Privy Council Appeal No. 67 of 1939

O. RM. O. M. SP. (Firm) - - - - - - - - *Appellant*

v.

P.L.N.K.M. Nagappa Chettiar and another - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH SEPTEMBER, 1940.

Present at the Hearing:
VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
SIR GEORGE RANKIN
MR. M. R. JAYAKAR
[*Delivered by* SIR GEORGE RANKIN]

This appeal arises out of a suit filed on the Original Side of the High Court at Madras on 29th April, 1933, and is brought from the decree of an Appellate Bench dated 9th May, 1938, reversing a decision of Lakshmana Rao J. dated 27th March, 1936, whereby the suit had been dismissed. All the parties to the suit are Nattukottai Chettiars. The appellant is a firm which is known by the letters O. RM. O. M. SP., and which carries on business at Madras as bankers and moneylenders. It was the first defendant to the suit and it will be conveniently referred to as the appellant bank. The plaintiff Nagappa and his younger brother Lakshmanan were the sons of one Minakshisundaram, whose brother Subrahmanyam, though not an original defendant, was added as the second defendant to the suit by an order dated 24th January, 1934. They were members of a joint Hindu family and had a family business in "piece-goods" (cloth) at Madras and other places—the plaintiff's father's share being 10 annas and Subrahmanyam's 6 annas. After the death of the plaintiff's father in 1914 a partition of the assets of business was effected with the aid of certain business friends and the terms of this arrangement were embodied in a *yadast* or note dated 17th January, 1916, which the plaintiff signed on behalf of himself and his brother, who was then a minor. The main term was that the business should be taken over in its entirety by Subrahmanyam. It appears that the plaintiff's father had been interested in two religious charities, one for the supply of water to worshippers at a certain place in the hills, and one for the supply of cloth for the purposes of a temple. Before the partition a sum of Rs.2,000 had been credited in the books of the business to the temple and it was arranged at the time of the partition that the two branches of the family should provide in all a capital of Rs.10,000 for each of these two charities. The shares in which they were to provide the money were five-eighths and three-eighths—i.e., 10 annas and 6 annas, according to their shares in the business. As Rs.2,000 had already been pro-

vided for the temple, the plaintiff's branch had to find Rs.5,000 for that and Rs.6,250 for the water charity. The *yadast* by clause 13 thereof provided that both branches of the family should manage and conduct the charities. Acting upon this arrangement the plaintiff drew and handed to his uncle, Subrahmanyam, two hundis, each dated 1st December, 1916, for the money which his branch had agreed to find—that is for Rs.5,000 and Rs.6,250 respectively with interest at the Madras *nadappu* rate from 17th January, 1916, the date of the *yadast*. The plaintiff had a banking account with the appellant firm and the hundis were drawn on that firm. Though made payable to bearer they were headed with the name of the charity concerned under the word "credit"—that is, showing the charity as the party or account in whose favour they were intended. It is not necessary that the terms of the hundis should be here set out. They were taken by Subrahmanyam to the appellant bank and on 11th September, 1917, the bank endorsed each with a statement that the amount with interest to date had been received. It is admitted that the bank credited these sums in each case to an account in the name of the charity concerned, though Subrahmanyam had had an account with the appellant bank since 6th January, 1917. The monies remained at the credit of the charities with the appellant firm until the 10th February, 1920, by which time they amounted in all to Rs.15,732-15-9. On that date they were transferred to the credit of Subrahmanyam's account and the accounts in the name of the charities were closed. The transaction is clearly and simply described in the Case of the appellant bank as follows:—A book entry of Rs.15,700 was made in favour of the appellant bank thereby cancelling an overdraft of Subrahmanyam in the books of the appellant bank and the balance of Rs.32-15-9 was paid to Subrahmanyam in cash. At the same time Subrahmanyam in his own books in his moneylending business opened new accounts in the names of the two charities—that is Rs.8,740-8-9 in favour of one and Rs.6,992-7-0 in favour of the other charity.

To challenge this transaction is the purpose of the present suit. The plaintiff seeks to make the appellant bank liable to refund to the charities the money received by it in reduction of Subrahmanyam's overdraft on the footing that this application of the money was a breach of trust on the part of Subrahmanyam of which the appellant bank had notice and by which the appellant bank has profited.

