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if the delay is caused not by any act of their own, but by some act of the Court itself—such as the fact of the Court being closed—they are entitled to do the act on the first opening day. This, then, is the general principle; and it has been followed in this Court. In the case of *Hossein Ally v. Donzelle* (1) a tenant was sued under Act VIII of 1869, and a decree obtained against him in the terms of section 52 of that Act, which provides that if the amount of arrears, interest and costs be paid within 15 days from the date of the decree, execution shall be stayed. Owing to the Court being closed it was impossible to carry out the express terms of the Act; but the amount was paid on the first opening day, and this Court, in conformity with the rules laid down in *Mayer v. Harding* (2), held that the payment was good. That principle has now been expressly incorporated in the new Act, and one of the questions we have to decide is, where there is an express mention of such a right in section 66, and no express mention in section 174, there was any intention of the Legislature to change the law as it was understood at the passing of the Act. We think not. Section 66 made no change. The law is the same now as it was before. Therefore, we think there is no intention on the part of the framers of the law to make any change in the general principle. The applicant will get the benefit of that provision of the law.

The rule is, therefore, made absolute with costs.

c. s.

Rule made absolute.

CIVIL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

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 January 2.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)
 v. FAZAL ALI AND ANOTHER (PLAINTIFFS).*

Limitation Act (XV of 1877), s. 10, and sch. II, arts. 62 and 145—Act XI of 1859, s. 31—Suit to recover surplus sale-proceeds of a sale for arrears of Government revenue.

WHERE *A* instituted a suit in November 1889 to recover from the Secretary of State for India in Council the surplus sale-proceeds of three

* Civil reference No. 16A of 1890, made by R. H. Anderson, Esq., Judge of Chittagong, dated the 15th August 1890.

(1) I. L. R., 5 Calc., 906.

(2) L. R., 2 Q. B., 410.

taluks sold for arrears of Government revenue on the 3rd of October 1877 and which were in the hands of the Collector, *held*, that the suit was governed by art. 62, sch. II, of the Limitation Act, and was therefore barred.

Held also, that section 31 of Act XI of 1859 did not vest the surplus sale-proceeds in the Collector as trustee, that a deposit did not necessarily create a trust, and that therefore section 10 did not apply.

Held further, that the Collector was not a depository of the money within the meaning of art. 145 of sch. II.

THIS was a reference by the Officiating District Judge of Chittagong under the provisions of section 617 of the Code of Civil Procedure. The facts of the case which gave rise to the reference were as follows:—

The plaintiffs instituted a suit in the Small Cause Court to recover from the Secretary of State for India the surplus sale-proceeds of three noabad taluks which had been sold for arrears of Government revenue on the 3rd October 1877. The suit was instituted in November 1889, that is, more than 12 years after the money had come into the hands of the Collector. The Secretary of State contended that the suit was barred by article 62, schedule II of the Limitation Act. The plaintiffs maintained that article 145 governed the case, and that they were in time. The Munsiff was of opinion that “the Collector is the depository of the sale-proceeds” and that article 145 applied, and decreed the suit. Against this decree an appeal was preferred to the District Judge by the Secretary of State, who contended, as he had done before the Munsiff, that the suit was barred by article 62. As the question was one of difficulty as well as of great importance to the Secretary of State and the public alike, the District Judge, entertaining reasonable doubts regarding it, and as no further appeal would lie from his decision, referred the case to the High Court for its decision on the question “whether the suit was barred by limitation or not” with the following opinion:—

“First, does article 145 apply? Is the Collector a ‘depository’ within the meaning of that article? Is it true that section 31 of Act XI of 1859 enacts that ‘the Collector shall apply the purchase-money, &c., holding the residue, if any, *in deposit* on account of the late recorded proprietor, &c.?’” But the rulings on article

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145 are conflicting. In *Radha Nath Bose v. Bama Churn Mookerjee* (1) it was held that the corresponding article of the earlier Limitation Act applied 'to a deposit which is recoverable in specie.' In *Upendro Lal Mukhopadhyaya v. The Collector of Rajshahye* (2) a different view appears to have been taken. In *Issur Chunder Bhaduri v. Jibun Kumari Bibi* (3) it is decided to be 'clear from the contexts that the deposit meant is a deposit of goods to be returned in specie.' I submit the last ruling is correct. Therefore the Collector is not a depository, and article 145 does not apply.

