CALCUTTA HIGH COURT

Secretary of State

Vs

Guru Proshad Dhur

(W.C Petheram, C.J. Prinsep andTottenham, JJ. Pigot and Ghose, JJ.)

12.03.1892

JUDGMENT

W. Comer Petheram, C.J.

1. My answer to the first question is, that the case of Secretary of State for India in Council v. Fazal Ali I.L.R. 18 Cal. 234 is not rightly decided.

To the second, that Section 10 does not apply to such a case.

To the third, that Article 120 does apply.

To the fourth, that the suits are not barred by limitation.

2. The terms on which the residue shall remain in the hands of the Collector, and the conditions on which the proprietor or proprietors of the estate sold are to be entitled to receive it, are laid down in Section 31 of Act XI of 1859, and are as follows: "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 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."

3. When these conditions have been fulfilled, if the money is not paid over, I think a liability arises, to enforce which the Secretary of State in Council may be sued, it being in the words of Sir BARNES Peacock in The Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India 5 Bom. H.C. App. 1 (16), a liability with which the revenue of India would he chargeable, and the only question is, what is the nature of the cause of action which

comes into existence in favour of the owner of the residue of the money if it is not then paid to him.

4. The meaning of the words "holding the residue in deposit on account of the late recorded proprietor" is, I think, that any residue at and from the time of its receipt belongs to the proprietor of the estate sold, who is to have credit in the books of the Collectorate for the amount, and if there were nothing more, 1 think that the cause of action would be what is called an action for money received, which is an action of debt on the promise which the law implies, whenever money, which in justice belongs to one man, has got into the hands of another, and this, in my opinion, is the case with the money in question. But the section goes on to direct that this money shall be paid out on certain terms and conditions, and there being a statutory provision how and when the money is to be paid, I think that the implication of a promise to pay, which would arise if the statutory obligation did not exist, is rebutted, and that the liability to pay out the money is that created by the statute, and that an action to enforce it must be, not on any implied promise but upon the statutory obligation, and as by the terms of the statute that obligation does not arise until a demand has been made by persons, who are in a position to give the required receipts, 1 think that no suit could be maintained until a demand had been made by some person who was in a position to give the necessary receipts.

5. The Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, so the suit is, I think, within Article 120; in other words, the period of limitation is six years, which begin to run from the time when a demand for the money is made by persons who could give the receipts required by the section. As, in my opinion, the money in the hands of the Government always remains the property of the proprietor of the estate which has been sold, and should always stand to his credit in the books of the Collectorate, it never, I think, vests in any one but himself, and therefore I do think the case can be brought within any of the definitions of trusts to be found in the English reports, but even if it could, it is, I think, equally within the ordinary definition of an action for money received, and 1 do not think it desirable in such a case as the present, where there is certainly nothing of the nature of a trust or confidence in fact, to apply the law of trusts unless we are compelled to do so, and for the reasons I have mentioned, I do not think we are under any such obligation in the present case.

6. In Special Appeals 913 of 1890 and 1161 of 1890, in which the defendant is the appellant, the appeals will be dismissed; in Special Appeal No. 1001 of 1890, in which the plaintiff is appellant, the appeal will be decreed; in each case the successful party will get his costs.

Tottenham, J.

7. I agree in the Chief Justice's judgment.

Prinsep, J.

8. I agree in the terms of the answers which it is proposed to give. I desire, however, to state the reasons why I have arrived at that conclusion.

9. The moneys in these suits are surplus sale proceeds after liquidating the Government dues of the recorded defaulting proprietors of the estate sold, and the law, Section 31, Act XI of 1859, declares that the Collector shall hold them in deposit on the account of these persons to be paid on demand to a proper receipt.

