It is with this contribution from the Awa estate that we are concerned in the present suit, and the position seems to be that the proprietor of the Awa estate for the time being is the trustee, the temple, i.e., the idol installed in it, being the *cestui que trust* or beneficial owner of half the annual contribution made from the revenue of the village or villages called Khasrai Bhajanpur. There is no evidence to show that there has ever been any conveyance of these villages, or the income of them, to any trustee in trust for the specific purpose of the maintenance of the temple. The villages remain the property of the estate—subject to the obligation imposed by the owner upon himself—to pay yearly from the income of the villages a sum of Rs. 1,650 which is to be divided

half and half between the temple and the custodians or *mutawallis* of the temple.

While it may be that the *mutawallis* have at various times been described as "trustees" of the temple property, they are certainly not persons in whom, to use the language of section 10 of the Limitation Act, "property has become vested in trust for any specific purpose."

The position of *mutawallis* and *shebaits* has been defined in a recent judgement of their Lordships of the Privy Council, *Vidya Varuthi* v. *Balusami Ayyar* (1), at page 843, where it is said :—

"Neither under the Hindu law nor in the Muhammadan system is any property conveyed to a *shebait* or a *mutawalli* in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager, with certain beneficial interests regulated by custom or usage. Under the Muhammadan law the moment a *waqf* is created all rights of property pass out of the *waqif* and vest in God Almighty."

It follows from this that the position of the contesting defendant in this suit—now the appellant—is not that of the express trustee referred to in section 10 of the Limitation Act. As a *mutawalli* or custodian of the endowed property of the temple he may, in a general way, be described as a "trustee"—a person in a position of trust with respect to the administration of the temple properties—but no property is vested in him upon trust for any specific purpose. Whatever sums, therefore, he has received for and on behalf of the idol installed in the temple can be treated only as sums received to the use of the plaintiff idol and a suit to recover money so received is governed by article 62 of the Schedule to the Limitation Act. This point is therefore decided in favour of the appellant.

The only other ground of appeal which was argued was that concerning the rate of interest, 12 per cent

(1) (1921) I.L.R., 44 Mad., 831.

1927

JAISTH MADHO ACHARIYAJI v. THAKUR SRI GAT ASHRAM NARAINJI.

per annum, allowed by the court below up to the date of the decree. It is said this is an excessive rate. We do not think so, and we should not be justified in interfering with the discretion of the court below to award interest at what it considered a reasonable rate. The patent dishonesty of the appellant in appropriating money which he knew did not belong to him is a very good ground for the award against him of interest at a substantial rate.

The appeal succeeds to the extent that we substitute for the decree of the court below a decree for profits received for the three years prior to suit at the rate of Rs. 412-8-0 per annum, carrying interest at 12 per cent per annum up to the date of this Court's decree and thereafter at 6 per cent per annum. The plaintiff will get proportionate costs upon this amount in the court below. The appellant, in view of his conduct as described above, will pay his own costs in this Court.

*Decree modified.*

---

*Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.*

1927
*May*, 26.

ISHRI PRASAD (PLAINTIFF) *v.* SRI RAM (DEFENDANT).*

*Civil Procedure Code, sections* 13 *and* 14—*Suit on a foreign judgement*—"*Judgement given on the merits of the case*"—*Assertion by defendant that he was not residing within the jurisdiction when the suit was filed—Burden of proof.*

In a suit brought in the Rampur State the judgement, after giving a summary of the plaint, ran as follows :—"The defendant, notwithstanding due service of summons, has not contested the suit. The document is registered. The failure of the defendant to contest the suit amounts to an admission of the plaintiff's claim. Accordingly the plaintiff's suit is decreed."

---

*Second Appeal No. 376 of 1925, from a decree of Joti Sarup, Second Subordinate Judge of Saharanpur, dated the 15th of September 1924, confirming a decree of Niaz Ahmad, Additional Munsif of Saharanpur, dated the 16th of February, 1924.