"But it has further to be considered whether or not section 10 of the Limitation Act saves the suit from being barred. In the Tagore Law Lectures for 1881, page 16, a trust is defined as 'an obligation imposed upon some person or persons having the ownership of property, whether moveable or immoveable, to deal with such property for the benefit of some other person or persons or for charitable purposes.' Then in page 17 it is said that "it is not necessary that the confidence should be expressly reposed by the author of the trust in the trustee, for it may be raised by implication of law, &c.' In my opinion the surplus sale-proceeds of an estate sold for arrears of revenue are by the operation of section 31 of Act XI of 1859 vested in the Collector in trust for the specific purpose of paying them to the late recorded proprietor, and consequently section 10 of the Limitation Act governs the present suit."

The *Advocate-General* (Sir Charles Paul), Baboo Hem Chunder Banerji, and Baboo Ram Churn Mitter for the Secretary of State.

Moulvie *Serajul Islam* for the plaintiffs.

Moulvie *Serajul Islam* took the preliminary objection that the Judge had no power to make the reference under section 617 of the Code, inasmuch as the suit involved the determination of title to interest in immoveable property, and was excepted from the jurisdiction of the Small Cause Court either by article 11 or 13 of schedule II of Act IX of 1887, and an appeal would lie to the High Court from the decision of the Judge. This objection was overruled by the Court.

(1) 25 W. R., 415.

(2) I. L. R., 12 Calc., 113.

(3) I. L. R., 16 Calc., 25.

The *Advocate-General*.—This suit is barred by limitation, as it is governed by article 62 of schedule II of the Limitation Act. It is a suit for money had and received, Bullen and Leake, 4th Ed., Part I, p. 280, *Harrison v. Paynter* (1); and three years' limitation bars it. Even if the limitation be six years, the suit is still barred. It is contended that it is governed by article 145, and that the Collector is a depository of the monies in his hands; that is not so. In the case of *Radha Nath Bose v. Bama Churn Mookerjee* (2) it was held that article 145 applied to deposits recoverable in specie. This decision of Jackson, J., has not been departed from. The cases of *Issur Chunder Bhaduri v. Jibun Kumari Bibi* (3) and *Upendro Lal Mukhopadhyaya v. The Collector of Rajshahye* (4) are distinguishable. The case of *Gobind Chunder Sein v. Collector of Dacca* (5) does not apply to this case, as in that case the money was deposited by the purchasers. Article 60 does not govern the present case, as it refers to a different matter. This case does not come under section 10 of the Limitation Act, as that section only applies when there is a trust for a specific purpose, that is to say, an express trust; the section excludes implied trusts or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations; *Kherodamoney Dasi v. Doorgamoney Dasi* (6), *Greender Chunder Ghose v. Mackintosh* (7). The trust must be one for a specific purpose, *i.e.*, an express trust, not upon any reference of law imposing a trust upon the conscience; *Cunningham v. Foot* (8), p. 984, and *Sands v. Thompson* (9). If "deposit" means deposit in the sense of "to the account of" *A. B.*, the Collector is not a trustee; *Pott. v. Clegg* (10) and *Foley v. Hill* (11). This suit is not against any particular Collector, but against the Secretary of State. A Collector is not a corporation, and his liabilities are not handed on to his successors in office; *Harrison v. Paynter* (1). It has been held that the Secretary of State is not a trustee; *Kinlock v. Secretary of State* (12). The words "on demand" in

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(1) 6 M. & W., 387.

(7) I. L. R., 4 Calc., 897.

(2) 25 W. R., 415.

