

(1935) 08 CAL CK 0034
In the Calcutta High Court

Bikram Kishore Manikya Bahadur

APPELLANT

Vs

Jadab Chandra Choudhury and Others

RESPONDENT

Date of Decision : 27-08-1935

Acts Referred:

Limitation Act, 1963 — Article 89

Citation : AIR 1935 Cal 817

Judgement

1. This appeal has been preferred by the plaintiff from a preliminary decree in a suit for accounts. During the pendency of the appeal a final decree in the suit has been passed. The facts necessary to be stated are the following: Defendant 1 was a mukhtear in the service of the plaintiff's father Maharaja Birendra Kishore Manikya Bahadur, the Ruling Chief of Tippera. He was appointed as such mukhtear on 22nd December 1914 and for this service he executed a kabuliat on 24th December 1916. In accordance with an order made on 22nd December 1914, about the time when he was appointed, he furnished two sureties defendants 4 and 5, who executed a surety-bond on 18th April 1919. The Maharaja died on 13th August 1923. Thereafter the plaintiff, Maharaja Bir Bikram Kishore Manikya Bahadur succeeded to the Raj and on 31st March 1926 executed an Ammuktearnama in favour of defendant 1 authorising him to withdraw money and file petitions of satisfaction and also giving him certain other powers. On 23rd May 1926 a fresh kabuliat was executed by defendant 1 in favour of the plaintiff in respect of his services, and as on the previous occasion when he had executed a similar kabuliat, this time he furnished two other sureties, namely defendants 2 and 3, who on the same date executed a fresh surety, bond. Defendant 1 continued in service till 5th September 1927 when he was suspended and he was eventually dismissed on 23rd April 1928.

2. On 21st March 1929 a notice of demand appears to have been served on defendant 1 calling upon him to pay up the amounts due from him to the State, and on his failure to comply with the said notice the present suit was instituted on 30th June 1930. The suit was framed as a suit for accounts, and in the schedules to the plaint, sever in number, various items set out, aggregating to a

sum of Rs. 10,000 odd in respect of which it was said that defendant 1 had either committed defalcation or was liable to make good the loss which had been caused to the State. In Sch. Ka were set out a number of items representing dues under decrees which defendant 1 was alleged to have realised out of Court but had not paid to the State. In Sch. Kha items were set out in respect of decretal dues which defendant 1 was alleged to have taken out of Court but had not credited into the accounts. In Sch. Ga a number of items were set out, in respect of which it was said that by reason of the default on the part of defendant 1 execution of decrees obtained with regard to the amounts, had become barred by lapse of time. In Sch. Gha a number of items were set out in respect of which execution petitions were dismissed for default or for want of Tadbir by defendant 1. And in Sch. Uma a few rupees were mentioned as having been taken either in cash or in Court-fees and misappropriated by defendant 1. In the plaint it was also stated that after the demand had been made on defendant 1 for putting in the total amount of Rs. 10,000 odd which had been found due from him on such accounts as were made, defendant 1 did not comply with the demand and on that a fresh loss to the extent of Rs. 1,000 odd was caused to the State. On these and similar other allegations the suit was laid, Written statements were put in by defendants 1, 2, 3, 4 and 5. Having regard to the contentions that have been put forward in the appeal, it is not necessary to refer to the contents of the written statement. It is sufficient to say that on 22nd August 1932, the Subordinate Judge made a preliminary decree in the suit.

3. The judgment in accordance with which this decree was made is anything but satisfactory. In it various findings of fact which were necessary to be arrived at in connection with the case were made, but they are scattered all over the judgment and it is difficult to form a clear idea as to what exactly the learned Judge intended to find. Indeed, with regard to some of the points, it may be said that the findings are not possible of reconciliation. In the decree that was drawn up, there was no reference whatsoever to the liability of the sureties, namely defendants 2, 3, 4 and 5 although in the final decree that had been made in the suit such adjudication on the one hand and these defendants on the other had to be relied upon. Having regard to these facts, the case had presented some difficulties, but thanks to the arguments that have been addressed to us on behalf of the parties who have appeared before us, the position in the end seemed to us to be perfectly clear. In the appeal only defendants 2 and 3 have appeared as respondents.

