are "Records-of-rights," and sections 103A and 105 apply. I agree therefore in reversing the District Judge's decisions, and in the order passed by my learned brother.

Appeal allowed case remanded.

1905 FEB. 27.

APPELLATE CIVIL.

32 C. 518=9 C. W. N. 504 =1 C. L. J. 239.

32 C. 527 (=1 C. L. J. 167).

[527] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

MAHOMED WAHIB v. MAHOMED AMEER.*
[3rd and 28th February, 1905.]

Limitation—Limitation Act (XV of 1877) Sch. II, Art. 62—Suit for money received by defendant for plaintiff's use.

B received from C money due from him on two deeds of mortgage.

A, who was entitled to a share of the money, instituted a suit for recovering his share from B more than three years after the receipt of the money by B:—

Held, that the money was received by B for A's use and that therefore the suit was governed by Art. 62 of Sch. II of the Limitation Act (XV of 1877), and not by Art. 120.

Nund Lall Bose v. *Meer Abco Mahomed* (1) and *Gurudas Pyne* v. *Ram Narayan Sahu* (2) distinguished.

[**Rel.** 17 I. C. 351; **Ref.** 37 Mad. 381; 33 All. 708; 59 I. C. 98; **Fol.** 30 Mad. 459=17 M. L. J. 452; 30 Mad. 298=17 M. L J. 224=2 M. L. T. 332; 4 N. L. R. 84; **Ref.** 1 P. L. J. 374=20 C. W. N. 983; 37 All. 238; 434: **Ref.** 60 I. C 698; 64 I. C. 312; **Dist.** 39 Mad. 62; 1 M. L. J. 705=1911 M. W. N. 220; 41 Cal. 171.]

SECOND APPEAL by the defendant first party.

The defendants second party executed in favour of the defendants first party two zurpeshgi mortgage deeds dated the 4th December and the 17th December 1890 respectively and borrowed two sums of Rs. 3,000 and Rs. 1,300. The deeds stood in the name of the defendant first party, but the plaintiffs had a share in the sums, which were advanced. The deeds provided that the mortgagees were to remain in possession for a period of ten years from 1298 to 1307 Fasli that the mortgagors would be entitled to redeem upon repayment of the loan in Jait 1307, and that they might also redeem at any time during the term, but that in such event, the mortgagee would be entitled to continue in possession till the end of the term upon payment of an annual rent specified in the deeds.

[528] On the 25th June 1896 the defendant first party received from the mortgagors, defendants second party, the whole of the two sums due under the deeds. The mortgagors thereupon transferred the properties to the defendants third party.

The plaintiffs claimed their proportionate share of the money realized by the defendants first party and also a certain sum of money for damages suffered by them by reason of the action of the defendants first party in allowing redemption and restoring possession to the mortgagors four years before the expiry of the term.

The defendants alleged that the plaintiff's share in the money had been paid to them, denied liability for damages, and stated that the claim, if any, was barred by the law of limitation.

* Appeal from Appellate Decree, No. 2203 of 1902, against the decree of W. H. Vincent, District Judge of Bhagalpur, dated July 3, 1902, confirming the decree of Jogendra Nath Ghose, Subordinate Judge of that District, dated Nov. 20, 1901.

(1) (1879) I. L. R. 5 Cal. 597. (2) (1884) I. L. R. 10 Cal. 860.

1905
FEB. 3, 28.
APPELLATE CIVIL.
32 C. 527=1 C. L. J. 167.

Both the lower Courts held that the suit was not barred and made a decree in favour of the plaintiff for a share of the money and also for damages. The defendant first party thereupon prepared this second appeal.

Babu *Saligram Singh*, for the appellant.

Syed Shamsul Huda for the respondent.

HARINGTON, J. This is an appeal by the defendants against the judgment of the District Judge, affirming that of the Subordinate Judge. The only question is whether the suit is barred by limitation. The case is a perfectly simple one and only stood over because certain zurpeshgi leases had to be translated.

The facts are that the plaintiffs and the first party defendants are members of the same family. The second party defendants granted two zurpeshgi leases for Rs. 3,000 and Rs. 1,300 respectively in favour of Mahomed Wahib first party defendant and of one Asadali in one case, in favour of Mahomed Wahib and Abdus Salam in the other case. The premium that was advanced by Mahomed Wahib in consideration for the zurpeshgi lease was in part money to which the plaintiffs were entitled: accordingly when the leases were extinguished by the repayment of the zurpeshgi premium to the lessor, the plaintiffs were entitled to a certain portion of the zurpeshgi premium. In this case the second party defendants, *i.e.*, the lessees, repaid to Mahomed Wahib the [529] lessor the whole of the zurpeshgi premium, and he did not pay over to the plaintiffs that proportion, which belonged to them.