Some evidence was given by a witness on behalf of the appellant bank to the effect that when Subrahmanyam first handed over the hundis and opened the two accounts in the name of the charities he had intimated "I shall take it whenever I want". Their Lordships regard this evidence as unreliable. The witness also deposed that at the time of the transfer of the monies on 10th February, 1920, cash was actually borrowed from Marwaris, was paid to one Chidambaram on behalf of Subrahmanyam, repaid to the bank by him and repaid to the Marwaris by the bank on the same day. Their Lordships regard these statements as untrue and they are here mentioned only to be put aside.

Admittedly, the substantial effect of the transaction of 10th February, 1920, was to empty the charity accounts and

to cancel Subrahmanyam's overdraft. Though a Hindu religious endowment is not technically for all purposes in the same position as an English trust and its property is not vested in its manager as trust property is vested in a trustee, such differences are of small importance for the purposes of the present case. *Gray* v. *Johnston* (1868) L.R. 3 H.L. 1 and *Coleman* v. *Bucks & Oxon Union Bank*, L.R. [1897] 2 Ch. 243 were cited at the bar, but their Lordships do not consider that an examination of the case law is required to show that the appellant bank in appropriating the charity moneys to itself was taking a transfer of property which in equity it would be bound to restore to the charities unless it could show that Subrahmanyam had authority to use these funds to pay off his overdraft. In that event no doubt the transfer which seemed on its face to be highly improper would turn out to be justified. Their Lordships will assume that if the transfer was within Subrahmanyam's authority, the appellant bank would not be liable to restore the money by reason merely that Subrahmanyam in exercising his authority had failed to pay due regard to the interests of the charities. But the appellant bank on the facts of this case is without defence upon the merits unless it first establishes that the transfer was within the authority of Subrahmanyam and not a breach of trust by him. It avails nothing to dispute whether the transfer was due more to Subrahmanyam's desire to put his account in credit or to the bank's desire to be repaid.

It is said that Subrahmanyam had received from the plaintiff authority to do what he did. Upon this question and upon the question of limitation—in their Lordships' opinion the only substantial questions in this case—it is necessary to notice some events which took place after the transfer had been made. Subrahmanyam's account with the appellant bank is in evidence and while it shows a credit balance of Rs.4,500 in May, 1920, it continues thereafter to be in debit the balances as struck rising in 1920 to Rs.60,000, in April, 1921, to Rs.1,12,680 and continuing throughout the rest of that year in the neighbourhood of half a lac. In 1924 the charities were no longer being kept up and before the end of 1925 an insolvency petition was presented in the High Court which resulted in Subrahmanyam being adjudicated insolvent on 4th January, 1926. It appears that he had engaged in speculative purchases of immoveable property involving considerable sums.

In 1924 the plaintiff came to know that the funds were no longer in deposit with the appellant bank and on 1st March of that year a letter written on the plaintiff's behalf by an advocate claimed from Subrahmanyam the amount of the hundis with interest as having been deposited by the plaintiff and his younger brother in Subrahmanyam's firm for the purposes of the charities at the *nadappu* rate of interest. This allegation was repeated incidentally in a plaint dated 25th April, 1924 (C.S. No. 328 of 1924) filed in the Madras High Court with reference to Subrahmanyam's collections from the branches of the joint family business which had been partitioned by the *yadast* of 17th January, 1916. Again in 1929 the plaintiff took steps in the insolvency to have it declared that the monies now in question did not pass to the Official Assignee as part of the estate of Subrah-

manyam but were trust monies. He brought a motion to obtain a declaration to that effect on the footing that Subrahmanyam had withdrawn the monies from the appellant bank and it is clear enough that this proceeding was taken and maintained upon the basis that Subrahmanyam had been authorised to withdraw them. The motion failed on the ground (*inter alia*) that there were no assets left at the time of the insolvency which could be traced to the monies which had been withdrawn from the appellant bank. It is stated in the judgment of the learned Chief Justice in the present case that the plaintiff came to know in 1929 of the fact that the monies were not really withdrawn from the appellant bank in 1920 but were taken by the appellant bank in cancellation of Subrahmanyam's overdraft so that the funds had disappeared altogether.

The case made by the plaintiff in his pleading and by his own evidence in the present suit was different from his previous statements. It was to the effect that at the time the charitable funds were constituted in 1916 it was agreed that they should be invested with a third party and not with Subrahmanyam; and that Subrahmanyam should not vary the investment without the plaintiff's consent. The learned trial Judge in view of the letter of 1st March, 1924, which the plaintiff endeavoured to repudiate as a misinterpretation of his instructions to his advocate, disbelieved this part of the plaintiff's evidence and came to the following conclusion:—

> " Under the circumstances it cannot reasonably be doubted that (Subrahmanyam) was authorised to invest the trust funds in his own business in consideration of his paying *nadappu* interest and the amount in question was on the same day—i.e., 10th February, 1920, credited by him in the accounts of the *dharmams* in his books. The result of the transaction on either supposition would be to transfer the trust money to the business of (Subrahmanyam) and he was acting within his rights in doing so."