4. The first question that has arisen for consideration in the case is about the period for which defendant 1 is liable for Accounts. The Subordinate Judge has held that he is liable for the period commencing from 13th August 1923 (the date of the death of the plaintiff's father) to 23rd April 1928 (the date of the dismissal of defendant 1): in other words that the said defendant is not liable for the period of his service during the lifetime of the plaintiff's father. This finding has been arrived at by the learned Judge under Issue 5 which was framed in this case. For reasons which would be found recorded by the learned judge under

that issue in his judgment he came to hold that defendant 1 was not liable for the period commencing from the date of his first appointment and ending with the point of time at which the plaintiff's father died. This conclusion of the learned Judge has been challenged on behalf of the appellant, the appellant's contention being that defendant 1 is liable for the entire period of his service commencing from 22nd December 1914, the date of his appointment and ending with 23rd April 1928, the date on which he was dismissed. In order to establish this contention two positions have been taken up on behalf of appellant. The first is that Article 89, Lim. Act, which presumably is the article which the learned Judge has applied to the case, is not really applicable but that the suit should be treated as governed by Article 90. Article 90 is worded thus:

Other suits by principals against agents for neglect or misconduct-three years when the neglect or misconduct becomes known to the plaintiff.

5. The argument, so far as this contention is concerned, is that the plaintiff did not stand in need of relief in the shape of a decree for accounts for the purpose of recovering the amounts which were due from defendant 1 to him and also that the misconduct or neglect on the part of defendant 1 which formed the allegations on which the suit was based came to light and became known to the plaintiff well within three years from the date on which the suit was instituted. It is upon these arguments that it has been contended that Article 90 is the correct article to apply to the case, and in support of this contention reliance has been placed upon the decision in *A.C. Mukherjee v. Municipal Board, Benares 1924 All 467*. That was a case in which the plaintiff's claim was for damages due to a loss sustained by him as principal, such loss being directly traceable to disregard on the part of the defendant as agent of directions issued to him regarding the conduct of the business which the defendant was carrying on as such agent. We are of opinion that the case aforesaid is easily distinguishable. In that case there was no question of any accounts being rendered. Here, in the present case, even a cursory examination of the plaint would show that although different items were mentioned in the different schedules to the plaint as forming items with regard to which the plaintiff asked for relief, the foundation of the entire claim was a claim for accounts. The first and the second prayers of the plaint, which are the only substantial prayers therein, are both based upon the liability of defendant 1 to render accounts and in those prayers the prayer was that the relief asked for should be awarded to the plaintiff on the footing of the accounts that were to be rendered. It is not permissible to the plaintiff to alter the frame of the suit in the way in which he desires to do at the present stage in order to establish that not Article 89 but Article 90 is the article applicable.

6. It has been next argued that an "irrevocable agency"-I am quoting the words of the learned Advocate who has appeared for the appellant-was created by the terms of the demand such as are evidenced by the kabuliat which was executed by defendant 1 in favour of the plaintiff's father, and that, in point of fact, that kabuliat carefully read would show that defendant 1 was holding service really

under the State and that the death of the plaintiff's father would not terminate the agency which had been created in favour of defendant 1 by his first appointment. With regard to this matter, it is quite true that some of the terms of the said kabuliati would indicate that the appointment that was being taken by defendant 1 was an appointment under the State of which the plaintiff's father was the proprietor. In so far, therefore, as the appointment was concerned defendant 1 cannot plead that he was not an officer of the State of which the plaintiff's father was the proprietor but that he was merely holding service under the plaintiff's father in this personal capacity. This question however is immaterial for it was an agency that was created, an agency in respect of which plaintiff's father was the principal and defendant 1 was the agent. That being the position, it can not be disputed that the agency that was created by the contract between the parties was an agency which could last during the lifetime of the plaintiff's father. With regard to this matter the most authoritative decision to which reference may be made is the decision of the Judicial Committee in *Nobin Chandra v. Chandra Madhab* 1916 PC 148. That was a case in which an agent was appointed by a certain person and thereafter that person died and the agent continued to hold service under the sons of the person who had made the appointment and had died. Their Lordships of the Judicial Committee held that the agency that was created, terminated at the death of the principal and that with regard to that period a suit for accounts would lie until the expiry of a period of three years from that date and that so far as the service of the agent after the death of the said principal was concerned it should be regarded as an agency held under the heirs of the said principal. That being the position, there can be no doubt that the two periods should have to be separately considered, and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which that agency terminated, that suit for accounts must be regarded as barred. That this view has been taken of a matter like this in this Court in several cases cannot be disputed. As for instance, reference may be made to the case of *Mohendra Nath Ghose v. Jadu Nath Mullik* (1909) 9 CLJ 107. There the defendant was a gomasta of the plaintiff's father and after his death in 1901, the plaintiff sued the defendant for accounts. It was held that the suit for accounts up to the time of the death of the plaintiff's father was barred by Article 89 having been instituted more than three years after the said date. The learned Judges observed thus:

We however entertain no manner of doubt that Article 89 is the appropriate article and that limitation began to run from the date of the plaintiff's father's death. Section 201, Contract Act, expressly says that an agency is terminated by either the principal or the agent dying, and the facts are that the plaintiff's father having died in 1908 that particular agency terminated by that event.