10. It has been said that these moneys are what is termed money received on behalf of the defaulting proprietors of the estate sold, which, but for the terms of the Revenue Sale Law, were kept under an implied promise to pay them to these persons. The manner in which the payment of these moneys has been made and the process by which the residue, termed surplus sale proceeds, has become the property of the defaulting proprietors, seem to prevent our holding that they were received by the Collector on account of the defaulters. In the first place, the law requires that the purchaser at the public sale shall immediately deposit 25 per cent. on his bid. That this sum cannot be regarded as money received on account of the defaulting proprietors is clear from the fact that a re-sale takes place if the full amount of the bid is not paid on the 30th day from the sale, and that, on such default, the amount deposited is forfeited to Government. Moreover, the sale itself may be annulled if the defaulters satisfy the superior Revenue authorities or the Government of hardship or injustice thus caused, and the estate will then be restored to the defaulters "on such conditions as may appear equitable and proper." The purchase-money would, in such an event, be paid to those by whom it had been deposited. In the next place, even when the balance of the purchase-money has been paid by the purchaser, as just stated, the estate does not pass to them. The sale is not confirmed and does not become final until the 60th day from the day on which it was held, and not until then is the purchaser entitled to claim a certificate of title. The money realized by the sale, however, remains all along with the Collector, and if the sale is subsequently set aside, the entire purchase-money is repaid to the purchaser with interest, which may be payable by Government [Section 32*]. I cannot, therefore, agree that the money held by the Collector, under such possible conditions, has been received by him on account of the defaulting proprietors.

11. It is only when after the sale has been confirmed and an account has been made of the moneys due to Government by the defaulting proprietors, which are rarely represented by the actual default for which the sale took place and a surplus is shown by this account, that any money can be said to belong to the proprietors. The law [Section 91] than says that any surplus money shall be held in deposit by the Collector on account of the defaulting proprietors, and it is only at this stage of the proceedings that it can be regarded as money belonging to the defaulters

and held by the Collector, under an obligation to pay it to these persons, and then only on their demand with a proper receipt. Even if there were not this condition of demand made and receipt tendered, I think that Article 62 of the Limitation Act would not apply, for the money was not received by the Collector for the plaintiffs' defaulters' use; and next, it would be impossible to apply the provisions of that article in so far as they fix the time from which the period of limitation in a suit to recover such money commences to run. Article 62 declares that limitation in such a suit commences to run from the time when the money was received for the plaintiff's use. It would be impossible to determine this. It can scarcely be said that the money was so received by the Collector, at the time it was placed in deposit to the credit of the defaulters, when the money has been held by the Collector for some time previously, first, but in part only, as earnest money after the sale, then as the proceeds of the sale, and after an interval ultimately as the property of Government;, with a contingency that there may be a surplus after paying all dues of the defaulting proprietors whose estate had been sold.

12. I apprehend, too, that the Legislature did not have in contemplation that it should be in the power of one of the parties to a suit to determine the period from which limitation in a suit against him should run, and that this should be fixed unknown to the plaintiff, that is to say, when the Collector may have adjusted the account of Government against the defaulting proprietors.

13. Lastly, as was pointed out in the course of argument, if limitation in a suit to recover surplus proceeds be regulated by Article 62, it may frequently happen that if the defaulting proprietors bring a suit to set aside the sale, the limitation for which is, as in Article 62, three years, and fail, his right to sue to recover the surplus sale proceeds will be barred. The result of this would be that if they sue to set aside the Revenue sale and fail, they will lose not only their property but money which undoubtedly belongs to them, and which they could not take without forfeiting their right to bring that suit. This, cannot have been intended by the Legislature.

14. All these considerations lead me to conclude that a suit brought to recover money held in deposit by the Collector, under Section 31 of the Revenue Sale Law, is not governed by Schedule II, Article 62 of the Limitation Act of 1877.

15. I am next of opinion that the suits before us are not within the terms of Section 10 of the Limitation Act. The position of the Collector is in many respects that of a trustee, but, inasmuch as the money so held is payable to the particular parties only on their demand with a receipt tendered, it seems to me that the obligation to pay would be only when such demand coupled with tender of a proper receipt shall have been made. Such a case has not been specially provided for by the Limitation Act, and it therefore would be governed by Schedule II, Article 120.

