

(1912) 08 CAL CK 0050

Calcutta High Court

Case No: None

Kumeda Charan Bala and  
Another

APPELLANT

Vs

Asuthosh Chattopadhyaya

RESPONDENT

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**Date of Decision:** Aug. 1, 1912**Acts Referred:**

- Contract Act, 1872 - Section 213
- Limitation Act, 1908 - Article 89

**Citation:** 16 Ind. Cas. 742**Hon'ble Judges:** Holmwood, J; Ashutosh Mookerjee, J**Bench:** Division Bench

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**Judgement**

1. This appeal is directed against what purports to be the preliminary-decree in a suit for accounts by a principal against the representative of his deceased agent. The case for the plaintiff respondent was that one Chandra Mohan Bala acted as his agent for collection of rents and realisation of advances from tenants from 1397 to 1901 that upon the death of Chandra Mohan, he was succeeded by his son, Gopinath Bala, as agent, who acted in that capacity from 1902 up to the time of his death in 1908, and, that finally, upon the death of Gopinath, he was succeeded as agent by his infant son the first defendant, Kumeda Charan Bala in 1909. The plaintiff asserted that though some account papers were delivered to him, they were neither explained nor supported by vouchers, and that he was consequently entitled to have the accounts taken for the entire period of agency from 1897 to 1901. The claim was resisted by two infant sons of Gopinath Bala represented by their mother as guardian ad litem. They denied that their father or grandfather had ever acted as agent or was liable to render accounts; they farther repudiated the suggestion that the first defendant had at any time acted or was competent to act as agent. The Subordinate Judge in a judgment, remarkable for wait of lucidity and precision, has overruled all the contentions of the defendants and made a decree in

these terms: "That a preliminary decree be passed in this suit and that the defendant do within fourteen days from this date submit the accounts, if there be any." The successor of the Subordinate Judge has, however, supplemented this decree by more specific instructions to the Commissioner appointed to take the accounts. On the present appeal by the defendants, it has been argued that the suit as framed is not maintainable, that the infant sons of Gopinath Bala are not liable to render accounts in respect of the agency of their father or of their grandfather and that, in any event, preliminary points in dispute should have been determined by the Court before inquiry into the accounts was entrusted to a Commissioner. In our opinion, the decree made by the Subordinate Judge is manifestly erroneous and cannot be supported.

2. It cannot be, nor, indeed, has it been disputed, that if there was an agency either on the part of Gopinath Bala or of Chandra Mohan Bala, each was liable to render an account. Section 213 of the Indian Contract Act provides that an agent is bound to render proper accounts to his principal on demand; this duty will be enforced by following in the hands of the agent properties representing the money for which he ought to have accounted, and the liability to account is irrespective of any express contract to that effect. In so far, however, as the alleged agency of Chandra Mohan Bala is concerned, the claim, even if it be assumed to have been enforceable against his representatives, is plainly barred by limitation. If Article 89 of the second Schedule of the Indian Limitation Act, 1908, which provides that a suit of this description must be brought against the agent within three years from the termination of the agency or from the date of refusal to render accounts, had been applicable, the claim would have been obviously barred, as the agency of Chandra Mohan Bala, if any, terminated in May 1901, and the present action was not commenced till the 4th January 1910. Article 89, however, is not applicable as the suit is brought, not against the agent but against his representatives *Seth Chand Mal v. Kalian Mal* 96 P.R. 1886 but if we assume with *Mr. Justice Wilson Lawless v. Calcutta Landing and Shipping Co.* 7 C. 627 that a fresh cause of action accrued to the plaintiff, upon the death of the agent, against the representative of the latter and then apply the three years' rule in Article 115 *Harender Kishore Singh v. Administrator General of Bengal* 12 C. 357 or the six years rule in Article 120 *Bindraban v. Jamuna* 25 A. 55 : A.W.N.(1902) 191 the claim is equally barred. In respect of the period covered by the Agency of Chandra Mohan Bala, the claim is thus obviously barred. In so far as Gopi Nath Bala is concerned, there is no distinct finding in the judgment as to the scope and limit of his agency, if any; but we shall assume for a moment that he was an agent for the plaintiff. As he died on the 4th February 1903, the suit is in time if the claim is enforceable as against his sons. The question thus arises, whether the liability to render an account as defined by Section 213 of the Indian Contract Act is enforceable against the legal representatives of the agent.