7. This view has also been taken in a more recent case, namely the case of *Sarashibala Dasi v. Chuni Lal Ghose* 1922 Cal 53, in which reference was made to the decision of the Judicial Committee to which we have already referred. We are aware that in a decision of this Court in *Kumeda Charan Bala v. Asutosh*

Chattopadhyaya (1913) 17 CWN 5, which however was a case in which the agent having died, a suit was instituted by the principal for accounts against the heirs of the agent, one of the propositions that came up for consideration was whether Article 89 having regard to its scope can be held to apply to a case where there is no relationship of principal and agent as between the parties, but that one of the parties was a representative of such principal or agent. The learned Judges in that case were of opinion that Article 89 would not apply to such a case but some other article of the Limitation Act would be applicable. The reasons that were given in that case have been considered in a decision of the Madras High Court in Parthasarathy Appa Rao v. Subba Rao 1927 Mad 157, in which a number of decisions bearing upon this point were considered and we are in agreement with what has been observed in that case, namely that the omission of any mention of legal representatives in the words under "Description of suit" in Article 89 does not mean that the article is not intended to apply to a suit against the legal representatives. We are of opinion that having regard to the decisions to which we have referred, Article 89 is the proper article to apply to the suit and that the learned Judge in holding that the accounts in respect of the period prior to the death of the plaintiff's father were barred has taken the right view on the question of limitation which arose in this case.

8. The second question which arose for consideration is about the period for which the defendants 4 and 5 would be liable as sureties. The learned Judge has held that these defendants would be liable for the period commencing with 13th August 1923, the date of the death of the plaintiff's father and up to 31st March 1926, the date on which the Am-muktearnama was executed. In other words, he has held that for the period during the life-time of the plaintiff's father the claim for accounts as against defendant 1 being barred, these sureties, defendants 4 and 5, are not also liable for that period and the learned Judge has also held that because on 31st March 1926 an Ammuktearnama was executed by the plaintiff in favour of defendant 1 and that Ammuktearnama enabled defendant 1 to do such acts as the withdrawal of moneys, the filing of petitions for satisfaction and soon, these defendants are not liable for what defendant 1 may have done in connexion with such works and therefore these two defendants will only be liable for the period aforementioned. We are of opinion that the learned Judge was entirely wrong in the view that he has taken in respect of both these matters. The liability of defendants 4 and 5 has to be ascertained upon the terms that are contained in the surety-bond which they executed. That surety bond states as follows:

If upon adjustment of accounts any money is found due to the State or if any kind of claim or decretal dues be barred by limitation or if any suit be lost on account of the laches of the Mukhtear, or if any money of any kind be found due to your State on account of any wrongful act such as defalcation, etc., on his part, and if the Mukhtear does not pay the said sum amicably within three months, you will be entitled to realise your entire dues from us.

9. The cause of action upon this stipulation would arise when defendant 1 served with a notice of demand in respect of moneys due from him on various accounts would fail to comply with the demand, and not before. It is difficult to see how any other view can be taken in respect of the liability of defendants 4 and 5. That being the position, there can be no question that no part of the claim which the plaintiff may have established as against defendant 1 can be regarded as barred as against defendant 4 and 5. It is quite true that having regard to the provisions of Article 89, Lim. Act, it will not be possible for the plaintiff to realise a part of his claim, namely, the part which relates to the period antecedent to the date when he came to take the State as heir to his father, but that fact is immaterial, having regard to the terms of the document to which we have just referred. We are therefore of opinion that the plaintiff would be entitled to enforce his rights under the surety bond in respect of the amounts which defendant 1 may be liable for, for the entire period commencing from the date of his appointment and ending with the date of his dismissal.