16. I agree in the terms of the orders which it is proposed to pass in the second appeals before us.

Pigot, J.

17. This suit is brought to recover Rs. 907-6-3, the amount of surplus sale proceeds of plaintiff's estate, sold under the provisions of Act XI of 1859. The estate was sold by the Deputy Commissioner of Sylhet on the 11th November 1885. The amount claimable by Government for rent, cesses and talabana was Rs. 5-11-5, the balance, the sum claimed, being kept in deposit according to the provisions of Section 31 of the Act.

18. The plaintiff's right to the money, as owner of it, is quite clear.

19. The plaintiff is an owner of some, and assignee of the rest, of the shares in the surplus proceeds of his co-proprietors, and they have, as is stated in the plaint, given notice of the assignment under the Transfer of Property Act. No question was raised as to this, and the argument proceeded upon the footing of his right under Section 31, save as affected by limitation.

20. But the defendant, the Secretary of State, defends the suit on the ground that the claim is barred by limitation; and, this contention having been rejected by the two lower Courts, has appealed to this Court. The Division Bench which heard the appeal referred the case to the Full Bench. His Lordship then referred to the order of reference above set out and proceeded].

21. If the Limitation Act does apply to the case, I agree with the other members of this Bench that Article 62 of the Act which was held in the case of Secretary of State for India in *Council v. Fazal Ali*[1] to govern this question] does not apply; but that Article 120 applies, if the Act applies at all. In this case, the suit was actually brought within six years from the sale itself, and within a far less period from the time of demand.

22. The second question referred, namely, whether Section 10 of the Limitation Act applies to the case, raises the question whether the Act governs this case at all. I am of opinion that it does not, and that that question should be answered in the negative. In what I have to say, I shall deal with this question alone, as to which my opinion differs from that of the other members, of the Bench.

23. There is no doubt whatever that the money which the plaintiff claims is his money, and that the Government has no right to it, or interest in it, of any kind. This is not denied on the part of Government, but it is contended that there is no trust of the money shown, under Section 10 of the Limitation Act, and that, therefore, it can avail itself of the Act as a defence to the plaintiff's suit; of course if not, there is no defence to the suit at all.

24. I think the money in this case did, within the meaning of Section 10 of the Act, "become vested" in Government "in trust for a specific purpose," that is, to he handed over to the person

described in Section 31 of Act XI of 1859, and that the plaintiff's suit cannot be barred by time.

25. The first question I shall deal with is as to the effect of the words in Section 31, which are said to create a trust. Assuming that Government can, under the law of this country, be a trustee, are the words of Section 31 such as to give rise to a trust in respect of the surplus proceeds?

26. Section 31 is 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 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 : 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.

27. Now, if the words "holding the residue, if any, in deposit on account of the late recorded proprietor...or their heirs or representatives to be paid..." were contained (substituting "mortgagor" for "proprietor") in a power of sale in a mortgage deed empowering the mortgagee to sell, I think they would create an express trust of the surplus proceeds after sale under the power, within the decisions on Section 25 of the English Act--Charles v. Jones L.R. 35 Ch. D. 544. It is practically the same provision as that which in powers of sale in mortgages has been held to have that effect. The absence of the word "trust" is immaterial.

28. I sea no reason why the intention should not be imputed to the Legislature, when it used those words, of giving to the proprietor whose estate has been sold the fullest security and protection possible in respect of the proceeds of his estate. The Revenue Sale Law is a law of the utmost stringency : the present case is a sufficient illustration of this, for an estate (not encumbered, so far as appears) for which nearly Rs. 1,000 has been once realized is sold for arrears, the exact amount of which does not appear, but which, with cesses and talabana, came to less than Rs. 6.

29. I think the words may properly be construed as intended to impress on the surplus proceeds the character of moneys held in trust for the late proprietor. I think that when the residue is ascertained, it becomes trust money held for him by the Collector under the Act, the Collector acting in this respect for, and representing, Government.

