1948 *Present:* **Howard C.J. and Canekeratne J.**

LAKSHMANAN CHETTIAR, Appellant, and MUTTIAH CHETTIAR, Respondent

S. C. 234—D. C. Galle, X 56

Trust—Defendant attorney of plaintiff—Money owing to plaintiff—Endorsement of promissory note to third party by defendant as attorney—Assignment of decree—Fraud or fraudulent breach of trust—Burden of proof—Prescription—Trusts Ordinance, Section 111.

Defendant was the attorney of the plaintiff who was a money lender resident in India. Plaintiff had two debtors A and S. A gave a promissory note and a decree was obtained against the estate of S. Three days before leaving the service of the plaintiff the defendant assigned the decree to one Alagappa Chettiar and he had previously endorsed the Note to the same Chettiar who recovered the money from A. No consideration had been paid by the Chettiar. Plaintiff claimed that defendant was a trustee of these monies and liable to account to the plaintiff. This action was brought more than six years after the transactions in question.

Held, that in the absence of fraud or fraudulent breach of trust to which the defendant was a party, the action was prescribed in terms of section 111 of the Trusts Ordinance for the reason that the money was neither retained by the defendant nor converted to his own use.

Held further, that the burden of proving fraud was on the plaintiff. Fraud must be established beyond reasonable doubt and a finding of fraud cannot be based on suspicion and conjecture.

APPEAL from a judgment of the District Judge, Galle.

H. V. Perera, K.C., with *C. Renganathan*, for defendant appellant.

F. A. Hayley, K.C., with *M. Somasunderam*, for plaintiff respondent.

Cur. adv. vult.

November 25, 1948. HOWARD C.J.—

The defendant appeals from a judgment of the District Court of Galle entering judgment for the plaintiff for the sum of Rs. 8,500 with legal interest thereon at 5 per cent. from October 3, 1934, and the sum of Rs. 5,706·81 with legal interest thereon at 5 per cent. from January 15, 1938, and costs. The plaintiff is a professional money lender who resides in India. The defendant was his agent and attorney at Colombo from about 1919 to January 28, 1933. Amongst the debtors of the plaintiff were two persons, I. M. Alles and C. B. A. Samaranayake, both of Galle. Alles died while a sum of Rs. 6,500 and interest was owing to the plaintiff's firm on a promissory note (P1) for Rs. 7,000. Alles' estate was administered by his executor Mr. W. R. de Silva. Samaranayake died while a sum of Rs. 7,000 was due to the plaintiff's firm. One E. C. Abeygoonewardene who had intermeddled with the estate of Samaranayake was sued by the defendant as the plaintiff's attorney in D. C. 27,002 and a decree had been obtained on September 23, 1929, for a

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sum of Rs. 8,619·20 with legal interest and costs. Of this sum Rs. 2,695 had been recovered and accounted for by the defendant. On January 25, 1933, three days prior to his leaving the service of the plaintiff and departing for India, the defendant by P20 assigned this decree to one A. L. A. S. M. Alagappa Chetty for an alleged consideration of Rs. 3,000. Alagappa had himself substituted as plaintiff in D. C. 27,002 and has recovered a sum of Rs. 5,706·81 (*vide* P19). The defendant has also prior to January 28, 1933, endorsed promissory note P1 granted by Alles to the same Alagappa Chetty who has recovered from the executor of Alles' estate the sum of Rs. 8,500 on October 3, 1934. It is the plaintiff's case that the defendant assigned the decree and endorsed the note to Alagappa without plaintiff's authority and with fraudulent intention, that no consideration received from Alagappa has been accounted for, that the assignment and endorsement had been made for the defendant's benefit and that through Alagappa has collected the sums mentioned and that the defendant is liable to pay the said sums to the plaintiff.

The position of the defendant is that the plaintiff's business was failing and as he was in insolvent circumstances the plaintiff directed the defendant to close the business at Colombo, to assign the decree to Alagappa and to endorse the note and to write off in the books the amount due on the note. The defendant executed these directions. He received no consideration of any nature from Alagappa, nor did Alagappa pay sums recovered by him to the defendant. After the termination of his services the defendant rendered an account to plaintiff of his stewardship. The plaintiff was satisfied and gave him a written discharge dated April 28, 1934. Therefore the plaintiff is not entitled to maintain this action.

