1924-25.

GAJADHAR PRASAD v. FIRM MANULAL JAGARNATH PRASAD.

JWALA PRASAD, J.

two months from this date (19th January, 1925), failing which the judgment-debtor will be entitled to execute this order as a decree. There will be no order as to costs of this application.

The result is that the judgment-debtor will be entitled to get Rs. 400 from the decree-holder within two months failing which this order will be executed by the judgment-debtor as a decree.

S. A. K. *Order set aside.*

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Foster, J.

1924-25.

Dec., 1, 8, 3, 4; Jan., 19.

TOFA LAL DAS

v.

SYED MOINUDDIN MIRZA.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, Articles* 62 *and* 96—*Two Articles applicable to a suit, one giving a longer period than the other—recovery of excess amount of cess paid, suit for—limitation*—terminus a quo.

In giving effect to a statute of limitations, if two Articles limiting the period for bringing a suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should, generally, and apart from other equitable considerations, be preferred.

In cases where the relief is based on mistake the period of limitation should run from the time when the mistake is first discovered even if some other Article in the Limitation Act should be wide enough to include the cause of action.

Where, therefore, a *patnidar* brought a suit to recover from the landlord a sum of money paid in excess of the amount demandable for cess, the relief being based on mistake, *held*, that Article 96, and not Article 62, was applicable.

* First Appeal no. 208 of 1922, from a decision of B. Suresh Chandra Sen, Subordinate Judge of Purnea, dated the 31st May, 1922.

Mathura Nath Kandu v. *Steel*(1), *Hanuman Kamat* v. *Hanuman Mandur*(2), *Dharamchand* v. *Goulal*(3), *Moidiyan's son Ambialath Vettie Punnayil Kuttu* v. *Anedath Valiyil Lakshmi Ammal's son Raman Nair*(4), referred to.

Appeal by the plaintiff.

The plaintiff-appellant in this appeal was the *patnidar* of a share in two villages comprising part of the Khagra estate, situate in the Purnea district and owned by two brothers, Syed Mohiuddin Mirza and Syed Moinuddin Mirza, each of whom owned a separate 8-annas proprietary share. Shortly before July, 1921, when the present suit was instituted, Syed Mohiuddin died and the persons impleaded as defendants in this suit were the surviving brother Syed Moinuddin and the executor, the widow and the daughter of the deceased brother.

The suit was instituted to recover back with interest a sum of Rs. 5,312-8-0 paid by the plaintiff to his landlords as cess in excess of the amount for which he was legally liable for the *Mulki* years 1318 to 1325 and half of the year 1326, which comprised a period between the first half of 1910 and the second half of 1918 A.D.

The *patni taluk* which the plaintiff held was assessed in the Collectorate rolls in or just before the year 1910 at a valuation of Rs. 7,714 to take effect from the beginning of the year 1318 *M.S.* As the cess demanded by the landlords and paid by the plaintiff had been calculated on a valuation of Rs. 17,714 the annual cess paid to the landlords based upon the larger valuation was Rs. 974-1-6 whereas the proper amount payable on the actual valuation was Rs. 349-1-6. The excess payment therefore was Rs. 625 for the first eight years and half of that amount for the last year by which time the mistake had been discovered.

(1) (1886) I. L. R. 12 Cal. 533.
(2) (1892) I. L. R. 19 Cal. 123; L. R. 18 I. A. 158.
(3) (1917) 48 Ind. Cas. 886.
(4) (1908) I. L. R. 31 Mad. 230.

1924-25.

TOFA LAL DAS v. SYED MOINUDDIN MIRZA.