30. The case of *Kinloch v. Secretary of State in Council*[2] was cited, as showing that the Secretary of State in Council could not be a trustee : that the Government of India could not be a trustee: and that the whole foundation of the claim, as based on a trust, must entirely fail.

31. I do not think that that case has any bearing whatever upon the present, except as to one dictum of that great Judge, Lord Justice JAMES, in the course of his judgment, to which I shall presently refer.

32. The decision rested principally on this, that upon the proper construction of the Queen's warrants, notwithstanding that the instrument was so worded as "to give and grant" to the Secretary of State in Council the booty, the subject-master of the suit, "intrust for the use of" the persons on whose behalf the suit was brought, the warrant did not create a trust cognizable in a Court of Equity at all, as Vice-Chancellor Hall had held that it did : the intention of the Crown as shown by the terms of the warrant being plain, to exclude anything of the sort: and the power of the Crown to do so being clear.

33. That case was appealed to the House of Lords. The judgments of the House of Lords are reported in L.R. 7 Ap. Ca., page 619.

34. The judgment of the Lord Chancellor makes it, I think, clear that, so far as the position of the Secretary of State in Council was dealt with in, that case it was dealt with on grounds wholly inapplicable to the present question. At page 622 his Lordship says: With respect to the Secretary of State for India in Council, I entirely agree with what seems to have been the opinion of the Court of Appeal. He is here sued as a Corporation. It is not the individual who now happens to fill that office who is sued, but it is the officer bearing that description; a remarkable and special description, derived evidently from Section 65 of 21 and 22 Vict., Chap 106; which simply enacted that suits to establish rights which, if that Act had not been passed, would have belonged to the East India Company, and for which they might have sued; and again suits to establish claims which, if that Act had not been passed, would have been proper to be made in actions at law or suits in equity against the East India Company, might be brought by or against the Secretary of State for India in Council. The enactment seems to proceed on the same principle on which in Banking Acts public officers are authorised to sue and be sued as representing the persons really entitled or liable. This is, no doubt, a very high public officer; and the designation 'in Council' is added, 1 suppose, in order that all matters arising out of such suits may be considered not only by himself individually but by himself in his Council. Whatever the reason for that may have been, the enactment is limited as I have expressed it; and this is clearly not a suit brought against him as representing the late East India Company, or which can by any possibility be described as a suit which, if the India Government Act had not been passed, might have been brought against the East India Company. Therefore, so far, there seems to be no

ground for suing the Secretary of State for India in Council in the manner in which he is here sued.

35. "It is said, and I dare say rightly said, that for some other purposes, under particular Acts of Parliament which define those purposes, he may be in like manner sued. But it has not been alleged that any of those Acts of Parliament extend to the subject-matter of this action."

36. It seems to me that the question whether or no, in a particular case in which the Secretary of State is defendant, there is any trust, is to be decided upon the principles laid down by PEACOCK, C.J., in The Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India Bourke, A.O.C. 106 : S.C. 5 Bom. H.C. App. 1, and that the question really is whether, to use the Lord CHANCELLOR's words in the passage just cited, if the India Government Act had not been passed, a suit could have been maintained against the East India Company by the plaintiff for these monies as having become vested in the Company in trust for the specific purpose set out in Section 31 of Act XI of 1859, namely, that the monies should be paid to the plaintiff on his demanding them. The right to a receipt, such payment being made by the Collector, is expressly given by the section. That right is, of course, an incident of every trust.

37. It need not be discussed whether or not the East India Company could be a trustee. It is certain that it could be and often was.

38. Lord Justice JAMES says (at L.R. 15 Ch. Div., page 9): But the Government of India is not, it appears to me, capable of being a trustee," et seq.