(8) L. R., 3 Ap. Ca., 974.

(3) I. L. R., 16 Calc., 25.

(9) L. R., 22 Ch. D., 614.

(4) I. L. R., 12 Calc., 113.

(10) 2 Cl. H. L., C., 28.

(5) 11 W. R., 491.

(11) 6 M. & W., 387.

(6) I. L. R., 4 Calc., 455.

(12) L. R., 15 Ch. D., 1; on appeal
L. R., 7 Ap. Ca., 619.

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section 31 of Act XI of 1859 mean "at once" or "immediately." The terms of this section are very loosely drawn, and certainly do not vest the funds in the Secretary of State as trustee. Therefore section 10 cannot possibly apply. This case is the same as a case of a first mortgagee holding surplus sale-proceeds belonging to subsequent mortgagees; he is not a trustee of the monies in his hands; *Banner v. Berridge* (1); nor is the Collector in this case. This is simply a case coming under the common law action of money had and received, and the claim is barred after three years; *Harrison v. Paynter* (2).

Moulvie *Serajul Islam* for the respondents.—Article 62 does not apply. See the cases of *Gurudas Pyne v. Ram Narain Sahu* (3), which deals with the corresponding article of the Limitation Act of 1877; *Upendro Lal Mukhopadhyaya v. The Collector of Rajshahye* (4), and *Muhammad Habibullah Khan v. Safdar Husain Khan* (5). The case is governed by section 10, as the monies are vested in the Collector as trustee. Section 31 of Act XI of 1859 makes the Collector a trustee for a specific purpose. It fixes on the Collector a statutory obligation to hold the money on account of the recorded proprietor and to apply it to a specific purpose. He is therefore a trustee for the recorded proprietor. *Kimlock v. Secretary of State* was decided on the warrant, and does not touch this case. A trust can be inferred from the circumstances under which the deposit was made; *Doorga Persad Roy Chowdry v. Tarra Persad Roy Chowdry* (6). A Collector must keep the money in deposit; he may not use it, and thus differs from a banker. The case of *Radha Nath Bose v. Bama Churn Mookerjee* (7) was not one of deposit, but of simple over-payment and is distinguishable. *Gobind Chunder Sein v. Collector of Dacca* (8) has nothing to do with this case. The English authorities cited are not applicable; *Banner v. Berridge* (1) is in my favour. If this case comes within any article, it comes within article 120. My right to sue accrues when demand is made and

(1) L. R., 18 Ch. D., 254.

(4) I. L. R., 12 Calc., 113.

(2) 6 M. & W., 387.

(5) I. L. R., 7 All., 25.

(3) I. L. R., 10 Calc., 860;

(6) 4 Moore's I. A., 452.

L. R., 11 I. A. 59.

(7) 25 W. R., 415.

(8) 11 W. R., 491.

refused; *Ram Sukh Bhunjo v. Brohmoyi Dasi* (1). "On demand" does not mean "immediately." We are therefore within time, and this suit is not barred.

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The *Advocate-General* in reply.—It is said that there is a statutory obligation. There is also another statutory obligation to sue when the cause of action accrues. You cannot have one without the other. This is not a case of agency. Therefore it comes under article 62 for money had and received, and is barred.

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was as follows:—

In this matter it was first objected that the Judge had no power to make a reference under section 617 of the Code. This question depends upon whether the suit might have been brought in the Small Cause Court. It is undoubtedly a suit for money; and as the pleader who raised the objection has been unable to suggest under which article of the schedule to the Small Cause Act a suit of this kind is excluded from the jurisdiction of the Small Cause Court, we cannot allow the objection, and must proceed to determine the reference.

The plaintiff in this suit seeks to recover from the Secretary of State the surplus sale-proceeds of three taluks which were sold for arrears of Government revenue on the 3rd October 1877.

This suit was instituted in November 1889, *i.e.*, more than 12 years after the money came into the Collector's hands. The question which we have to determine is whether the suit is barred by limitation.

