

(1938) 05 CAL CK 0014
In the Calcutta High Court

Biraj Mohan Ghose and Others	Vs	APPELLANT
Abani Kanta Ghose and Others		RESPONDENT

Date of Decision : 27-05-1938

Acts Referred:

Trusts Act, 1882 — Section 94

Citation : AIR 1938 Cal 610

Hon'ble Judges : Nasim Ali, J;Henderson, J

Bench : Full Bench

Judgement

Nasim Ali, J.—This is an appeal against a preliminary decree for accounts passed by the Fourth Court of the Subordinate Judge, Dacca in a suit for partition and accounts. In the suit, the plaintiff claimed accounts-from defendant 1, his share of the rent and profits of the properties mentioned in Schedule Ga of the plaint hereinafter referred to as Bogi, on the ground that the collection of the rent and profits of the said properties-was being made under the management and control of defendant 1. The relation ship of the parties to the suit is shown in the following genealogy:

SAMBHU |
 | | |
 | Haris Banga Mohini Abhoy | | | Akhoy
 Sashi | | | | | | | | Bepin Benod
 Joges Dines Prithis | Deft. 1 Deft. 2 Deft. 7 Deft. 9 Deft. 8. | | |
 | | | | Deft. 1 Ka Deft. 1 Kha Deft. 1Ga | |
 | | | |
 Kumudini Abani Nishi Naren Brojen | Pltff. Deft. 3 Deft. 4 Deft. 5 Robin, Deft. 6

2. Bogi was acquired by Kumudini and defendant 1 for the benefit of the two branches of the family. The plaintiff, defendants 3 to 5 and defendant 6, are owners of eight annas share of the property while defendants 1 and 2 and 7 to 9 are the owners of the remaining eight annas share. Defendant 1 died during the pendency of the suit and his sons, defendants 1 Ka to 1 Ga, were substituted in

his place. Before his death defendant 1 filed a written statement. His defence in substance was as follows : The collection of the rent and profits was entrusted to a joint Tahsildar named Srish Chandra Mitra with the consent of all the cosharers up to Chaitra 1330 B. S. After his death Dharanidhar Sen was appointed to collect eight annas share of the rent and profits belonging to the plaintiff and his brothers for the year 1331B. S. Thereafter the plaintiff and his brothers had been making collection of their eight annas share, through their Tahsildar and defendant 1 used to make collections of the remaining eight annas share of defendants 1, 2, 7, 8 and 9. Plaintiff's claim for account is vague and indefinite as there is no mention in the plaint from which year to which year account is claimed. The plaintiff's claim is also barred by limitation.

3. Defendants 1 Ka to 1 Ga also filed a written statement. They denied their liability as well as the liability of their father to account. They also pleaded that the suit for accounts was not at all maintainable against them. Defendants 3 and 5 filed a written statement stating inter alia that the parties separated in mess long ago and that thereafter they had been making separate collections from all the joint mehals by separate officers in proportion to their respective shares. The learned Subordinate Judge after considering the evidence in the case arrived at the following conclusions : (a) That defendant 1 has been managing Bogi as an agent of the plaintiff and was realizing rent and profits of the plaintiff's share as such agent and was thereafter liable to render accounts for the same. (b) That defendants 1 Ka to 1 Ga were not liable to render accounts. (c) That they are liable to pay the money due to the plaintiff out of the assets of defendant 1 in their hands. He accordingly directed the defendants to produce collection papers in Court in order to enable the plaintiff to take copies thereof. He also directed that a commissioner should be appointed to determine the amount due to the plaintiff from defendant 1 in respect of Bogi, first, by reference to the papers produced and next by local enquiry, if necessary. Hence this appeal by defendants 1 Ka to 1 Ga.

4. The first point for determination in this appeal is whether the defendant managed Bogi as agent of the plaintiff and collected plaintiff's share of the rent and profits of the said property as such agent. An agent is a person employed to act for another. The contract of agency may be created either by the express or implied assent of principal and agent or by the ratification by the principal of the agent's acts done on his behalf. The assent of the agent is implied whenever he acts or assumes to act on behalf of another person and after having so acted or assumed to act he is not permitted in an action by such person to deny that the agency in fact existed or that he acted on such person's behalf: Bow-stead, "Agency" Edn. 8, p. 15. There is no evidence in this case that the agency was created by the express consent of the plaintiff and defendant 1. On the other hand plaintiff in his evidence said that Kumudini and defendant 1 were making realization of Bogi since his infancy and that he could not say when or how they started doing so. There is no finding by the Judge as to when the agency of defendant 1 was created. The learned advocate for the plaintiff-respondent in the

course of his argument stated that the relationship of principal and agent was created from 1326 B. S., i.e. after the plaintiff separated in mess from his brother in 1325 B. S. He also contended that from that year defendant 1 acted or assumed to act on behalf of the plaintiff. In support of this contention he relied upon Exs. 1, 1 (a), 1 (b), 1 (c), 1 (d) and 1 (f). These are letters written by defendant 1 to the plaintiff. In Ex. 1 dated 10th Falgun 1329 B. S. it is stated that defendant 1 had been looking after all the mehals for three years. (His Lordship then discussed the evidence and proceeded.) The evidence in this case in my opinion does not establish that defendant 1 realized or took upon himself the responsibility of realizing plaintiff's share of the rent and profit of Bogi on behalf of the plaintiff.