The plaintiff alleged in his plaint and proved by his evidence that the larger sum was represented to him as the correct valuation by the landlords' *muharrir*, Manmohan Das, who produced a copy of the cess valuation roll showing the valuation as Rs. 17,714, and that he paid on that valuation. He also deposed that he did not himself receive from the Collector a copy of the valuation roll. It appears from the evidence given by the plaintiff and his son that he acted upon the representation made on behalf of the landlords and had no suspicion that the valuation was not correct. In his plaint he further alleged that the landlords' valuation roll had been fraudulently altered so as to make the valuation appear to be Rs. 17,714 instead of Rs. 7,714 and that they fraudulently induced the plaintiff to pay on that valuation. A criminal proceeding was in fact instituted before the District Magistrate against the manager of the Khagra estate, Mr. P. W. Duff, in 1919, but as no criminal offence against him could be proved the proceedings were withdrawn and in the present suit the charge of fraud was not persisted in. It was the fact, however, that the defendant's copy of the cess-valuation roll showed the valuation as Rs. 17,714 and not Rs. 7,714 as appeared in the Collectorate rolls. It should also be mentioned that in proceedings before the Collector on the 13th June, 1919, at the instance of the plaintiff, the Collector passed orders that the Khagra estate should be informed that the correct valuation of the plaintiff's tenure in the cess roll was Rs. 7,714, and not Rs. 17,714 as appeared in the landlords' copy.

The defendants in their written statement denied the charges of fraud and maintained that the correct valuation was the larger figure and not the smaller and that the cess was payable upon a valuation of Rs. 17,714. They further pleaded that the suit was barred by limitation.

The Subordinate Judge of Purnea, before whom the case came for trial, found that the correct valuation

was that pleaded by the plaintiff. As the charge of fraud had been abandoned he found that the charge had not been substantiated. On the question of limitation he found that Article 62 of the Limitation Act as contended by the defendants was applicable and that Article 96 as contended by the plaintiff did not govern the case, and that the claim was barred in respect of any cess paid more than three years before the commencement of the suit. It followed therefore that the only sum recoverable was the sum of Rs. 312-8-0 paid on the 19th November, 1918, the claim for the earlier payments made more than three years before the commencement of the suit, being barred by limitation. He accordingly passed a decree for Rs. 312-8-0 together with interest at 12 *per cent. per annum* from the date of payment to the date of the suit amounting to Rs. 99-8-0, making Rs. 412-0-0 in all, and allowed 6 *per cent. per annum* interest upon the decretal amount from the date of the decree to the date of realization.

From this decree the plaintiff appealed and contended that Article 96 of the Limitation Act, and not Article 62 as found by the Subordinate Judge, was applicable.

Lachmi Narain Singh (with him *Nurul Hosain*), for the appellant: The overpayment was due to a mistake which was discovered only when the appellant obtained a certified copy of the valuation roll from the Collectorate. Under these circumstances limitation ought to run from the point of time when the mistake was first discovered and not from the date of the payment. Article 62 does not cover the present case. It is a general article which is applicable to all cases covered by the well-known English form of action for "money had and received". Article 96 specially provides for all suits based on the ground of mistake and is therefore applicable in preference to the general article. *Mathuranath Kundu* v. *Debendranath Kundu*(1) is a direct authority

(1) (1886) I. L. R. 12 Cal. 533.

1924-25.

TOFA LAL DAS v. SYED MOINUDDIN MIRZA.

on the point. This relates to a suit brought by a tenant for the recovery of a sum paid in excess of the actual amount of cess payable to the landlord and the learned Judges held that Article 96 was applicable. I submit, therefore, that in the absence of any authority to the contrary, the law as laid down in *Mathuranath Kundu* v. *Debendranath Kundu* (1) is still good law and ought to be followed in the present case.

Khurshaid Husnain and *Syed Ali Khan*, for the respondents: Article 62 is a special article providing for a special form of action technically called in England an action for "money had and received", whereas Article 96 is a general article providing for all sorts of claims based on the ground of mistake. [*See* Mitra's *Tagore Lectures on Limitation*, Vol. II, page 1010; Kedarnath's *Limitation*, page 1891.] Where two articles are applicable the one which provides for a special form of action should be preferred. In *Ram Narain* v. *Brij Banke Lal*(2) the scope of Article 62 is fully discussed. This Article was applied to an action for the recovery of surplus sale-proceeds in *Harihar Misser* v. *Syed Mohammed*(3). In *Torab Ali Khan* v. *Nilruttun Lal* (4) and *Radha Nath Bose* v. *Bama Churn Mookerjee* (5), which were cases similar to the present one, the learned Judges held that Article 62 was applicable. It is the nature of the claim that is material for the determination of the question of the applicability of the proper article. It, follows, therefore, that all claims for money, whether based on mistake or fraud or any other ground, ought to be governed by Article 62 which specially provides for this class of cases. In cases of fraudulent trespass there has been a distinction drawn between "mistake" and "inadvertence". In the present case money was paid in the