39. I do not understand the Lord Justice to decide by this expression of opinion that in cases coming within the provisions of the Government of India Act the Government of India could not be a trustee, or the Secretary of State could not be liable to be sued as a trustee, as representing it, and I do not think he can have meant so to decide, as he does not refer to the effect of that Act at all, as the Lord CHANCELLOR did in the House of Lords. In truth it would be difficult to reconcile this opinion, if the Lord Justice had expressed it, with the case of the Clive Fund--Walsh v. Secretary of State in Council 10 H.L. Ca. 367, in which the representatives of Lord Clive were held entitled to recover from the Secretary of State in Council under the provisions of the deed, whereby the East India Company was made trustee of the fund handed over to them by Lord Clive in 1770. No doubt it was on the liability created by the covenant entered into by the Company that the Secretary of State was held bound in that case to repay the money; but it was a liability binding on the Company as trustee, and as such binding on the Government of India in respect of the Indian revenues, and on the Secretary of State, as 1 understand, as being bound by the trust as representing the Government.

40. Then it is said that these monies have not become vested in the Government within the

meaning of the section.

41. The Account Code showing the practice of the department with respect to surplus proceeds held under the Act was referred to by both sides in argument. In Chapter XXV, Sections 11 and 12 are as follows:

11. Deposits not exceeding one rupee unclaimed for one whole account year, balances not exceeding one rupee of deposits partly repaid during the last year, and all balances unclaimed for more than three complete account years, will, at the close of March in each year, be credited to Government by means of transfer entries in the Account Office. Of deposits or balances thus lapsing the treasury officer must submit to the Accountant-General, immediately after 31st March, a list showing date of receipt, number of deposit, and balance at credit.

12. Deposits credited to Government under this rule cannot be repaid without the sanction of the Accountant-General, but this sanction will be given, as a matter of course, on ascertaining that the item was really received, was carried to credit as lapsed, and is now claimed by the person who might have drawn it any time before the lapse. The amount of a lapsed deposit refunded will, however, be charged in the cash-book as a refund, and not debited to deposits. But the application for refund and the payment of the deposit should be recorded in the district register of receipts, so as to guard against a second repayment.

42. It appears to me that, upon the ascertainment of the surplus, the money became "vested" in the Government in the hands of its servant, the Collector (in this case the Deputy Commissioner). I am not aware of any definition of the expression "vested" save that of MARKBY, J., in *Kherodemony v. Doorgamoney*[3] But I do not see how it can be contended that these monies have not become vested in the Government. They are now, as against all the world but the owner, the property of the Government. They were so from the moment they were paid, and even before the surplus was ascertained; and this, quite apart from any question which need not be discussed here, as it was not at the bar, whether or not they ought to have been when the surplus was ascertained, not merely ear-marked, but held separately and not mixed in the general funds of the State, as of course they have been. They are in the hands of the Government, and so effectually vested in its hands, that the owner of them has failed to get them, and has been refused them when he demanded them. Possession, with all the indicia of property in respect of them, so far as regards third persons, is had by the Government. I think this must be "vesting" of this moveable property, within the meaning of the section.

43. I think this is made more clearly to appear upon looking at the practice under the rules read to us both by the pleader for the appellant and by the Standing Counsel. For three years, according to the practice, surplus proceeds of sales remain to the credit of the persons entitled under Section

31 of the Act, after that date they are credited to Government by means of transfer entries in the Accounts Office. I do not see how it can be contended that (at any rate after this last transfer is effected) the monies do not become "vested" in Government.

44. The word "become" seems to cover every possible manner in which the vesting could take place.

45. I think, too, that the fact that the monies are, up to that time, quite properly credited to the parson or persons entitled under the Act, bears upon the character in which they are held, when read by the provisions of the section : they are up to that date avowedly held for him. I may refer to the well-known decision of Sir R. Couch in *Jamsetji Jijibhai v. Sonabai*[4] which has been frequently followed, in which it was held that even a voluntary trust might be perfectly and completely created by entries in the books of the donor of the trust in favour of the cestui que trust.