By his answers to the issues the learned Judge has held as follows :—

(1) That the defendant wrongfully, unlawfully, fraudulently and without the consent and approval of the plaintiff endorsed the promissory note P1 and assigned the decree in case No. 27,002 for the sum of Rs. 3,000 to Alagappa Chetty, thereby misappropriating the said note and decree or their proceeds.

(2) That the said Alagappa recovered a sum of Rs. 8,500 on P1 and a sum of Rs. 5,706·81 under the said decree and the plaintiff was entitled to recover the said sums from the defendant.

(3) The frauds in connection with P1 and the decree were discovered by the plaintiff on or about February, 1942.

(4) The defendant neglected and failed to hand over to the plaintiff a sum of Rs. 3,000 alleged to be paid by Alagappa as consideration for the assignment of the decree in D. C. 27,002.

(5) The consideration of Rs. 3,000 alleged to have been received by the defendant prior to the execution of the deed was not paid in the presence of the notary. The learned Judge did not think the consideration of Rs. 3,000 was paid by Alagappa to the defendant. It was only a colourable transaction to enable the defendant to collect the monies due on the decree through Alagappa as his agent. Therefore it is not Rs. 3,000 but Rs. 5,706.81 which the plaintiff is entitled to recover from the defendant.

(6) That the said Alagappa Chetty collected the two sums of Rs. 8,500 and Rs. 5,706·81 for and on behalf of the defendant and the latter became the trustee of these two sums for the plaintiff who is entitled to recover the said two sums with interest thereon at 5 per cent. from the defendant.

(7) The defendant wrongfully and fraudulently represented to the plaintiff that the two debts were irrecoverable and after the recovery of the same fraudulently and wrongfully concealed the fact of collection from the plaintiff.

(8) Defendant realized the sum of Rs. 5,706·81 through Alagappa Chetty. There was no direct evidence that Alagappa Chetty paid the defendant this sum, but it is unlikely that Alagappa Chetty double-crossed the defendant of the amount collected by him on the assignment.

(9) The defendant did not endorse P1 or assign the decree at the direction and on the orders of the plaintiff.

(10) The defendant rendered an account to the plaintiff of the defendant's transactions as plaintiff's agent, but failed to disclose the fact of his assigning the decree and endorsing the note. All the account books were left with the firm and were available to the plaintiff. No letters written by the plaintiff to the defendant were handed to the plaintiff.

(11) The plaintiff on April 28, 1934, gave the defendant a complete discharge and acknowledged that the plaintiff had no present or future claims against him.

(12) The defendant did not hand over the books and papers to the plaintiff relying on a representation that the defendant was discharged from all present and future claims.

(13) The plaintiff's causes of action were not prescribed.

It will be observed that the plaintiff's case against the defendant has been based on the contention (*a*) that the assignment of the decree in case No. 27,002 and the endorsement of the promissory note P1 to Alagappa Chetty were fraudulent transactions and (*b*) that apart from fraud the defendant was a trustee of these sums and liable to account for the same to the plaintiff. Both these contentions have been answered by the learned Judge in favour of the plaintiff. With regard to (*b*) the decision of the learned Judge is contained in (6) and (13). The reasons guiding him to this decision receive but scant consideration in his judgment. So far as P1 and the decree in case No. 27,002 were concerned the relationship between the plaintiff and the defendant was that of beneficiary and trustee. Moreover, the question was one of an express trust. So far as prescription is concerned the matter is governed by sections 111 of the Trusts Ordinance, Cap. 72. This section is worded as follows: —

" (1) In the following cases, that is to say—

(*a*) in the case of any claim by any beneficiary against a trustee founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy ;

(*b*) in the case of any claim to recover trust property, or the proceeds thereof still retained by a trustee, or previously received by the trustee and converted to his use ; and

(*c*) in the case of any claim in the interests of any charitable trust, for the recovery of any property comprised in the trust, or for the assertion of title to such property,

the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance.

(2) Save as aforesaid, all rights and privileges conferred by the Prescription Ordinance shall be enjoyed by a trustee in all actions and legal proceedings in the like manner and to the like xtent as they would have been enjoyed if the trustee had not been a trustee :

Provided that in the case of any action or other proceeding by a beneficiary to recover money or other property, the period of prescription shall not begin to run against such beneficiary, unless and until the interest of such beneficiary shall be an interest in possession.

(3) No beneficiary as against whom there would be a good defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(4) Nothing in this section shall preclude the court from giving effect to any application by a trustee for any equitable relief to which he would otherwise be entitled on any ground recognized by the court.