10. The third question which arises for consideration is the question of the liability of defendants 2 and 3. The learned Judge has held that the said defendants are liable for the period commencing from 13th August 1923, that is to say the date of the plaintiff's father's death, up to 23rd April 1928, the date of the dismissal of defendant 1. The contention of the appellant is that this conclusion of the learned Judge is not right and that the said defendants should be held liable for the entire period of the service of defendant 1 just as defendants 4 and are liable. We have read the surety bond which was executed by defendants 2 and 3 and it cannot be denied that it is upon the terms of that bond that the liability of the said defendants will have to be determined. It appears that in that bond reference was first made to the fact that defendant 1 had been serving as a Muktear after being appointed to that post in accordance with an order passed on 22nd December 1914. Now, this reference was to the first appointment of defendant 1, namely the appointment that he came to hold under the father of the plaintiff. Then it was stated in the surety bond that the said sureties would remain liable for the acts done by the said Muktear since his appointment and up-to-date, as well as for his acts which will be done by him in future in accordance with the terms set out in the kabuliat which was executed by defendant 1 on 9th Jaistha 1336, that, is to say, 23rd May 1926. It should be remembered that this surety bond was also executed on 9th Jaistha 1336 corresponding to 23rd May 1926. The terms recited above can only mean that not only would the sureties remain liable for the period of service of defendant 1 during his second appointment but also for the period which had preceded. That being the position, the liability of these two defendants also should be held to extend from the date on which defendant 1 was first appointed and right up to the point of time when he was dismissed. The considerations which weigh with us in holding that defendants 4 and 5 were similarly liable do, in our opinion, apply with equal force to the case of defendants 2 and 3. Anything said by the learned Judge to the contrary must be regarded as overruled.

11. Then comes up for consideration another question, and that really is a question which has got to be very carefully considered. The learned Judge has held that all these four defendants are jointly and severally liable for a Sum of Rupees 1,000 and no more. Though there are certain passages, at least one passage in the judgment of the learned Judge which indicates also a contrary view, it seems to us fairly clear that what the learned Judge intended to find was that it was for an aggregate sum of Rs. 1,000 and no more, that all these defendants will be jointly and severally liable. On behalf of the appellant, on the other hand it has been contended that it should be held, that all these defendants should be jointly and severally liable for the entire amount which would be found due from defendant 1 for the entire period of his service in the State. The question is as to whether either of these two views and if so which is correct and if not what is the correct view to take of the situation.

12. It will appear from the words used in the two surety bonds that so far as the bond executed by defendants 4 and 5 are concerned that bond opens with the words that the sureties who were standing sureties were doing so in accordance with an order dated 22nd December 1914, and in referring to that order it was stated that immovable properties of the value of Rs. 1,000 or personal surety for the said sum had been ordered to be furnished as a guarantee for discharging the duties of the Ammuktear; and later on in the same document it was stated that if upon adjustment of accounts money is found due from defendant 1 and the latter does not on demand pay it up, the plaintiff's father would be entitled to realise his entire dues from the sureties; and again in another part of the document it is stated that the sureties would remain responsible for the acts which defendant 1 might do in contravention of the terms of the kabuliat which he had filed and if in consequence thereof any injury or loss is caused to the State. If reference is made to the other surety bond, namely the one which was executed by defendants 2 and 3 in favour of the plaintiff, it will be found that first of all the appointment of defendant 1 as Muktear is referred to and the order of 22nd December 1914 is also referred to and then it is stated that immovable properties of the value of Rs. 1,000 on personal liability for the said sum had been ordered to be furnished as a guarantee for discharging the duties of the Muktear and so on and thereafter it was said thus: "We of our own accord and in our personal capacity", etc. This latter expression is not a happy translation of the original which really means for themselves stand surety for him (that is to say, defendant 1) for the said sum of Rs. 1,000. Thereafter, follow other terms and conditions which taken together would indicate that the intention of the parties was that the sureties would remain liable for the entire amount that may be found due from defendant 1 just as was provided for by the terms of the other surety bond. The question is what in these circumstances should be held to be the meaning and intention of the parties with regard to the liabilities of the two sets of sureties. We have been referred to a principle of construction which has been followed in authoritative decisions, This principle of construction was laid down by Lord Esher, M.R. in *Ex parte Dawes In re Moon* (1886) 17 QBD 275

in these words:

If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

13. It should be remembered, however, that this case was one in which a deed of composition was being construed. It is well known that the principles of construction so far as surety bonds are concerned are somewhat different from the principles which should be adopted for construing any other documents. A surety in the eye of the law is a favoured debtor and we shall presently refer to the well-recognised cannon of construction so far as surety bonds are concerned, but in the meantime we must refer to the other two cases which have been brought to our notice in support of the construction which the appellant has advanced. One of these cases is *Halliday v. Overton* (1852) 14 Beav 467 in which it was held that the plain effect of the operative part of the deed cannot be cut down by the recitals. The case, however, was one in which a settlement deed had to be construed. The third case is *Ingleby v. Swift* (1833) 10 Bing 84. That was a case of a bond executed by certain persons. On the facts it was a case converse to the present one. There a bond had been executed by the defendants for a sum of ₹1000 and in the body of the bond it has been stated that the obligor had been required to furnish two sureties under the penalty of ₹500, and on the strength of this last mentioned recital it was argued that although the bond was for a sum of ₹1000 the fact that two sureties with penalties of ₹500 each had been called for it should be held that the recitals are contrary to the operative part and therefore the bond should be taken as a bond executed for ₹500 only and not ₹1000. The learned Judges went into this matter and held that the mere fact that in the recitals the amount for which sureties had been called for had been mentioned would not mean that after such requisition had been made the parties had not; changed their minds, or, in other words, that it was not possible for the obligor to execute a bond for ₹1000. And having regard to the clear terms of the operative portion, the learned Judges were unable to hold that the mere fact that sureties had been asked for ₹500 would counteract the operative part which was plain and clear and stated that the bond was taken for a debt of ₹1000. The true principle with regard to construction of surety bonds appears to be this that

the operative part of a guarantee is liable to be controlled by the recitals at least where the latter are plainly inconsistent therewith, but not otherwise, though it seems a covenant of indemnity unlike a release or guarantee, is not to be restricted by its recitals see *Halsbury's Laws of England* Vol. 15, Article 908.

14. Having regard to the fact that the recitals plainly indicated that the sureties had come to execute these bonds on the requisition which the principal had made, calling upon the agent to furnish the sureties who would remain liable to

the extent of Rs. 1,000 and no other amount being mentioned in the bonds but only a general statement about liability for the entire amount for which defendant 1 would be found liable, and having regard also to the fact that in the latter bond, though not in the former a distinct statement is to be found limiting the liability of the sureties to Rs. 1,000 only and it not being apparent that two different kinds of liability were contemplated and reading the two bonds in their entirety we think it should be held that the intention of the parties was that the executants would remain liable for each bond up to the extent of Rs. 1,000 and no more.

15. We have been asked on behalf of defendants 2 and 3 to hold that though there were two bonds executed, the learned Judge's view should be supported on the footing that it was only Rs. 1,000 that was sought to be guaranteed by these two bonds. We are unable to accept this contention either and for the simple reason that there is nothing to show that the second bond, the one that was executed by defendants 2 and 3, was being taken in substitution for the bond which defendants 4 and 5 had previously executed and which continued in force and was to continue in force right up to the time when the appellant's service in the State terminated. We are of opinion therefore that neither the view taken by the learned Judge nor the contention urged on behalf of the parties before us can be accepted on that it should be held that the two sets of sureties were liable, each to the extent of Rs. 1,000 and no more. That is all that we have to say in connexion with the contentions that have been advanced in this appeal.

16. The result, in our opinion, is that the decree from which the appeal has been preferred should be modified and in lieu of that decree it should be ordered that accounts be taken of the work of defendant 1 for the period commencing from 13th August 1923, the date of the plaintiff's father's death, up to 23rd April 1928, the date of the dismissal of defendant 1, the said defendant being held liable to render accounts for the said period; and that defendants 2 and 3 and defendants 4 and 5 be declared liable for the period commencing from 22nd December 1914, the date of defendant 1's appointment as Mukhtear to 23rd April 1928, the date of defendant 1's dismissal but that such liability in respect of each of the two sets of defendants above-named would be joint and several liability for Rs. 1,000 and no more. If such accounting as has already been had in respect of the liability of defendant 1 after the preliminary decree passed in this suit by the Court below has disclosed a liability of defendant 1 which would be sufficient to cover the liabilities of these two sets of defendants it will not be necessary to have a fresh accounting or any further accounting in respect of the period antecedent to the date of the death of the plaintiff's father.

17. But otherwise a further accounting or fresh accounting in respect of that period will also have to be made. The order as to costs made by the Court below in the decree appealed from will stand. On the basis of the conclusions which we have recorded as above a final decree in accordance will have to be made by the Court below. It is superfluous to state that the preliminary decree which the

Court below made having been varied by this Court in this way the final decree that has also been made is hereby set aside. As regards the costs and the appeal the appellant will be entitled to his costs from all the respondents, hearing-fee in the appeal being assessed at five gold mohurs.