46. I think, therefore, first, that; the words of Section 31 satisfy the expression "trust for a specific purpose" in Section 10 of the Limitation Act; secondly, that the monies have "become vested" in Government within the meaning of those two words; and thirdly, they have become vested in it in trust for the specific purpose, which in the present case is payment to the plaintiff.

47. The effect of the Act is, I think, to place Government in the same position as a mortgagee after exercise of his power of sale, in ordinary form, in respect of the surplus proceeds. I cannot see that the fact that the sale is in invitum, under a power created for the advantage of the State and not under a power created by him, ought to place him in a worse position than that held by an ordinary mortgagor. In effect, the Revenue Sale Law hypothecates land held under the State for the payment of the revenue, and the sale is the exercise of a power of sale in enforcement of the hypothecation. It is made by the law one of the terms of the contract or transaction between the Government and its tenant, under which the latter takes and holds his land. In fact, in Regulation X of 1793, Section 19, the relation is actually described as that of mortgagor and mortgagee.

48. I also think that when, in the exercise of its authority over the Collector, Government causes a transfer of the monies from the credit of the proprietor to its own credit, it must be treated (apart from the question of its being a trustee through him before that time) as taking over monies which then, at any rate, become vested in it, which monies are, when taken over, impressed with a trust for a specific purpose; and at that time, even if not before it, become vested in Government on that trust.

49. The opinion of the entire Bench, that limitation runs from six years from date of demand, renders the answer to the question as to Section 10 of little practical importance in cases like the

present; but the general question as to the possible liability of Government as a trustee is one of considerable importance; none the less so by reason of the high prerogative view urged on us on behalf of Government, and for which some of the expressions in Kinloch's case (L.R. 15 Ch. D. 1; L.R. 7 Ap. Ca., 619)(Supra) were used, not for the first time. I own that I think it would be very unfortunate if those views were well founded in law; any tendency to withdraw the acts of the Government and of its servants from the cognizance of the Courts of Justice would be a very serious thing, and I certainly do not think the Courts should be astute for the purpose of aiding that object.

50. In this country, the relations of the Government with the individual subjects of Her Majesty are of almost infinite variety and extent; partly arising from the trading operations to a vast amount necessarily carried on by it, and partly from the multitude of enactments, the number of which is steadily augmenting, which bring Government in close relations with the subject in respect of his private rights of property.

51. I am well aware that the opinion which 1 have formed on this question is one which, during the many years in which the Revenue Sale Law has been in operation, is for the first time expressed in a Court of Justice. That is a formidable argument, perhaps, against the soundness of my opinion. Still, I cannot discover that the occasion has ever before arisen. I am aware of no reported case in which limitation has ever been set up by Government as an answer, and the sole answer as in this case it has been in this Court, to a claim by the owner of surplus proceeds of sale.

Ghose, J.

52. I agree with the Chief Justice in the answers he proposes to give to the questions that have been referred to the Full Bench.

53. According to the Revenue Sale Law (Act XI of 1859), immediately upon the conclusion of a sale, the party declared to be the purchaser has to deposit a portion of the purchase-money (25 per cent.), and the balance before sunset of the thirtieth day; but the sale does not become final and conclusive before the sixtieth day or before the appeal, if any be preferred to the Commissioner, is dismissed. "Upon the sale becoming final the Collector applies the purchase-money, first, to the liquidation of the arrear for which the estate was sold, and then, to the liquidation of all outstanding demands debited to the estate in the public accounts; and if there be any surplus left, it is to be paid to the recorded proprietor or his legal representative.

54. It seems to me, therefore, that the purchase-money when paid by the purchaser is not money received by the Collector to the use of the owner of the estate; but a portion of it, i.e., the surplus, if there be any, may possibly assume that character some time afterwards. The 62nd Article of

the second Schedule of the Limitation Act says:

For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, three years, when the money is received.

