

P. C. K. MUTHIAH CHETTIAR & ORS.

v.

V. E. S. SHANMUGHAM CHETTIAR & ANR.

July 26, 1968

[R. S. BACHAWAT AND K. S. HEGDE, JJ.]

*Contract—agreement to sell shares—non-disclosure of receipt of substantial dividends which purchaser was under fiduciary duty to disclose—
if vitiated by fraud.*

*Limitation Act, 1908—s. 13—exclusion of time during which defendant abroad—cause of action arising abroad or defendant abroad at time
of its accrual—if material.*

C was the owner of five original shares in a Rubber Estate in Malacca. After his death in December, 1912 his son the first respondent entered into a compromise agreement in July, 1915 with the appellant, who was in partnership with C during his lifetime, whereby it was agreed that out of five shares, 2½ would belong to the partnership and the remaining 2½ shares to the first respondent, furthermore, the appellant undertook to recover the 5 shares and account to the first respondent for 2½ shares and for the income and dividends arising from them. In January, 1924, while the appellant and the first respondent were both at Malacca, they entered into another agreement whereby the first respondent transferred his remaining 2½ shares to the defendant on receipt of 18,000 dollars as consideration. In September, 1927 the first respondent instituted a suit against the appellant in India for a declaration that he was entitled to all the original five shares and for accounts and consequential relief, as both his agreements with the appellant were vitiated by fraud and fraudulent concealment. The Trial Court granted the declaration, but the High Court, in appeal held that while the arrangement of July, 1915 was valid, that of January, 1924 was vitiated by fraud and that the appellant was therefore liable to account for 2½ shares and dividends amounting to 35,535 dollars with interest. The High Court also rejected a contention raised by the appellant that the period of his absence from the country could not be taken into account for determining the period of limitation and that the suit was therefore barred by limitation.

On appeal to this Court,

HELD: (i) The defendant had concealed the fact that he had collected 35,535 dollars as dividend on the shares and had the respondent known this, he would not have parted with the shares with all their accrued benefits for 18,000 dollars. The defendant was under a fiduciary obligation to disclose the true state of affairs. The two courts had therefore rightly found that the agreement was vitiated by fraud. [446 F-G]

(ii) In computing the period of limitation prescribed for the suit, "the time during which the defendant has been absent from India" has to be excluded under sec. 13. The words of the section are clear and full effect must be given to its language. The section makes no exception for cases in which the cause of action arose in a foreign country or for cases in which the defendant was in a foreign country at the time of the accrual of the cause of action. [447 F-F]

Atul Kristo Bose v. Lyon & Co., (1887) I.L.R. XIV Cal. 457; and *Mathukanni v. Andappa*, A.I.R. 1955. Mad. 96; referred to and applied.

- A *Ruthinu v. Packiriswami*, A.I.R. 1928 Mad. 1058; and *Subramania Chettiar v. Maruthamuthu*, A.I.R. 1944 Mad. 437 disapproved and overruled.

(iii) On the material on record it was necessary to revise the basis of valuation of the shares and to modify the decree passed by the High Court.

- B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 705 of 1965.

Appeal from the judgment and decree dated November 28, 1958 of the Madras High Court in Appeal No. 756 of 1964.

M. S. K. Sastri and *R. Thiagarajan*, for the appellants.

- C *T. R. Srinivasan* and *R. Kopalakrishnan*, for respondent No. 2.

The Judgment of the Court was delivered by

- Bachawat, J. Subramanian Chettiar was the owner of 5 original shares subsequently represented by 1250 shares in the Chop Leong Watt Hin Rubber Estate in Malacca. On December 9, 1912 Subramanian died leaving behind him his widow and his son the plaintiff Shanmugham. In August 1913 the attorney of Subramanian's widow took out letters of administration to his estate. Subramanian, the defendant and certain others were partners in the P.M.S. Firm at Malacca. On July 16, 1915 while both Shanmugham and the defendant were at Malacca they entered into a compromise agreement which is evidenced by Exhibits A-177 and A-178. Under this compromise they agreed that out of the aforesaid original 5 shares in the Shop Leong Watt Hin Rubber Estate $2\frac{1}{2}$ shares would belong to the P.M.S. Firm then represented by the defendant as the managing partner and the remaining $2\frac{1}{2}$ shares would belong to Shanmugham. Under this compromise the defendant agreed and undertook to recover the 5 shares and to account to Shanmugham for the $2\frac{1}{2}$ shares belonging to him and the income and the dividends arising therefrom. On January 7, 1924 while Shanmugham and the defendant were at Malacca they entered into an agreement which is recorded in Exhibit B-2. Under this agreement Shanmugham transferred his remaining $2\frac{1}{2}$ shares in the Rubber Estate to the defendant on receipt of 18000 dollars as consideration. On September 14, 1927 Shanmugham instituted a suit against the defendant in the court of the Subordinate Judge, Devakottai, asking for a declaration that he was entitled to the original 5 shares in the Rubber Estate, that Exhibits A-177, A-178 and B-2 were void, and for accounts and consequential reliefs. Shanmugham alleged that the transactions of July 16, 1915 and January 7, 1924 were vitiated by fraud, and fraudulent concealment. During the pendency of the suit Shanmugham was adjudicated an insolvent and thereupon the Official Receiver of Ramanathapuram
- L12Sup.C.I/68—14