It is conceded that, if the plaintiffs' suit to recover their portion of the premium is a suit for money had and received by the defendant for the plaintiff's use, it is barred by section 62 of the Limitation Act, but it is contended by the respondent that the plaintiff's claim does not fall within that description of suit and that Article 120 of the Limitation Act applies.

The learned District Judge, in coming to the conclusion that Article 120 applies, seems to have felt himself pressed by the case of *Nund Lall Bose* v. *Meer Aboo Mahomed* (1). In that case compensation money in respect of certain lands taken by Government forming a portion of certain mouzahs in possession of the defendant had been lodged in the Collectorate. The plaintiff was entitled to the mouzahs and sued for possession, which he recovered. Meantime the defendant drew out from the Collectorate the compensation money and appropriated it.

The learned Judges held that a suit to recover it was not a suit for money had and received for the plaintiff's use "because it could not be said that the money which was taken out by the defendants from the Collector's hands was so taken out for the plaintiff's use." Accordingly the learned District Judge holds that Article 62 does not apply and he says " the money was not received by the defendant for the plaintiff's use but for his own benefit, though the plaintiffs might have a right to follow it up and have an equitable claim on the defendants for it."

I am unable to agree in the view of the law taken by the learned District Judge, or in the correctness of the decision in Nund Lall Bose's case on which that view is founded. Mr. Justice Blackstone in his Commentaries, when discussing this species of action says, it lies "when one has had and received money belonging to another without any valuable consideration given on the receiver's part; for the law construes *this to be money had and received for the use of the owner only*; and implies that the persons so

(1) (1879) I. L. R. 5 Cal. 597.

receiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and [530] undertaking ; and he will be made to repair the owner in damages, quivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy applicable to almost every case where the defendant has received money, which *exaequo et bono* he ought to refund. It lies for money, paid by mistake or on a considera-tion, which happens to fail, or through imposition, extortion, or oppression or where any undue advantage is taken of the plaintiff's situation." (1) These words very aptly describe the present case : the defendant has received monies belonging to the plaintiff which *exaequo et bono* he ought to refund ; the plaintiff's cause of action therefore is for money had and received to the plaintiff's use, and the money is none the less received to the use of the plaintiff, because the defendant unjustly detains it for his own benefit.

It is perhaps hardly necessary to distinguish the case of *Gurudas Pyne* v. *Ram Narain Saha* (2) referred to by the learned District Judge, but it may be observed that in that case the money received by the defen-dant did not belong to the plaintiff, but to a totally different person.

The case of *Thomas* v. *Thomas* (3) was cited for the respondent in the course of the argument. That case lays down that one tenant in common of real property cannot maintain an action for money had and received against his co-tenant. But the ground of that decision was that the plain-tiff was bound to pursue his statutory remedy for account under 4 Anne, cl. 16, s. 27, so it does not affect the present case.

I am of opinion, therefore, that the plaintiffs' claim against the defen-dant for their portion of the zurpeshgi premium received by the defendant must be enforced by an action for money had and received for the plaintiff's use. That being so, the action is barred by Art. 62, Sch. II of the Limi-tation Act. The appeal must be allowed, and the suit dismissed with costs, both here and in the Courts below.

MOOKERJEE J. I agree with my learned brother that this appeal must be allowed. The plaintiffs-respondents instituted [531] the suit, which had led to this appeal, against the appellant and others for the re-covery of a share of a cartain sum of money alleged to have been received by the appellant in satisfaction of two mortgages in which the plaintiffs claimed to be jointly interested with him and also for damages. It appears that on the 4th and 17th December 1890 the defendants second party executed in favour of the defendants first party two zurpeshgi deeds and borrowed two sums of Rs. 3,000 and Rs. 1,300 respectively. The deeds stood in the name of the defendants first party, but the plaintiffs allege, and their allegation has been found to be true by both the Courts below, that they had a share in the sums which were advanced. The deeds provided that no interest was to run on the principal money, that the mortgagees were to remain in possession for a period of ten years from 1298 to 1304 F. S. that the mortgagors would be entitled to redeem upon repayment of the loan in Jait 1307, and they might also redeem at any time during the term, but that in such event, the mortgagee would be entitled to continue in possession till the end of the term upon payment of an annual rent specified in the deeds.