(5) This section shall not apply to constructive trusts, except in so far as such trusts are treated as express trusts by the law of England."

The claim to recover this property arose in the case of P1 some few days prior to January 28, 1933, when it was endorsed to Alagappa Chetty, and in the case of the decree in case No. 27,002 on January 25, 1933, when it was assigned to Alagappa Chetty for Rs. 3,000 (*vide* P20). Section 111 (2) of Cap. 72 states that save as aforesaid all rights and privileges conferred by the Prescription Ordinance shall be enjoyed by a trustee in all actions and legal proceedings and to the like extent as they would have been enjoyed if the trustee had not been a trustee. In these circumstances the claim comes within section 6 of Cap. 72 and action must be instituted within six years unless it is a case that comes within sub-section (1) of section 111 of Cap. 72. The phraseology employed in section 111 is similar to that of section 8 of the Trustee Act, 1888, which is worded as follows :—

"(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use, the following provisions shall apply :—

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent

as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run agains a married woman entitled in possession for her separate us', whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding, and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

The comment in Lewin on Trusts on this section is as follows :—

"The general effect of the section appears to be that in future, whenever an action is brought by a cestui que trust against a trustee or any other person claiming through him, whether in respect of land or money, and whether the defendant is sought to be charged under an express or a constructive trust, there the defendant will be entitled to the protection which the section gives, unless the plaintiff can prove either (1) fraud or fraudulent breach of trust, or (2) that at the time of action brought, the trust property, which is the subject-matter of the action, or the proceeds thereof, is or are still retained by the trustee, or (3) that, previously to the bringing of the action, such property or proceeds were received by the trustee, and converted to his use. If the plaintiff brings his case within one of these three exceptions, the old law will still apply ; if not, the section will take effect."

The section has been the subject of judicial interpretation in several cases. In *How v. Earl Winterton* [1], the plaintiff, under a will on the expiration of a term of fourteen years from the death of the testatrix (who died on May 20, 1875), became entitled to an annuity for her life. During the term it was the duty of the defendant, as trustee under the will, to receive the rents of certain devised estates, and after payment

[1] (*1896*) *2 Ch. 626.*

of some immediate annuities, to accumulate the surplus rents and invest the accumulations in the purchase of lands. The plaintiff's annuity was charged upon the accumulations and the lands to be purchased therewith, as well as upon the devised estates. Without any fraudulent intent the defendant, instead of accumulating the surplus rents, applied them in keeping down interest on incumbrances and in necessary repairs.

The term expired on May 20, 1889, the plaintiff's annuity fell into arrear in November, 1894, and on August 9, 1895, she brought this action for an account.

The defendant had not trust moneys in his hands at the issue of the writ, and had never converted any trust moneys to his own use; and he relied on section 8 of the Trustee Act, 1888, but admitted that within six years before the issue of the writ he had rents in his hands which he ought to have accumulated and invested:—It was held (1) that the plaintiff was entitled to an account of the moneys in the hands of the defendant six years before the issue of the writ and liable to the trust for accumulation, and also to an account of the rents which ought afterwards to have been accumulated, but not to an account from the death of the testatrix; and (2) that the case fell either within clause (*a*) or clause (*b*) of section 8 of the Act of 1888, but (per Rigby L.J.) preferably within clause (*a*); and that whichever clause was applicable, the defendant was protected from demands more than six years before the issue of the writ." At pages 640–641 Lindley L.J. stated as follows:—

> "Section 8 is cumbrously worded, and it is difficult to grasp the idea which underlies it; but the short effect of s. 8 appears to me to be that, except in three specified cases, namely, fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them."

Again the headnote of *In re Bowden, Andrew v. Cooper* [1] is as follows:—

> "A newly appointed trustee of a will brought an action against an old trustee and the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. R. G., the executor of D. G., one of the deceased trustees, had after D. G's death issued the proper statutory advertisements and administered the estate, retaining in hand two legacies which had been bequeathed to him on trust. By leave of the Court at the trial the statement of claim was amended to make it a claim against R. G. as trustee of the legacies and to follow the legacies into his hands, R. G. to be at liberty to claim the benefit of any statutes of limitation:—
>
> *Held*, that having regard to Order xvi, r. 8, the cestuis que trust of the legacies were not necessary parties to the action.