3. On behalf of the appellants it has been argued that the liability is personal and the legal representatives of the deceased agent cannot be required to render accounts in the same sense in which the agent himself might have been called upon to do. A similar question appears to have been raised in, the case of *Manmothnath Bose v. Basanto Kumar Bose* 22 A. 332 where it was ruled that though a guardian of a ward was liable to render accounts of his guardianship, yet after his death, his representatives could not be called upon to render an account in the same manner. The same view was adopted in the cases of *Rameshur Tewari v. Kishun Kumar A.W.N.(1882) 6* and *Pritam Singh v. Mubarik Singh* 78 P.L.R. 1911 : 74 P.W.R. 1911 : 9 Ind. Cas. 591. This position may plainly be defended on principle. No doubt, as stated in *Shib Chandra Roy v. Chandra Narain Mukerjee* 32 C. 719 at p. 724 : 1 C.L.J. 232 the first duty of an agent is to be constantly ready with his accounts and to be always prepared to explain them and support them by vouchers. But it does not follow that his representatives may be required to discharge this duty, to explain matters of which they have no personal knowledge, and to assist the plaintiff in the investigation of the management of his estate of which they are wholly ignorant; any other decision would place the representatives of the deceased agent at an unfair disadvantage; they cannot be called on to do that which does not lie in their power, and should not be required to attempt the impossible. We are not unmindful that Sir Ernest Trevelyan in his work on *Minors* (1906, p. 214) broadly formulates the rule that the Court may require the representative of a guardian, if he is dead, to deliver property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. But even if we assume that this general statement, in support of which no authority is cited, does not require to be qualified, it does not bear out the contention that the representative may be called upon to render an account in the same sense as the agent himself Nor is the form in *Seton on Decrees* (Volume I, page 114) of any real assistance to the plaintiff as it refers to the continuation of a suit for account against an agent, after the preliminary decree has been made. Article 89 of the second Schedule of the Limitation Act" also, does not, even by implication, indicate that such suit can be maintained against the representative of the agent; besides, as their Lordships of the Judicial Committee observed in *Hari Nath v. Mothurmohun* 20 I.A. 183 : 21 C. 8 and *Khunni Lal v. Gobind Krishna* 38 I.A. 87 at p. 88 : 15 C.W.N. 545 : 8 A.L.J. 552 : 13 C.L.J. 575 : 13 Bom. L.R. 427 : 10 M.L.T. 25 : 2 M.W.N. 432 : 21 M.L.J. 645 : 33 A. 356 : 10 Ind. Cas. 477 "the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar, after a certain period to a suit to enforce an existing right". On the other hand, the view taken by Mr. Justice Wilson in *Lawless v. Calcutta Landing and Shipping Co.* 7 C. 627 that upon the death of the agent a fresh right accrues to the principal against the representative of the agent, supports the position that the right and remedy against the representative are not identical with those against the agent. What, then, is the nature of the remedy of the principal against the representative of his deceased agent? It does not follow that the estate of the agent who has not rendered an account escapes all liability in the