The finding of fact as to the authority given to Subrahmanyam, contrary though it was to the plaintiff's evidence, was not contested before the learned Chief Justice and Krishnaswami Ayyangar J. on appeal. The Chief Justice states:—

> " The trust funds were created and it is admitted that the second respondent (Subrahmanyam) being the uncle of the appellant (plaintiff) and much older was given the management of them. It is also admitted that the second respondent (Subrahmanyam) was given the right of investing the trust funds in his own business if he so decided."

But the Appellate Bench did not consider that Subrahmanyam had acted within his authority:—

> " There could be no investment of the trust monies in (Subrahmanyam's) business unless they were replaced. They were not replaced and therefore there was no investment. The first respondent (that is the appellant bank) was not entitled to do what he did without being satisfied that the entries in (Subrahmanyam's) books were going to be supported by cash. He took no steps to satisfy himself that this would be done. On the other hand he applied the trust monies for his own benefit knowing full well that (Subrahmanyam) was merely intending to constitute himself a debtor to the trusts."

" To invest the trust funds in his own business " is a phrase which stands in need of some interpretation and it

is possible that the trial Judge may have taken it too broadly and that the Appellate Bench may have taken it too narrowly. The burden of proving the nature and extent of the authority is on the appellant bank and the fact that the plaintiff's evidence was not believed does not necessarily imply that the statements previously made by him in the letter of 1st March, 1924, the suit of 1924 and the insolvency proceedings of 1929 can be accepted. Subrahmanyam was not called nor was his absence from the witness-box explained. The result is that there is no direct and reliable evidence as to what was said by the plaintiff or his uncle on the subject of investment. It is to be inferred that the authority relied upon is an authority given by the plaintiff at the time of handing over the hundis in 1916 or 1917—while he still bore the character of settlor and the endowment was not yet perfected. The trusts having arisen in connection with the family piece-goods business, it is not very difficult to suppose that Subrahmanyam who was to carry it on after the partition might be authorised to use the money in that business. It is a common practice among Chettiars to carry sums in their books to the credit of a charity without intending that the money should be set apart or taken out of the business. The present was a case in which the money was the money of the plaintiff and his brother and the business was to be their uncle's, but this may not have been regarded as calling for a stricter system. Any wider authority to deal with the monies, even if alleged to have been given to the uncle, must, however, be established by the strictest proof. To arrive at a correct interpretation of the arrangement made, and to ascertain whether it covered what was done by Subrahmanyam in February, 1920, it is important to know what businesses he was engaged in at the time of the arrangement and to ascertain the character of the account into which the money went. In addition to continuing the piece-goods business and collecting the assets of certain shops which are mentioned in the *yadast,* Subrahmanyam seems in 1917 to have done business of some sort at Penang. Whether his speculations in immoveable property had then begun it is not possible on the evidence to ascertain, though it appears in evidence that one large transaction of this character took place in May, 1920. An account with the appellant bank called the "go-down" account was opened by Subrahmanyam in January, 1917, and would appear to have had reference to the piece-goods business. At some date before March, 1918, he began a moneylending business in Coral Merchant Street and in that month an account was opened with the appellant bank called the account of the "street shop" in connection with this business. The "go-down" account was closed in April, 1919, by a transfer to the "street shop" account of Rs.4,401. From that date the latter account can only be described as Subrahmanyam's "private account" to use the words of the Chief Justice, or as the appellant bank's written statement calls it "his personal ledger in the defendant firm". It is this account which was overdrawn in February, 1920, and into which the charity money was paid, and it was in the books of the moneylending business or "street shop" that Subrahmanyam made credit entries in favour of the charities and debited the bank's account. What other books of account were kept by