(1) Blackstone's Commentaries, Vol. III, p. 162.

(2) (1884) I. L. R. 10 Cal. 860.

(3) (1850) 5 Exch. 28.

1905
FEB. 3, 28.

APPELLATE CIVIL.

32 C. 527=1 C. L. J. 167.

On the 25th June 1896, the defendant first party received from the defendant second party the whole of the sums due under the zurpeshgi deeds and placed them in possession ; at the same time, the mortgagors, defendants second party, transferred the properties to the defendants third party. The plaintiffs alleged that they are entitled not only to a share of the zurpeshgi money received by the defendant first party, but also to damages, which they have suffered. by reason of the action of the first party. defendant in allowing redemption and restoring possession to the mortgagors four years before the expiry of the term. The defendants pleaded payment, set up the Statute of Limitation as a bar to the claim and denied liability for damages. The Courts below have overruled the plea of limitation and made a decree in favour of the plaintiffs for a share of the zurpeshgi money and for damages. The first defendant alone has appealed to this Court, and on his behalf, the decision of the learned District Judge has been assailed on two grounds, namely *first*, that the suit is barred by limitation and *secondly*, that upon the facts **[532]** found, the plaintiffs are not entitled to a decree for damages. I am of opinion that each of these contentions is well founded and must prevail.

In support of his first contention, the learned vakil for the appellant relied upon Article 62 of the second schedule to the Limitation Act. The learned vakil for the respondents, on the other hand, argued that Article 120 covered the case. But as observed by a Full Bench of this Court in the case of *Sharoop Das Mondal* v. *Joggessur Roy Chowdhury* (1), the Court ought not to regard a case as coming under Article 120, unless clearly satisfied that it does not come under one of the many articles dealing with specific cases. I must therefore first consider whether Article 62, upon which the appellant relies, is applicable. Article 62 provides that a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use must be instituted within the period of three years from the date, when the money is received. The learned vakil for the appellants contends that as the money which the plaintiffs claim, was received by the defendant on the 25th June 1896 and as the present action was not commenced till the 16th June 1900, it is clearly barred. The learned vakil for the respondents argues on the other hand that Article 62 cannot apply in as much as the money in question cannot be said to have been received by the defendant-appellant for the plaintiffs' use, and in support of this position, he relies upon the case of *Nund Lall Bose* v. *Meer Aboo Mahomed* (2). In that case, a portion of a property comprised in a lease granted by a Hindu widow was taken up by Government and the compensation money deposited in the Collectorate was withdrawn by the lessee ; after the death of the widow the reversionary heirs of her husband sued the lessee for the recovery of this sum, upon the allegation that the lease had been granted without legal necessity and that the lessee had wrongfully received the money. The learned Judges of this Court held that the suit could not be brought within Article 60 of Act IX of 1871, which is identical with Article 62 of the present Limitation Act. The principle of this decision as also the observations of Stuart, C. J., **[533]** in *Ram Kishan* v. *Bhawani Das*, (3) support the construction, which the respondent seeks to place upon Article 62. But I am unable to hold that the view taken by the learned Judges who decided the case of *Nund Lall Bose* v. *Meer Aboo Mahomed* (2) is well founded, if they intended to rule that money is not received to the plaintiff's use in any case where, at the

(1) (1899) I. L. R. 26 Cal. 564.
(2) (1879) I. L. R. 5 Cal. 597.
(3) (1876) I. L. R. 1 All. 333, 338.

time of receipt, the defendant does not so intend to receive it. It seems to me to be clear, as pointed out by Markby, J., in *Raghumoni Audhikary* v. *Nilmoni Singh Deo*, (1) that the Article, when it speaks of a suit for money received by the defendant for the plaintiff's use, points to the well known English action in that form ; consequently the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff. As pointed out by Lord Mansfield, C. J., in *Moses* v. *Macfarlane*, (2) this form of action lies for money paid by mistake, or upon a consideration, which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or an undue advantage taken of the plaintiff's situation contrary to laws made for protection of persons under those circumstances, in other words, this form of action would be maintainable in cases in which the defendant at the time of receipt, in fact or by presumption or fiction of law receives the money to the use of the plaintiffs : see also Keener on Quasi Contracts, page 180. As illustrations of cases where under circumstances similar to those of the present case it has been held in England that an action lies in this form I may refer to *Litt* v. *Martindale*, (3) and *Andrews* v. *Hawley*. (4) In the first of these cases, it was held by Jarvis, C.J. that where the defendant has wrongfully obtained the plaintiff's money from a third party as by a false pretence, it may be recovered in an action for money had and received. In the second case, it was held by Pollock, C. B. that where defendant wrongfully obtained from the plaintiffs' debtors the payment of their debts under a fraudulent misrepresentation that he had an authority to collect **[534]** them, the plaintiff was entitled to recover the amount under this count. The same view is amply supported by other cases : see *Neate* v. *Harding*, (5) and *Holt* v. *Ely* (6). It is clear therefore that under the English law, a sum received by the defendant is treated as having been received for the plaintiff's use, even though it might have been taken wrongfully, and I am of opinion that the same principle ought to be applied in construing Article 62. This view is in accordance with a series of cases decided by the Courts in this country, to which I shall now refer.