(1) (1886) I. L. R. 12 Cal. 533.
(2) (1917) I. L. R. 39 All. 322.
(3) (1916) 1 Pat. L. J. 374.
(4) (1886) I. L. R. 13 Cal. 155.
(5) (1876) 25 W. R. 415.

ordinary course of business, or in other words, inadvertently. There is, therefore, no case of a *bona fide* mistake and Article 96 would be applicable, if at all, to cases of " mistake " alone, and not to a case where there has been a simple overpayment. Besides a claim for money paid erroneously does not necessarily imply a claim based on mistake. [*See* Wood on *Limitation*, page 1415, Article 276 D(1)]. I also submit that in the present case the cess was realized on the strength of the valuation roll served on me under the Cess Act by the Collector. This sort of payment being akin to a payment under compulsion of a legal process, limitation would begin to run from the date of the payment. [*Marriq* v. *Hampton*. (1)]. In *Mathuranath Kundu* v. *Debendranath Kundu* (2) the question was whether the general law of limitation or the special law provided by the Rent Act was applicable. The learned Judges who decided that case never applied their minds to Article 62 inasmuch as the choice was between the general law on the one hand and the special law under the Rent Act on the other.

Lachmi Narain Singh, in reply: See *Dharamchand* v. *Gorelal* (3). If in all fairness the respondents ought to refund the money received, Article 96 should be applied as it would promote the ends of justice.

Cur. adv. vult.

S. A. K.

DAWSON MILLER, C.J. (after stating the facts set out above, proceeded as follows:) Article 62 relates to a claim for money received by the defendant for the plaintiff's use and prescribes a limitation period of three years from the date when the money is received. Article 96 applies to a suit for relief on the ground of mistake and the period of limitation therein prescribed is three years from the date when the mistake becomes known to the plaintiff. It

Jan., 19.

(1) 2 Smith's Leading Cases, 409, ed. 12.
(2) (1886) I. L. R. 12 Cal. 593.
(3) (1918) 47 Ind. Cas. 886.

1924-25.

TOFA LAL DAS v. SYED MOINUDDIN MIRZA.

DAWSON MILLER, C.J.

follows therefore, that if the latter Article is applicable the plaintiff is entitled to recover the whole sum claimed as the mistake was not discovered until within three years from the date of the suit. Apart from the question as to which Article applies, on the assumption that the excess payments were made by reason of a mistake on the part of the plaintiff, it has been contended on behalf of the defendants that the relief claimed in the plaint is based not upon mistake but upon fraud and that the case of fraud has failed. The relief claimed in the plaint is framed as follows:

> "The plaintiff prays for the following reliefs:—
>
> (*a*) A decree may be passed in favour of the plaintiff against the defendants for the refund of Rs. 9,606-4-0 as principal and interest as per account given below on account of the excess amount realized from him by the defendants' estate."

Clauses (*b*) and (*c*) relate to costs and any other relief to which the plaintiff may be deemed entitled. It is true that in the body of the plaint where the facts are set out it is alleged that the landlords fraudulently realized from the plaintiff the excess amount every year and that the defendants are liable to refund the same. At the same time paragraph 2 of the plaint alleges that the manager and *amlas* of the landlords shewed the *karpardaz* and son of the plaintiff a valuation roll with an entry of Rs. 17,714 as the valuation on account of their *patni mahal* and after having assured them collected from the plaintiff cesses according to the said valuation and the plaintiff continued to pay cesses according to the valuation as represented and assured by the manager and *amlas* of the landlords, and in paragraph 4 it is alleged that the plaintiff's suspicion having been aroused he obtained a copy of the valuation roll on the 12th April, 1919, and on perusal of it, it transpired that the correct valuation was Rs. 7,714 and that he afterwards claimed back the balance overpaid. The actual relief as claimed is not stated to be based either upon mistake or fraud but must be taken as based upon the