55. When the law says "when the money is received" it means, I take it, the time when it is actually received, and not the time when, after the Collector has applied the purchase-money to different purposes, it is ascertained that there is a surplus due to the proprietor. I do not think it could have been the intention of the Legislature to lay it down that the cause of action to the defaulting proprietor would arise on the day that the money is received by the Collector. The law allows him two distinct remedies : first, he may appeal to the Commissioner; and second, he may bring a suit to contest the legality of the sale. And the prosecution of these remedies may take him more than three years. If he is bound to sue for the surplus within three years, under Article 62, he may have to give up his suit to contest the sale; for Section 33 of the Revenue Sale Law provides that "no person shall be entitled to contest the legality of a sale after having received any portion of the purchase-money." In other words, the result may, in some cases, be that the defaulting proprietor must either receive the money within three years from the date when the purchaser pays it into the hands of the Collector, or he must give up his right to contest the sale.

56. I do not think that the Legislature could have intended such a result, and to provide Article 62 for such a case as the present. The claim of the plaintiff for the surplus is either a claim which arises upon the statute (Section 31, Act XI of 1859), or it is an equitable claim for the money in the hands of the Collector; but in either case, it seems to me, it could not fall within Article 62 (see in this connection the decision of the Privy Council in *Gurudas Pyne v. Ram Narain Sahu* [5]

57. As regards the other question that has been raised in this case, and which has been discussed at considerable length before us, viz., whether the suit falls within Section 10 of the Limitation Act, it is, I think, a difficult one. But after giving the matter my best consideration, I am inclined to think that it is not governed by that section -- at any rate, it is not clear that it is so.

58. Section 10 of the Limitation Act provides that no suit against a person in whom property has vested in trust for any specific purpose, for the purpose of following such property in his hands, shall be barred by any length of time.

59. The question for our consideration is, whether the surplus sale proceeds has vested in the Collector in trust for the defaulting proprietor.

60. Now, what is it that vests the surplus in the Collector as a trustee for the defaulting proprietor? So far as the defaulting proprietor is concerned, he is not a party to the sale held by the Collector: there is no confidence reposed by him upon the Collector, and we are not aware

that under the engagement that the plaintiff or his predecessor in title executed for the payment of the Government revenue fixed upon the estate, he authorised the Collector to sell the estate in the event of a default in payment of the revenue and to receive the surplus for him. There is no fiduciary relation between him and the Collector; and herein, I think, lies the distinction between the position of the Collector in the present case and that of a mortgagee, who, when he is authorized by the mortgagor to sell, receives on behalf of the mortgagor the surplus sale proceeds. It was strongly argued before us upon the authority of certain cases in England, and more especially upon some of the observations in the case of *Banner v. Berridge*[6] that the mortgagee is a trustee for the mortgagor in respect of the surplus and that on the same principle, the Collector should be regarded as a trustee for the specific purpose of handing over the surplus to the recorded proprietor. But it seems to me that the analogy does not hold good when it does not appear that the proprietor, when he entered into an engagement for the Government revenue, authorised the Collector to sell the estate and receive the surplus for him. The power to sell an estate for arrears of revenue is, 1 take it, only given by the law; and we have simply to determine what was the intention of the Legislature when they passed that law. Was it their intention to make the Collector a trustee for the defaulting proprietor in respect of the surplus? I hardly think that it was so. Section 31 of the Act provides that "the Collector, after applying the purchase-money to the liquidation of all arrears and demands of Government, shall hold 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," etc., etc. The section here casts upon the Collector a duty which he is bound to perform in the manner prescribed therein; but nothing more. On turning to Regulation XI of 1822, I find that the words used in the corresponding Section (22) were "the residue shall belong to the defaulter or defaulters, and be payable to his or their receipts upon demand." I hardly think that these words could be construed as the creation of a trust in the hands of the Collector. There was a slight change in the wordings in the subsequent Act, XII of 1841, Section 21, they being the same as we find them in Section 31 of the present Sale Law; but I do not think that the Legislature, if they did not intend in 1822 to make the Collector a trustee, intended to make him so by the words that they used in 1841. I think what the Legislature meant to say was that the surplus shall belong to the recorded proprietor and shall stand to his credit in the Collector's books until a demand is made and receipt is tendered, when the Collector will be bound to hand it over to the recorded proprietor or his representative. No doubt, no technical words are necessary to create a trust, but we must be satisfied that the Legislature by enacting Section 31, Act XI of 1859, intended to constitute the Collector a trustee for the proprietor in respect of the surplus. I do not think that this was their intention, and I am not aware of a single case since the passing of the Sale Law in 1822 in which the Government has been regarded as a trustee in similar circumstances.