In *Kundun Lal* v. *Bansi Dhar* (7), the learned Judges of the Allahabad High Court held that, where the plaintiff claimed as one of the two heirs of a deceased person, a moiety of monies which at the time of his death were deposited with a banker and which the defendant, the other heir, had withdrawn, the suit must be treated as a suit for money received by the defendant for the plaintiff's use and was accordingly governed by Article 62. In a later case in the same Court, *Thakur Prasad* v. *Partab* (8) the learned Judges held that, where the plaintiff sued for his share of money realised by the defendant under a decree obtained by him in his name alone, although the bond on which the decree was obtained belonged to the plaintiff and defendant jointly, the suit must be treated as one for money had and received and consequently fell within the purview of Article 62.

This decision was accepted as good law by this Court in the case of *Banoo Tewary* v. *Doona Tewary* (9), and is substantially in accordance with

(1) (1877) I. L. R. 2 Cal. 393.
(2) (1760) 2 Burr. 1005.
(3) (1856) 18 C. B 314.
(4) (1857) 26 L. J. Exch. 323.
(5) (1851) 6 Exch. 349.
(6) (1853) 1 E & B. 795.
(7) (1880) I. L. R. 3 All 170.
(8) (1884) I. L. R. 6 All. 442
(9) (1816) I. L. R. 24 Cal. 309.

1905 FEB. 3, 28.

APPELLATE CIVIL.

32 C. 527=1 C. L. J. 167.

the decision of the Madras High Court in *Arunachala* v. *Ramasamya* (1) and of the Allahabad High Court in *Sundar Lal* v. *Fakir Chand* (2). In this latter case it was held that where a benamidar has realised upon a bond standing in his own name, money to which other parties were beneficially entitled, a suit against the benamidar to recover money so received is governed by Article 62. The same view was taken by the Bombay High Court in *Harmukhgauri* v. *Harisakh Prasad* (3) in which the learned Judges held that, where the plaintiff sued for his share of **[535]** an allowance attached to an hereditary office, against another sharer, who had improperly received the whole, the suit falls within the description of a suit for money received by the defendant for the plaintiff's use. The same principle appears to have been applied in *Desai Maneklal Anantlal* v. *Desai Shivlal Bhogilal* (4) (as to which case it may be observed that the decision of the Judicial Committee in *Ahmad Hossein Khan* v. *Nihaluddin Khan* (5), relied upon by the learned Judges has apparently no bearing) ; *Dulabh Vahugi* v. *Bansidhar Rai* (6) and *Raoji* v. *Bala* (7). The same doctrine has been accepted in a recent case before the Madras High Court, *Tellis* v. *Saldanha* (8) where a suit by one co-sharer against another for a moiety of the whole rent received by the latter was held to fall within Article 62. It may be observed in passing, however, that under the English law (see 4 Anne, ch. 16, s. 27), one tenant in common cannot recover in a count for money had and received against another, who has received more than his share of the profits. See *Thomas* v. *Thomas* (9).

The rule deducible from these cases, appears to me to be in accordance with the principle, which underlies the decision of the Judicial Committee in *Syad Lutf Ali Khan* v. *Afzlunissa Begum* (10), where the plaintiff, one of the heirs of a deceased banker, sued the other heirs for recovery of a sum of money, which had been paid to the latter by a debtor of the deceased in satisfaction of a bond in which the plaintiffs and the defendants were jointly interested and their Lordships held that any sums, which the defendants had received in excess of their proper share, must be treated as money had and received by them to the plaintiff's use and that the cause of action for the recovery of such excess arose from the time when the defendants received more than their proper share. The case of *Gurudas Pyne* v. *Ram Narain Sahu* (11) is clearly distinguishable, because in that case the plaintiff had a mere equitable claim to follow money in the hands of the defendant which, when received, was not received for the plaintiff's use, **[536]** and under these circumstances their Lordships of the Judicial Committee held that Article 62 did not apply. Similarly, the case of *Hanuman Kamat* v. *Hanuman Mandur* (12) is distinguishable, inasmuch as in that case the receipt by the defendant became one to the use of the plaintiff by virtue of an event which happened subsequent to the time of the receipt.