5. The evidence in this case rather indicates that after Bogi was acquired, the two heads of the two branches of the family had been jointly looking after the property and after the death of Kumudini defendant 1 alone, apparently being the senior most member of the family, was supervising the collections made by the joint Tahsildar of his family. A manager of a joint family property is not the agent of the members of the family so as to make him liable to be sued as if they were the principals of the manager. The relation of such persons is not that of the principal and agent: *Annamalai Chetty v. Mnrugasa Chetty* (1903) 26 Mad 544 at p. 553. In this case defendant 1 simply supervised the collections made by the Tahsildar and that whenever there was any difficulty about the collections he used to come to Bogi to help the Tahsildar in the collection in order that the rent due to superior landlord might be paid and the property might not be sold for arrears of rent. The evidence in this case is not sufficient to prove that he received the plaintiff's share of the money from the Tahsildars. The evidence in this case also does not establish that defendant 1 was in possession of Bogi as contemplated by Section 94, Trusts Act. The learned advocate for the respondent drew our attention to a decision of this Court in *Chandra Madhab Barua v. Nobin Chandra Barua* (1913) 40 Cal 108. In that case however, one co-sharer was appointed by the other co-sharers to manage the joint property. The facts of that case are entirely different from the facts of the present case. The learned Subordinate Judge was therefore wrong in holding that defendant 1 managed Bogi and realized rent and profits of plaintiff's share as agent of the plaintiff and was liable to render accounts for the same.

6. The difficulty of the plaintiff does not end here; before the hearing of the case defendant 1 died and the plaintiff brought the appellants on the record in his place. They objected that the suit was not maintainable against them. If defendant 1 was his agent, the appellants cannot be asked to explain the accounts kept by defendant 1 as agent. The plaintiff no doubt can recover money due to him from defendant 1 out of the assets left by defendant 1. The onus however is on the plaintiff to prove what amount was due to defendant 1. After the appellants were brought on record the plaintiff was bound to put in his statement of claim. The onus was on him to prove each item in the sum which he claims, that is to adduce evidence to prove that each item was actually realized

by defendant 1 and further that it was not paid to the plaintiff. Plaintiff did not put in any statement of his claim before the trial Judge. The evidence on the side of the plaintiff to prove the amount of his dues consists of Ex. 3 and Ex. 4 to which reference has already been made. Ex. 3 shows that Srish was the Tahsildar. It simply shows the collections from the tenants for the year previous to 1326, when, according to the plaintiff's own evidence, the mehal was under the joint management of Kumudini and defendant 1. Further this document does not show that the amount realized by the Tahsildars from the tenants was made over to defendant 1. Ex. 4 simply shows the collections made by Probhat who was appointed plaintiff's Tahsildar in 1337. Ex. 1 (a) shows some collections by defendant 1 in 1329. Plaintiff adduced no evidence to show how much was collected by defendant 1 in that year. Ex. 1 (d) shows sums realization by defendant 1 but it is not clear whether it was from Bogi. Further this letter does not show that there was any money left in the hands of defendant 1 on account of Bogi after paying the landlord's dues. The evidence adduced by the plaintiff is not at all sufficient to prove the amount of the plaintiff's dues from defendant 1.

7. The trial Judge without coming to any finding whether defendant 1 actually received any money from the tenants of Bogi passed a preliminary decree and directed the commissioner to ascertain the amount due to the first plaintiff by reference to account papers as far as available and next by enquiry in the mehals. From his order it is not clear what would be the nature of this enquiry. It was brought to our notice in course of the hearing of this appeal that the plaintiff did not adduce any evidence to prove the amount of his dues from defendant 1 before the commissioner, who, in pursuance of the preliminary decree under appeal was appointed to ascertain the amount of plaintiff's share. The commissioner had no other alternative but to submit a report on the basis of the materials on the record which I have already discussed. His report was placed before us. This report shows that he assumed that defendant 1 realized from the tenants the amount shown in Exs. 3 and 4. As regards the realization of other years he appears to have taken an average. He did not make any enquiry in the mehal. It was brought to our notice that the trial Judge subsequently considered the report of the commissioner, accepted it in part and passed a final decree. This final decree is based on the preliminary decree and on the materials before the Court before the preliminary decree, which do not at all establish the plaintiff's claim for accounts or money due from defendant 1. The result therefore is that this appeal is allowed. The preliminary decree under appeal as well as the final decree passed by the trial Judge after the filing of this appeal, so far as they relate to plaintiff's claim for accounts against the appellants, are set aside. Plaintiff's claim for accounts relating to schedule Ga property is dismissed. The appellants will get their costs from the plaintiff respondent in this Court. Hearing fee in this appeal is assessed at ten gold mohurs.

Henderson, J.

8. I have had the advantage of considering the judgment which has just been

delivered by my learned brother and have nothing to add to it. I entirely agree that this appeal must be allowed for the reasons given by him.