APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge, and Mr. Justice A. G. P. Pullan.

SURAJ NARAIN SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) v. BABU NARBADA PRASAD, (PLAINTIFF-RESPONDENT).* 1928 November, 15.

Limitation Act (IX *of* 1908), *articles* 62 *and* 120—*Tenants-in-common—Suit for share of profits by one tenant-in-common against another who had realized more than his share, limitation applicable to.*

Where there has been no division between two tenants they must be regarded as tenants-in-common and a suit by one tenant-in-common against another who has received more than his share, is governed by article 120 and not by article 62 of the Limitation Act. *Parsotam Rao Tantia* v. *Radha Bai* (1), *J. Subba Rao* v. *J. Rama Rao* (2) and *Yerukola* v. *Yerukola* (3), relied upon. *Gajraj Singh* v. *Sadho Singh* (4), and *Lala Balmakund* v. *Lala Chandika Prasad* (5), distinguished.

Messrs. *Ghulam Hasan* and *D. K. Seth*, for the appellants.

Mr. *Radha Krishna*, for the respondent.

HASAN, A. C. J. and PULLAN, J. :— The suit to which this second appeal relates was brought by one Babu Hanuman Prasad against his brother Babu Manna Lal and the latter's son Babu Suraj Narain asking for an account to be taken and his share of profits awarded to him which had accrued from the *theka* of two villages obtained in the name of himself and Babu Suraj Narain

*Second Civil Appeal No. 105 of 1928, against the decree of Saiyid Asghar Hasan, Additional District Judge of Gonda, dated the 18th of January, 1928, confirming the decree of Bhuder Chandra Ghosh, Subordinate Judge of Bahraich, dated the 18th of February, 1927.

(1) (1916) I. L. R., 38 All., 318. (2) (1917) I. L. R., 40 Mad., 291.
(3) (1922) I. L. R., 45 Mad., 648. (4) (1912) 15 O. C., 397.
(5) Select Decision No. 246 of the Judicial Commissioner of Oudh.

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from the Court of Wards. The suit was defended first on the ground that the leases were *benami* and were really executed in favour of Babu Manna Lal, his son and brother being merely *benamidars;* and the second principal ground of defence was a plea of limitation as against some of the money collected in respect of these leases. The suit was decreed by the court of first instance for a sum of Rs. 1,296-15-9 and the appeal was dismissed by the learned Additional District Judge. In second appeal, although the question of limitation is put first, the first two arguments which have been addressed to us are, first, that we should hold that the leases were *benami*, secondly, that in any case the defendants had not even collected the share of defendant No. 1 and that there was nothing due from them to the plaintiff and, thirdly, that no decree should be passed against Babu Manna Lal who was not one of the lessees. It will be observed that the third ground is in direct contradiction to the first. In our opinion no second appeal lies on the question of *benami*. The courts below have found as a fact that these leases were executed in the names of the two persons, who are the lessees, and that they were not in favour of Babu Manna Lal. This is a pure finding of fact and cannot be challenged in second appeal. The second question as to whether the defendants have or have not collected sufficient to pay the share of defendant No. 1 may be disposed of as briefly. It was never raised in the court below and it is not raised in the grounds of appeal. We find that the question of collection was gone into by the first court and it held, after consideration of all the evidence, first, that the defendants Nos. 1 and 2 were running the business of the leases and, secondly, that they had collected a certain amount showing a balance to be divided between them and the plaintiff, and for this balance the decree has been passed. Such a finding cannot be challenged in this Court.

As to the liability of Babu Manna Lal, that also is covered by the finding that Babu Manna Lal, and his son have been doing the whole business of the leases including naturally the collection of rents. The plea also comes ill from the mouth of the appellant in view of his own defence that he is the real lessee and that the names of his brother and son were entered fictitiously in the leases.

There remains only the question of limitation. It is argued before us that the article of the Limitation Act applicable to a case of this nature is No. 62. If this were so, the period of limitation would be one of three years in respect of each collection and a certain portion of the amount claimed would be no longer recoverable. Article 62 deals with suits "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." Counsel has been unable to show us any ruling reported in a recognized publication which would make article 62 applicable to the present case. He has referred us to *Lala Balmakund* v. *Lala Chandika Pershad* (1) of the court of the Judicial Commissioner of Oudh which is a case in which there had been a partition in a Hindu family and it was understood at the time of the partition that the member or members of the family to whom a particular village was allotted should be entitled to the arrears which might be due from the tenants at the time of partition. In spite of this agreement the lambardar took bonds from the tenants for the arrears and thereby obtained money which was not due to him but to the individual co-sharers, who, under the terms of the partition, were entitled to collect the rents of those tenants. We have also been referred to another Oudh case reported in *Gajraj Singh* v. *Sadho Singh* (2) which also refers to a

(1) Select Decision of the Judicial Commissioner of Oudh No. 246.
(2) (1912) 15 O. C., 397.

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joint Hindu family where there has been a partition and the individual members were managing their own shares separately. Neither of these cases is applicable to the case of tenants-in-common; and where there has been no division of shares between tenants they must be regarded as tenants-in-common. As pointed out by the Allahabad High Court in *Parsotam Rao Tantia* v. *Radha Bai* (1), article 62 does not apply where the property is managed by one member of a family. But the strongest rulings on the side of the respondents are those of the Madras High Court reported in *J. Subba Rao* v. *J. Rama Rao* (2) and *Yerukola* v. *Yerukola* (3). In the former case the parties were co-sharers in a *jagir* and it was held that a suit brought by one of them was a suit for an account and governed by article 120 and not article 62 of the Indian Limitation Act and the *ratio decidendi* is given at page 295 :—

> "The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded makes no difference . . . The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The article of limitation governing the suit is not, therefore, article 62."

The second of these rulings being the decision of a Full Bench of even greater authority. On page 659 the learned CHIEF JUSTICE points out :—

> "Article 62 relates to suits for money payable by the defendant to the plaintiff for money

(1) (1916) I. L. R., 38 All., 318. (2) (1917) I. L. R., 40 Mad., 291.
(3) (1922) I. L. R., 45 Mad., 648.

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> received by the defendant for the plaintiff's use. These are technical terms of the law of England used to cover a great variety of cases in which it can be said that the defendant has received money which really belongs to the plaintiff. There is, however, one case in which that form of action would not lie in England and that is by one tenant-in-common against another who has received more than his share."

And in the concluding portion of his judgment at page 664 he follows the same line of argument as that which found favour in the earlier ruling of the same court and applied article 120 to the case of tenants-in-common. In our opinion there is no distinction of principle between those cases decided by the Madras High Court and that before us, and we consider that this question of limitation is conclusively decided by authority. We find that the suit has been rightly decided by the courts below, and we dismiss this appeal with costs.

Appeal dismissed.