facts alleged in the body of the plaint. In substance the plaint makes out a case of mistake induced by the representations of the defendants or their servants and whether these representations were fraudulent or not the ground upon which the plaintiff is entitled to recover, if at all, is that the payment was made under a mistake of fact as to his liability. Even in cases of fraud the foundation of the claim is based upon mistake for if the alleged fraud did not deceive the plaintiff he would not have any cause of action. It is true the charge of fraud has failed but the case of mistake has been amply proved and, in my opinion, the plaint is comprehensive enough to cover the relief claimed on that ground.

It remains to consider which Article of the Limitation Act governs the present case. It is well established that where the relief claimed is covered by two Articles of the Schedule one being of general import and the other of especial import applying to the particular facts of any case the latter shall govern. Article 62 undoubtedly covers many more cases than those of money paid under a mistake of fact. It is a general Article covering all cases covered by the well-known action in English law for money had and received by the defendant for the plaintiff's use. It would apply to cases of money received upon a consideration which happens to fail or of money rightfully received by the defendant for the plaintiff's use but wrongfully detained as also for money obtained through extortion, deceit or oppression as well as to the case of money paid by mistake. Some of these cases are undoubtedly provided for by later Articles in the Schedule. Instances will be found in Article 87 which relates to suits by the assured to recover premia paid under a policy voidable at the election of the insurers, Article 89 which provides for suits by a principal against his agent for moveable property received by the latter and not accounted for and Article 97 which relates to suits for money paid upon an existing consideration which afterwards fails. In

1924-25.

TOFA LAL DAS v. SYED MOINUDDIN MIRZA.

DAWSON MILLER, C.J.

each of these cases the commencement of the period of limitation is different from that provided in Article 62 and the provision made with regard to the special cases would govern rather than that provided as to the commencement of the period of limitation in Article 62. If Article 96 provided specifically for the case of a suit to recover money paid under a mistake and nothing more there could be no doubt that that Article rather than Article 62 would govern the present case. Article 96, however, is itself an Article of general import and covers all cases in which relief is sought on the ground of mistake. It would, for example, cover the case of a suit for rectification of a document on the ground of mutual mistake, and other reliefs relating to moveable as well as immoveable property.

In *Mathura Nath Kandu* v. *Steel*(1) a suit by a tenant to recover from the landlord a sum of money paid in excess of the amount demandable for cess, the High Court at Calcutta applied Article 96 but in that case it does not appear to have been contended that Article 62 was applicable. In *Hanuman Kamat* v. *Hanuman Mandur*(2) the claim was to recover purchase money on the ground of failure of consideration. Their Lordships held that if there never was any consideration from the beginning the price paid was money had and received within Article 62 but they were inclined to think that the consideration did not fail at once so as to render the contract void but only when the purchaser could not obtain possession of the property and that the consideration then failed so that the case appeared to them to come within Article 97. It was not necessary, however, to decide definitely which of these Articles should be applied as in either case the suit was barred. In *Dharamchand* v. *Goulal*(3) a case decided in the Court of the Judicial Commissioner of Nagpur the claim was to recover the purchase price paid for a house and it was held that in such

(1) (1886) I. L. R. 12 Cal. 533.
(2) (1892) I. L. R. 19 Cal. 123; L. R. 18 I. A. 158.
(3) (1917) 48 Ind. Cas. 886.

cases it was only where the sale was void *ab initio* that Article 62 applied but where the consideration subsequently failed Article 97 being more specific would govern. But no case has been drawn to our attention in which it was directly determined whether Article 62 or Article 96 should be preferred in a suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due. It has been determined by the High Court at Madras that relief sought on the ground of fraud within the meaning of Article 95 is governed by that Article and not by Article 62 or Article 97. [See *Moidiyan's son Ambialath Vettie Punnayil Kuttu* v. *Anedath Valiyil Lakshmi Ammal's son Raman Nair* (1).]