was added as the 2nd plaintiff. After protracted proceedings which is not necessary to mention now, the Subordinate Judge granted the declarations claimed by Shanmugham and passed a preliminary decree for accounts. The Subordinate Judge accepted the plaintiff's contentions and held that both the transactions of July 16, 1915 and January 7, 1924 were vitiated by fraud and were liable to be set aside. The defendant filed an appeal in the High Court of Madras. During the pendency of the appeal the defendant died and his legal representatives were brought on record. The High Court held that the arrangement dated July 16, 1915 was valid and was not vitiated by fraud. With regard to the arrangement dated January 7, 1924 the High Court agreed with the Trial Court and held that the transaction was vitiated by fraud and that the defendant was liable to account for 2½ shares in the Rubber Estate and dividends amounting to 35535 dollars and 50 cents with interest thereon. The High Court also held that the suit was not barred by limitation. The High Court assessed the value of 2½ shares at 31250 dollars and in modification of the decree passed by the Trial Court passed a final against the defendant for Rs. 2,35,555 and further interest. The present appeal has been preferred by the defendants after obtaining a certificate from the High Court.

Mr. M.S.K. Sastri attacked the finding that the arrangement dated January 7, 1924 was vitiated by fraud. He argued that the High Court failed to take into account the exception to sec. 19 of the Indian Contract Act and that assuming that Shanmugham's consent was procured by fraud, nevertheless the agreement was not voidable as he had the means of discovering the truth with ordinary diligence. There is no substance in this contention. The two courts have concurrently found that the agreement was vitiated by fraud. The defendant concealed from Shanmugham that he had collected 35535 dollars and 50 cents on account of dividend in respect of the shares. Had Shanmugham known that this huge amount had been realised by way of dividend he would not have parted with the shares with all their accrued benefits for the sum of 18000 dollars. The defendant was under a fiduciary obligation to Shanmugham to inform him of the true state of affairs. In the High Court it was not suggested that Shanmugham had the means of discovering the truth with ordinary diligence and it is now too late to raise this contention.

Mr. Sastri next contended that the suit was barred by limitation. The suit is for obtaining relief on the ground of fraud and is governed by Art. 95 of the Indian Limitation Act, 1908. The starting point of limitation is the date when the fraud is known to the party wronged. The fraud was committed on January 7, 1924. The Subordinate Judge found that the fraud was discovered on or about April 16, 1924. We accept this finding.

- A It may be noted that this finding was not challenged in the High Court. The defendant was outside India for several months in 1924 and 1926. The suit was instituted on September 14, 1927. It is common case before us that if the period of the defendant's absence from India is excluded under sec. 13 of the Indian Limitation Act, 1908, the suit is not barred by limitation. Section
- B 13 reads :—

“In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from India and from the territories beyond India under the administration of the Central Government shall be excluded.”

- C It is to be noticed that the agreement dated January 7, 1924 was entered into between Shanmugham and the defendant at Malacca. The cause of action for the suit arose at Malacca and at the time of the accrual of the cause of action the defendant was at Malacca. Mr. Sastri argued that in these circumstances sec. 13 has no application. We are unable to accept this contention.
- D

- E On the date of the filing of the suit the defendant was residing at Kothamangalam within the jurisdiction of the court of the Subordinate Judge, Devakottai. That Court had jurisdiction to entertain and try the suit and the Indian Limitation Act was applicable to the suit though the cause of action may have arisen outside India. In computing the period of limitation prescribed for the suit, “the time during which the defendant has been absent from India” has to be excluded under sec. 13. The words of the section are clear and full effect must be given to its language. The section makes no exception for cases in which the cause of action arose in a foreign country or for cases in which the defendant was in a foreign country at the time of the accrual of the cause of action.
- F In all such cases the time during which the defendant has been absent from India must be excluded in computing the period of limitation.