[1] (*1890*) *45 Ch. 444.*

Held, that section 8, sub-section 1 (*a*) of the Trustee Act, 1888 (51 and 52 Vict. c. 59), did not apply to the case, but that section 8, sub-section 1 (*b*) did apply; that under it R. G. was entitled to plead the lapse of time as he might have done in an action of debt, and that, as the cause of action had accrued more than six years before the action, R. G. had a good defence."

Also *in re Gurney, Mason v. Mercer* [1] it was held that " the exception in section 8, sub-section (1) of the Trustee Act, 1888, which prevents a trustee relying on the Statute of Limitations as a defence to an action to recover the proceeds of trust property 'received by the trustee and converted to his use,' does not, in the absence of fraud, apply where trust funds advanced on mortgage are, with the concurrence of the mortgagor, applied in payment of debt previously charged on the mortgaged property in favour of a bank in which the trustee is a partner."

The words " converted to his use " were considered by Kekewich J. in *re Timmis, Nixon v. Smith* [2] in the following passage :—

" As I pointed out in the argument, the Legislature has carefully used the word 'retained' as meaning what it says, namely, money which is not merely in the eye of the law in the hands of the trustee, because he has never paid it away to a person entitled to give a discharge, but money which is really in his pocket in the sense that it is invested in his name, or in land belonging to him, or in the name of some other person as trustee for him. In order to say that it is 'retained', you must be able to put your finger on the property or the proceeds and say that it is still under the control of the trustees. There is no suggestion that that can be done here, but it is said that the case can be brought within the succeeding words. It is said that each of the three trustees must be taken to have received one-fourth of the share belonging to the children of Ann Pointon, and to have converted such fourth to his use. I pointed out to Mr. Renshaw that in that point of view, if entitled to succeed, he is entitled to go against each trustee in respect of a fourth, and not against three trustees in respect of three-fourths, because the statute points only to the personal use by a trustee, and does not speak of the payment by one trustee to another, which, after all, is only a breach of trust as much as a payment to a stranger who is not a trustee. Then Mr. Renshaw says Peter Smith (to take his case) has received and converted to his use one-fourth of this share, and therefore the case is taken out of the statute, and of course the plaintiff is entitled to an amount of that. The answer to that is, that Peter Smith was himself entitled to a one-fourth share; that this is not the case of a trustee putting into his own pocket what belongs to a cestui que trust so as to defraud the cestui que trust, but he only appropriated to himself that which the will gave him. I think that answer is complete. The point is a new one, and at first I felt some difficulty about it, but I think that when one looks at the statute there can be no doubt what was meant. The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or

[1] *(1893) 1 Ch. 590.* [2] *(1902) 1 Ch. 176 at pp. 185–186.*

technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, i.e., money of the trust received by him and converted to his own use. That seems to me the proper construction of the words, and I think the context confirms that view. Here Peter Smith (and so with the others) only received that to which he was entitled. They ought to have put one-fourth of the fund apart. Whether they did that or not could not in the least interfere with their right to receive their own shares; and it would be extremely hard to say that, having paid themselves what they were entitled to, they were not to have the advantage of the statute as to which ought to have been paid to a cestui que trust."

In my opinion this is not a claim to recover trust property or the proceeds thereof still retained by a trustee. Nor was the trust property or proceeds thereof previously received by the defendant and converted to his use. Nor in view of the learned Judge's finding referred to in (5), was part of the trust property or its proceeds converted to the use of the defendant. In the absence of fraud or fraudulent breach of trust to which the defendant was party or privy the claim should have been brought within six years from January 28, 1933. As the action was not instituted till January 29, 1942, the Prescription Ordinance applies and the claim is statute barred.

The next point for consideration is whether the learned Judge was right in holding that the defendant when he endorsed P1 and assigned the decree in case No. 27002 to Alagappa was guilty of fraud or fraudulent breach of trust. The following passage occurs in the judgment :—

"It is admitted that the defendant assigned the Samaranayake decree and assigned Alles' note to Alagappa Chetty. That being so the burden rests on him to prove that he did so at the instance of the plaintiff."

The burden of proof is thus placed on the defendant.