On the whole I am of opinion that the intention of the legislature was that in cases where the relief is based on mistake the period of limitation should run from the time when the mistake was first discovered even if some other Article in the Limitation Act should be wide enough to include the cause of action. Otherwise in many cases the relief would be barred before the plaintiff could possibly be aware that he had a right to sue. The remedy in such a case as the present is provided by section 72 of the Contract Act which enacts that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it and it seems to me reasonable to suppose that it was not the intention of the legislature in passing the Limitation Act to take away that remedy in the case of money paid under mistake merely because the mistake remained undiscovered for three years from the date of payment. Moreover, I consider that in giving effect to a statute of limitations if two Articles limiting the period for bringing the suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other that which keeps alive rather than that which bars the right to sue should generally and apart from other equitable considera-

(1) (1908) I. L. R. 31 Mad. 280.

1924-25.

TOFA LAL DAS v. SYED MOINUDDIN MIRZA.

tions be preferred. This applies I think with particular force to a case like the present where if Article 62 should be held to govern the plaintiff through no laches or delay on his part would be deprived of his remedy before he could reasonably become aware that he had a remedy at all.

DAWSON MILLER, C.J.

It was argued, however, that the plaintiff ought to have been aware all along that the correct valuation was the lower figure because his copy of the cess valuation roll must have disclosed it. As against this the plaintiff deposes that he never received a copy of the revised valuation roll in 1910 but accepted the correctness of the defendants' copy whilst the defendants' witness Manmohan Das alleged that the plaintiff had a copy of his own and that the valuation there mentioned was also the larger figure. Neither of the copies was produced in evidence but whichever version be correct there can be no doubt that the plaintiff was acting under a *bona fide* mistake in making the excess payment. Nor is there any reason to suppose that the plaintiff if he was aware of the correct valuation as he must have been if he received a correct copy of the register would voluntarily pay cess based upon a larger figure.

It was also argued that the cess was in fact paid under legal process and therefore could not be recovered back until the decree or order compelling payment had been set aside. The argument rests solely upon an answer given by the plaintiff in cross-examination that his rents were usually realized under the *patni* sale law. What the exact significance of this statement may be is left in doubt but the point was never taken either in the pleadings or before the Judge in the trial Court nor was any issue framed with regard to it before the trial. There is, in my opinion, no evidence sufficient to justify a finding that the excess payments made in this case were made under legal compulsion. I am of opinion that the claim is governed by Article 96 of the Limitation Act and that the suit is not time-barred. [The remainder of

the judgment which related to a preliminary point taken by the defendant that the appeal had abated as against the representatives of Syed Mohiuddin Mirza, is not material to this report.]

The result is that the decree of the learned Subordinate Judge will be varied by ordering that the respondents Syed Mohiuddin Mirza and Mr. Patridge as Administrator of the estate of the deceased Syed Mohiuddin Mirza are liable severally for a moiety of the sums paid in excess of the amounts of cess due for the years 1318 to 1325, *M.S.*, amounting to Rs. 5,000. In the circumstances these sums will carry no interest up to the date of this decree but interest at 6 *per cent. per annum* will be payable on the amount awarded hereunder from this date up to the date of realization.

The appellant is entitled to the costs of this appeal from the first defendant who alone has contested the appeal. Each party will bear his own costs of the application for setting aside the abatement.

FOSTER, J.—I agree.

Decree varied.

REVISIONAL CRIMINAL.

Before Jwala Prasad, J.

MOHAMMAD NASIRUDDIN

v.

KING-EMPEROR.*

1925.

Jan., 20.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 342—*Examination of accused, scope of—Penal Code*, 1860 (*Act XLV of* 1860), *section* 441—*Criminal trespass—entry with intent to have forcible sexual intercourse.*

* Criminal Revision no. 699 of 1924, from an order of T. S. Macpherson, Esq., Sessions Judge, Manbhum, dated the 21st November, 1924, upholding the order of Babu J. G. Brahma, Subdivisional Magistrate of Sambalpur, dated the 29th September, 1924.