The residue of the purchase-money of the taluk has remained in the hands of the Collector in accordance with the provisions of section 31 of Act XI of 1859, which provides how the purchase-money of estates sold for the arrears of Government revenue is to be applied. That section runs as follows:—"The Collector shall apply the purchase-money, first, to the liquidation of all arrears due upon the latest day of payment from the estate or share of an estate sold; and secondly, to the liquidation of all outstanding demands debited to the estate or share of an estate in the public accounts of the district; holding the residue, if any, in deposit on account of the

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late recorded proprietor or proprietors of the estate or share of an estate sold or their heirs or representatives to be paid to his or their receipt on demand in the manner following; to wit, in shares proportioned to their recorded interest in the estate or share of an estate sold, if such distinction of shares were recorded or, if not, then as an aggregate sum to the whole body of proprietors upon their joint receipt. And if before payment to the late proprietor or proprietors of any surplus that may remain of the purchase-money the same be claimed by any creditor in satisfaction of a debt, such surplus shall not be payable to such claimant, nor shall it be withheld from the proprietor except under precept of a Civil Court." The words of this section which are important to the present case are:—"Holding the residue, if any, in deposit on account of the late recorded proprietor or proprietors of the estate or share of an estate sold or their heirs or representatives to be paid to his or their receipt on demand in manner following." It is upon this provision that the determination of the case mainly depends. The Judge who has referred this case considers that the Collector is a trustee of the money for the parties interested, and that under the terms of section 10 of the Limitation Act the suit is not barred.

It has been contended that the monies were deposited with the Collector in the sense intended by article 145 of the Limitation Act. The Crown contends before us that the right article applicable is article 62.

It has further been suggested that the limitation applicable is to be found in article 120, which provides for cases to which the other articles do not apply.

We think it clear that section 10 of the Limitation Act has no application to this case. We do not think that the money was in any sense vested in the Collector. He has no control over it personally. He is merely an officer of the Government who is required to deal with or retain the monies in his charge in accordance with the provisions of the law and the lawful directions of his superiors in office. The money is not vested in him in any sense, and unless it be so, we can give no effect to the section in this case. Apart from this objection, we think that for many

reasons it would be impossible to hold that section 10 of the Limitation Act applies to this case. A deposit does not necessarily create a trust.

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The next question is whether the Collector is a depository of the money within the meaning of art. 145; that article is as follows:—

“Against a depository or pawnee to recover moveable property deposited or pawned, 30 years. The date of deposit or pawn.” The article (147) of Act IX of 1871 which corresponds with this article was held in the case of *Radha Nath Bose v. Bama Churn Mookerjee* (1) to apply only to a case of a deposit which is recoverable in specie; and we see no reason to differ from that view. The same view was taken by a Bench of this Court in *Issur Chunder Bhaduri v. Jibun Kumari Bibi* (2); and we think that the learned Judge who has referred this case is wrong in considering the case of *Upendro Lal Mukhopadhyaya v. The Collector of Rajshahye* (3) as an authority for the contrary proposition.

Article 60 has clearly no application, as there is no agreement in this case.

Article 62 does, we think, apply. There is authority [*Raghunoni Audhicary v. Nilmony Singh Deo* (4)] for the proposition that this article was intended to cover the cases to which the English form of common law action for money had and received applied; but it is sufficient in this case to accept the more contracted view of the article taken by a Bench of this Court in the case of *Nund Lall Bose v. Aboo Mohamed* (5). The surplus proceeds come into the hands of the Collector for the use of the proprietors of the estate sold and are retained by him for such use. This is, we think, within the words of the article.

We answer this reference by holding that the plaintiff's claim is barred by limitation. We make no order as to costs.

C. S.

(1) 25 W. R., 415.

(2) I. L. R., 16 Calc., 25.

(3) I. L. R., 12 Calc., 113.

(4) I. L. R., 2 Calc., 393.

(5) I. L. R., 5 Calc., 597.