- G In *Atul Kristo Bose v. Lyon & Co.*⁽¹⁾ the defendants were foreigners and they never came to India on or after the date of the accrual of the cause of action. The Calcutta High Court held that sec. 13 applied and that the suit was not barred by limitation. The Court was not impressed with the argument that according to this construction a defendant who was in England when a cause of action against him accrued, and has remained there ever since might be liable after an indefinite time to be sued in a Calcutta court. In *Mathukanni v. Andappa*⁽²⁾ the plaintiff and the defendant who were residents of Mannargudi in India had gone to
- H

(1) [1887] I.L.R. XIV Cal. 457.

(2) A.I.R. 1955 Madras 96.

Kaula Lampur to earn their livelihood, and while there the defendant executed a promissory note to the plaintiff on November 16, 1921. In 1925 the plaintiff brought a suit on the promissory note in the District Munsif's Court of Mannargudi. The cause of action in the suit arose outside India. A Full Bench of the Madras High Court held that the plaintiff was entitled to the benefit of sec. 13 and in computing the period of limitation he was entitled to exclude the time during which the defendant was absent in Kaula Lampur. We agree with this decision. The Full Bench rightly overruled the earlier decisions in *Rathinu v. Packiriswami*⁽¹⁾ and *Subramania Chettiar v. Maruthamuthu*⁽²⁾. We hold that the suit is not barred by limitation.

Mr. Sastri argued that the suit is bad for non-joinder of the other partners of the P.M.S. Firm. The point was not taken in the courts below. It is not open to the appellant to take this point at this late stage.

The High Court valued 625 shares representing the original 2½ shares in the Rubber Estate at 31250 dollars on the footing that the value of each share on January 7, 1924 was 50 dollars. There is force in Counsel's criticism that this valuation is erroneous. The Trial Court did not record any finding as to the value. The High Court said that in 1930 the value of the shares was 31250 dollars, and as there was a boom in the post-war period and a slump had set in since 1921, the value on January 7, 1924 would be 31250 dollars. The parties relied on the testimony of Tan Siew Giab. He proved Exhibit A-74, a list of transfers of shares in the Rubber Estate between June 29, 1920 and September 14, 1931. From the list it appears that the price per share on June 29, 1920 was between 23 and 20 dollars; on March 29, 1923, 20 dollars; on September 5, 1923, 10 dollars; on April 11, 1924, 20 dollars; on August 10, 1925, 10 dollars and on January 22, 1930 and February 28, 1930, 50 dollars. The price of the shares went up in 1930. But it is common case that the shares should be valued as on January 7, 1924. On the material on the record we assess the value of a share on that date to be 20 dollars. The value of 625 shares would therefore be 12500 dollars. Having regard to this finding the decree passed by the High Court requires modification.

The High Court held that the defendants were liable to pay (1) 35535 dollars and 50 cents on account of dividend, (2) interest thereon at 6% per annum from the date of their receipt till November 28, 1958, (3) 10250 dollars after deducting from the value of the shares amounting to 31250 dollars the sum of 18000 dollars received by the plaintiff on January 7, 1924 and another sum of 3000 dollars given up by the plaintiff. Having regard to our finding the defendants are liable to be debited under

(1) A.I.R. 1928 Mad. 1058.

(2) A.I.R. 1944 Mad. 437.

- A** the last head with 12500 dollars and are entitled to be credited with 18000 dollars and 3000 dollars. Thus under the last head the defendants are entitled to a net credit of 8500 dollars. The result is that the defendants are liable to pay 35535 dollars 50 cents minus 8500 dollars, that is to say, 27035 dollars 50 cents and interest thereon at 6% per annum. From the material on
- B** the record it is not possible to find out the precise dates of receipt of the dividends. Counsel on both sides are agreed that we should allow interest on 27035 dollars and 50 cents at 6% per annum from January 7, 1924 upto November 28, 1958 and further interest at 6% per annum from November 28, 1958 until payment. The agreed rate of exchange is Rs. 156 per 100 dollars.
- C** Counsel on both sides have worked out the figures and on that basis the defendants are liable to pay Rs. 42174 and 60 paises for principal and Rs. 88292 and 49 paises for interest upto November 28, 1958 aggregating to Rs. 130467 and interest on Rs. 42174 and 60 paises at 6% per annum from November 28, 1958 until payment.
- D** The appeal is allowed in part. The decree passed by the High Court is reduced to Rs. 130467 with interest at 6% per annum on Rs. 42174 and 60 paises from November 28, 1958 until payment. Directions II, III, IV, V and VI incorporated in the High Court decree are affirmed. The parties will pay and bear their own costs in this Court. The second respondent will be at liberty to retain his costs out of the estate of the first respondent in his
- E** hand.

R.K.P.S.

Appeal allowed in part.