him does not appear. It is not possible on the evidence to ascertain that the overdraft outstanding on 10th February, 1920, had been incurred on account of the piece-goods business or the moneylending business or any other business in particular: still less can it be said that any particular business got the benefit of the charity money. Unless it can be held that the plaintiff at the time of handing over the hundis authorised his uncle to borrow the money and use it as he chose—whether for buying property, lending money, dealing in piece-goods or any other business purpose, the appellant bank has not shown the authority of Subrahmanyam to make the transfer of the 10th February, 1920. The learned Chief Justice may have gone too far if his language was intended to exclude all possibility of investing money in a business by paying off a liability of the business. It would not be impossible to put a case in which a business in need of new stock or having occasion to acquire new premises paid for its requirements in the first instance by means of an overdraft. In such a case, a stranger finding money to discharge the overdraft might without difficulty be said to be investing money in the business. Their Lordships are not construing a document or even arriving at the terms of an oral bargain spoken to by reliable witnesses but are in the position of arriving at the facts of the case in the light of an admission made in the appellate Court; and they find it impossible to be satisfied that the discharge of an overdraft on this particular account comes within the scope or intention of any authority given by the plaintiff " to invest the trust funds in his own business ". The disappearance of the money into this account would not among ordinary business men be deemed an " investment " of the money and the appellant bank has not succeeded in showing that Subrahmanyam in February, 1920, acted within any authority given to him when the hundis were handed over.

The question of limitation has next to be considered. The claim against the appellant bank is not that a breach of trust was committed by it but that it took the trust property by a transaction with Subrahmanyam which was a breach of trust on his part and with notice that it was a breach of trust. Their Lordships are of opinion that article 36 of the Limitation Act does not apply to the case and that it comes under article 120 which prescribes a period of six years from the time " when the right to sue accrues ". The question is whether time began to run from 10th February, 1920, or from the date in 1929 when the plaintiff came to know that the money of the charities was set off against Subrahmanyam's debt to the appellant bank upon his overdraft. The suit having being brought in 1933 it is necessary for the plaintiff to be able to calculate the time from the later date. The language of article 120 makes no reference to the knowledge of the plaintiff and is in this respect in contrast with that of other articles, e.g., 90, 91, 92, 95, 96, 114. On the other hand it was recognised by the Board in *Musammat Bolo* v. *Musammat Koklan* (1930) 57 I.A. 325, that an infringement of the plaintiff's right or at least a clear and unequivocal threat to infringe it is necessary before time begins to run against the plaintiff under the article. The

Appellate Bench acted upon a principle which has been accepted as applicable to this article in a number of cases in several of the High Courts: *Venkateswara Ayyar* v. *Somasundaram Chettiar* (1918) 44 Indian Cases 551; *Peruri Viswanadham* v. *Pendela Narayana Dass* A.I.R. (1928) Madras 837; *Lal Singh* v. *Jai Chand* (1930) I.L.R. 12 Lahore 262; *Mathura Singh* v. *Rama Rudra Prasad* (1935) I.L.R. 14 Patna 824; *M. Basavayya* v. *Majeti Bapana,* A.I.R. (1930) Madras 173. In the last-mentioned case it was said that in cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Such articles as 90, 91, 92, 95 and 96 were mentioned by way of illustration of this principle, and it was considered that article 120 being an omnibus one the general expression employed in column 3 is necessitated by the variety of suits coming within its purview, in some only of which would fraud, misconduct or mistake be part of the cause of action. It was accordingly held that it would be in consonance with the scheme of the Act if the right to sue should be deemed to accrue under article 120 from the time of the plaintiff's knowledge of the fraud, misconduct or mistake where such a ground was the basis of the suit. Their Lordships can see some difficulties in this reasoning as a matter of interpretation of the language of the statute and had the matter been *res integra* they are not certain that this interpretation would have prevailed with them. But the decisions in India have established a rule of limitation under article 120 by which the plaintiff in the cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay. The decisions which have been referred to were given in cases where the plaintiff sought to set aside a decree passed against him when a minor owing to the negligence of his guardian, or a mortgage of property which belonged not to the mortgagor but to a temple, or a transfer by a debtor to defeat his creditors. The subject-matter of the present suit is somewhat different but their Lordships are prepared to follow the principle of the Indian decisions in the present case and to hold that the suit is within time.

It was suggested in the course of argument that the suit should only have been brought with the consent of the Advocate-General under section 92 of the Code of Civil Procedure but their Lordships think it clear that no such consent is necessary in order that a trustee may recover trust property in the hands of a stranger to the trust. It was also contended that an account should have been taken as to the monies expended by Subrahmanyam upon the charities up to the year 1924 after which he seems to have neglected them; but as no such point appears to have been taken in the High Court their Lordships do not think right to direct any such account. They will humbly advise His Majesty that the appeal should be dismissed. The first respondent entered an appearance but no case was lodged for any of the respondents. The first respondent will get from the appellant firm such costs as he has incurred.

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