I must hold accordingly that the present suit instituted by the plaintiffs for recovery of money, which has been received by the defendant as their co-mortgagee is a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and is consequently barred under Article 62, Schedule II of the Limitation Act.

(1) (1883) I. L. R. 6 Mad. 402.
(2) (1902) I. L. R. 25 All. 62.
(3) (1883) I. L. R. 7 Bom. 191.
(4) (1884) I. L. R. 8 Bom. 426.
(5) (1883) I. L. R. 9 Cal. 945.
(6) (1884) I. L. R. 9 Bom. 111.
(7) (1890) I. L. R. 15 Bom. 135.
(8) (1886) I. L. R. 18 Mad. 69.
(9) (1850) 5 Exch. 28.
(10) (1871) 9 B. L. R. 348.
(11) (1884) I. L. R. 10 Cal. 860.
(12) (1891) I. L. R. 19 Cal. 123.

1905
FEB. 3, 28.

APPELLATE CIVIL.

32 C. 527=1 C. L. J. 167.

As regards the second contention advanced on behalf of the appellant, namely, that the plaintiffs are not entitled to a decree for damages, I am of opinion that it is well founded and must prevail. The plaintiffs base their claim for damages upon the ground that under the zurpeshgi leases, if the mortgagors redeemed the property within the term, the mortgagee would be entitled to continue in possession and enjoy the profits subject to the payment of a specified rent and that they have been deprived of their share in such profits by reason of the appellant restoring possession to the mortgagors as soon as the redemption was effected. This contention appears to me to be clearly untenable on two grounds ; in the first place as the plaintiffs were not parties to the zurpeshgi deeds, they were not entitled as against the mortgagors to claim possession after redemption ; in the second place as between themselves and their co-mortgagee, they have neither alleged nor proved any agreement under which they could compel the appellant to avail himself of this provision in the deeds and to continue in possession as lessees after the mortgagors had redeemed the properties comprised in the security. I must hold therefore that the plaintiffs have no just ground of complaint against the appellant by reason of his surrendering possession to the mortgagors at the time the redemption was effected.

In this view of the matter, I am of opinion that the decrees made by the Court below ought to be discharged and the suit dismissed with costs in all the Courts.

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32 C. 537.

[537] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

RAHIM BUX *v.* ABDUL KADER.*
[13th December, 1904.]

Limitation—Claim to attached property—Investigation of claim—Limitation Act (XV of 1877), Sch. II Art. 11—Civil Procedure Code (Act XIV of 1882) ss. 278, 281 and 283—Waqf property.

Where a Court rejects a claim to attached property by reason of the claimant having failed to adduce any evidence in support of his claim, notwithstanding that he was allowed an opportunity to do so, the order rejecting the claim is one properly made under section 281 of the Civil Procedure Code, and is conclusive as between the parties, if no suit is brought within one year to establish the claim, as contemplated by Art. 11, Sch. II to the Limitation Act (XV of 1877).

Kallar Singh v. *Toril Mahton* (1) distinguished.

Zardhari Lal v. *Ambika Persad* (2) referred to.

[**Ref.** 11 O. C. 180 ; **Doubted:** 6 C. L. J. 362 ; 8 A. L. J. 626=10 I. C. 401 ; **Dist.** 34= Cal. 491= 11 C. W. N. 487; 64 I. C. 713 ; **Fol.** 17 M. L. T. 223=1915 M. W. N. 188=28 I. C. 244.]

SECOND APPEAL by defendants Rahim Bux and others.

This appeal arose out of an action brought by the plaintiff on the 22nd September 1902 to recover possession of certain waqf properties, and

* Appeal from Order, No. 185 of 1905, against the order of Upendra Chandra Ghosh, Subordinate Judge of Dacca, dated March 16, 1904, reversing the order of Mahim Chandra Sarkar, Munsif of Dacca, dated March 9, 1903.

(1) (1895) 1 C. W. N. 24.
(2) (1881) I. L. R. 16 Cal. 521 ; L. R. 15 I. A. 123.