61. If then Section 10 does not govern the case, there is no other section applicable; and the result, therefore, must be that the limitation prescribed is that in Article 120. Under that article the right to sue for the surplus does not accrue until, as provided by Section 31, Act XI of 1859, the demand is made.

In No. 1001 of 1890.

62. Pigot, J. (Petheram, C.J., Prinsep, Tottenham, and Ghosh, JJ., concurring).--The sale took place in January 1883. The suit was brought in December 1888. Under divers precepts of the Civil Courts, the proceeds were attached, and the Collector was, of course, entitled to refuse payments until they were disposed of: this has been properly held to be so by the lower Court, and the plaintiff's have been properly ordered to pay the costs of the Secretary of State in that Court on that ground, hut as the attaching creditors abandoned their claim at the hearing, the plaintiff obtained a decree, which was set aside by the Lower Appellate Court on appeal by the Secretary of State on the ground alone that Article 62 of the Limitation Act governed the case. This being held not to be so, the decree of the Lower Appellate Court will be set aside, and that of the Subordinate Judge restored. Plaintiff will have his costs in this Court and the Lower Appellate Court.

In No. 1161 of 1890.

63. Pigot, J. (Petheram, C.J., Prinsep, Tottenham and Ghose, JJ., concurring).--In this case the Secretary of State appealed from the decision of the Subordinate Judge, who held that Article 120 of the Limitation Act applied. The appeal on that ground must fail.

64. But the plaintiff brought his suit in respect of his share of the surplus proceeds of the mehal. His name is duly registered, but his lands and the jama are not specified; he therefore could not recover; but this objection was waived in the written statement filed on behalf of Government provided the other parties interested should appear, and the plaintiff's claim should be established in their presence--a very fair and considerate course. The issues raised must be read with reference to this written statement.

65. It has been found that the plaintiff's claim has been so established in the presence of the other parties interested, so that in truth the question before the lower Court of appeal was only that of limitation : and the fourth paragraph of the memorandum of appeal to this Court does not arise.

66. The Secretary of State was properly given his costs in the original Court.

67. But he appealed on the ground of limitation alone to the Lower Appellate Court, and from that Court to this.

68. Article 120 applies, and as the objection under the concluding portion of the first paragraph of Section 31 was waived in the written statement of Government, the case must be treated as though the demand was duly made on behalf of all the sharers; and if so, it was within time.

69. The appeal must therefore be dismissed with costs.

* Notification of annulment of sale.

[Section 32:-The annulment by a Commissioner or by Government of a sale made under this Act shall be publicly notified by the Collector or other officer as aforesaid, in the same manner as the becoming final and conclusive of sales is required to be notified by section XXVII of this Act; and the amount of deposit and balance of purchase money shall be forthwith returned to the purchaser with interest thereon at the highest rate of the current public securities; which shall be paid by the Government, unless the proprietor shall have become liable for the same under the provisions of section XXV or section XXVI of this Act.]

Cases Referred.

1I.L.R. 18 Cal. 234
2L.R. 15 Ch. D. 1 : L.R. 7 Ap. Ca. 619
3I.L.R. 4 Cal. 455 (468)
42 Bom. H.C. 2nd Ed. 133
5I.L.R. 10 Cal. 860 : L.R. 11 I.A. 59
6L.R. 18 Ch. D. 254