In *A. L. N. Narayanan Chettyar and another v. Official Assignee, High Court, Rangoon, and another* [1] it was held that fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture. The burden of proof in regard to fraud has therefore been placed by the learned Judge wrongly on the defendant. For this reason the judgment cannot stand. Even with the burden so placed I am of opinion that the defendant has raised a reasonable doubt as to whether he was guilty of fraud when he assigned the decree and endorsed P1 in favour of Alagappa Chetty. It has not been established that the defendant obtained any financial advantage from these transfers. His power of attorney ceased on January 28, 1933, from which date he was no longer the agent of the plaintiff. From that date Chinniah held the power of attorney and was the agent of the plaintiff. Again the relationship between the latter and Alagappa

[1] *1941 A. I. R. (P C.) 93.*

Chetty is a factor requiring careful consideration when one embarks on an inquiry as to whether the defendant in making the transfers to Alagappa was acting *bona fide* and carrying out the plaintiff's instructions. According to the plaintiff the defendant's instructions prior to handing over to Chinniah in January, 1933, were " to collect whatever possible from my assets, pay as much as possible to the creditors, and then hand over the remaining assets to Chinniah and come over to India. Chinniahpulle was to go on carrying on as best as he could." It is quite obvious from this that the defendant on October 29, 1932, informed the plaintiff that Alles' debt was recoverable. In regard to the assignment of the decree and the proceedings for the recovery of the amount due thereon by Alagappa it is quite obvious from the letters of Chinniah, the plaintiff's agent, to Alagappa dated February 14, 1933, and December 8, 1933 (D7 and D8) that Chinniah was aware of the assignment and the proceedings taken by Alagappa. The fact that Chinniah was aware of the proceedings instituted by Alagappa for the recovery of the money owed by Samaranayake's estate suggests that defendant in making the assignment to Alagappa was acting on the plaintiff's instructions or to put this evidence at its lowest value from the defendant's point of view it raises a reasonable doubt as to whether his conduct was fraudulent. So it may also be said of Alles having regard to the defendant's letter (D6). Again the relationship of Alagappa Chetty with the plaintiff raises a reasonable doubt as to whether the defendant has been guilty of a fraud. Plaintiff in evidence states that Alagappa is a relation of his. An adopted son of his son is married to the plaintiff's daughter. This is what the plaintiff states with regard to the suggestion of the defendant that he had instructions from the plaintiff to endorse P1 and assign the decree in case No. 27002 to Alagappa :—

" In 1932, Alagappa Chettiar was in India. I saw him in India. I did not send him to Colombo to settle my accounts. He did not come to my firm of A. T. K. P. L. M. On one occasion when he came to my house he told me that he was going to Ceylon to see to his business in Pussellawa. So I suggested to him to settle my matters and to assist Letchimanan in settling my affairs in Colombo. I do not know whether he complied with that request. I do not know whether he stays in my firm when he stays in Colombo. The defendant wrote to me that Alagappa Chettiar did not come to the shop in Colombo. I do not remember whether I wrote to the defendant informing him that Alagappa Chettiar would come to the shop to assist him. I do not know whether I have got a letter written by Letchimanan stating that Alagappa did not come to my shop at Colombo. I have got several letters, but I have to examine them. That copy was in the press copy book. I will have to ask my agents and find out the date. Chinniahpulle and Velaithan Chettiar are my agents. I told Alagappa Chettiar—' when you go to Colombo, assist the defendant in settling my affairs by recovering as much as could be recovered and paying off the creditors ; the defendant was in Colombo alone ; and I would like to see the affairs wound up decently.' That was in 1932. I do not remember whether it was during the end of 1932.

It was in the latter part of 1932. At that time Alagappa and I were not friends as he had failed to repay my loans. In spite of that I had confidence in him. He was my relative and my son's adopted son was married to his daughter and therefore I requested him to do that.

I therefore had confidence in him.

Q.—Alagappa Chettiar never deceived you ?

A.—He borrowed Rs. 80,000 and arranged to pay the amount but has been paying me little from time to time.

Isn't that deception ?

Still because he was my relative and my Sammandie, my son's adopted son had married his daughter, therefore I thought he would not play me false. We are even now on speaking terms. I will not trust him with regard to money matters. It may be that when I had some disputes here and there I had asked him to be a joint arbitrator with others on my behalf."

Later in his evidence plaintiff states that about 5 or 6 months ago in a dispute in the village he asked Alagappa to be an arbitrator. The plaintiff concedes that Alagappa was instructed to assist the defendant in settling his affairs by recovering as much as could be recovered. This evidence of the plaintiff raises a reasonable doubt as to whether he is speaking the truth when he says he did not instruct the defendant to transfer the rights in Samaranayake's and Alles' debts to Alagappa. I think that fraud has not been established beyond all reasonable doubt.

The appeal is allowed and judgment must be entered for the defendant with costs in this court and the court below.

CANEKERATNE J.—I concur.

Appeal allowed.