hands of the representatives. The remedy of the principal in a case of this description is to sue the representative for any loss he may have suffered by reason of the negligence or misconduct, the misfeasance or malfeasance of his agent; in other words, the suit is not one for accounts strictly so called, but a suit for money payable to the principal by the representatives of the agent out of the assets T in their hands. This view is supported by the decision in *Nujuf Ali v. Patterson* 2 N.W.P.H.C.R. 103 which was a suit brought against the representative of an agent for recovery of money and for delivery of papers and documents belonging to his principal. The contention that the liability was personal and had expired on the death of the agent was overruled. It was held that if the agent had misappropriated the money, the representative was bound to indemnify the principal to the extent of the estate that had come into his hands; as by the alleged wrong of the agent, property was acquired which benefited the deceased, the right of action did not expire on the death of the wrongdoer; the claim for papers and documents also survived; the plaintiffs did not seek to obtain damages for their detention; they sued for delivery of the documents and this claim could not expire with the deceased. This view accords with the decision in *Concha v. Murietta* (1889) 40 Ch. D. 543 : 60 L.T. 798 where a claim was sought to be enforced on behalf of a ward against the representatives of his deceased guardian. It was contended that the claim could not be enforced in view of the maxim of English Law "Actio personalis moritur cum personu." Lord Justice Cotton observed, in answer to this argument, that, although no action for a tort could be revived or commenced against the representatives of the person who committed it, yet the case was different where the act was not a mere tort but was a breach of a quasi contract, where the claim was founded on breach of a fiduciary relation or on failure to perform a duty. In support of this view, reference was made to the decision of Bowen 1 T in *Phillips v. Homfray* 24 Ch. D. 439 : 52 L.J. Ch. 833 : 49 L.T. 5 : 32 W.R. 6 and the conclusion was reached that the plaintiff was entitled to recover the loss he had suffered on account of the breach of obligation of his guardian, by following up his estate. In the case before us therefore, although we hold that the suit has not been properly framed, yet the claim is maintainable for recovery of money misappropriated by the deceased if he proved to have been the agent of the plaintiff and also for recovery of damages for the loss suffered by the plaintiff by reason of his negligence or misconduct I 1h?Lin| difference in substance will be that the burden will lie Upon the Plaintiff has attached to his plaint a detailed statement of the sums he was entitled to receive from his agent and sums he did actually receive. The suit may, therefore, be deemed as one for recovery of the balance and the onus will be upon the plaintiff to establish with regard to each specific sum that he is entitled to recover it.

4. Under these circumstances, we hold that the decree of the Subordinate Judge must be discharged and the case remitted to him will be as follows: first, was Gopi Nath Bala the agent of the plaintiff? If so what was the precise scope and, limit of that agency; and what was the period during which he served as agent? Secondly,

was any rent, if so, how much, barred by the negligence of the agent? Thirdly, what was the stock of paddy that came into the hands of the agent from the time when the paddy business was started and what was the amount of paddy lost by the negligence the agent? Fourthly, did the plaintiff allow any remission of paddy as alleged by the defendant? If so, to what extent? Fifthly, what were the bonds on account of paddy that came into the hands of the agent? Was the claim upon any of these bonds barred by his negligence? Sixthly, what is the extent of the estate of the deceased agent that has come into the hands of the defendants? The burden of proof, as we have stated, will lie upon the plaintiff. The inquiry will be held in the first instance by the Subordinate Judge himself and the matter will be referred to a Commissioner only if the Subordinate Judge finds that the inquiry is likely to be so protracted that it cannot be conveniently conducted in Court. If reference is made to a Commissioner, the items to which the inquiry is limited must be specified in the order. We further direct that the plaint be amended in the manner following: in the First prayer clause, the following words will be struck out: "That the decree may be passed against the defendants for getting accounts from the defendants as mentioned in para. 7 of the plaint" and the prayer Clause (ga) will be expunged. The suit will then stand as one for recovery of a specified sum of money, i.e., Rs. 6,372, and the plaintiff will be strictly confined to the items specified in the schedule to the plaint. As the defendants have preferred a cross-claim, the question whether the plaintiff has been over-paid and is bound to refund the excess will also be tried out.

5. The appellants will have their costs of this appeal. We assess the hearing fee at five gold mohurs.