

(1946) 07 CAL CK 0031
In the Calcutta High Court

Brijkishore Singh and Others

APPELLANT

Vs

Sm. Nazuk Bai and Others

RESPONDENT

Date of Decision : 02-07-1946

Acts Referred:

Bengal Excise Act, 1909 — Section 19, 23
Succession Act, 1925 — Section 306

Citation : AIR 1948 Cal 19

Judgement

1. One Dhan Singh, a person governed by the Mitakshara School of Hindu law, died on 11-10-1922 at Karagpur in the District of Midnapore. He migrated to Bengal from the Central Provinces. By carrying on the business for a contractor and other businesses in the District of Midnapore including a business of sale of country liquor he acquired considerable properties, both movable and immovable. He left behind him his wife and adopted son of the name of Puran Singh, a Mohamedan mistress, Mustani Bai, two children by her, Nazuk Bai and Fakir Singh, and a number of nephews?brother's sons and sister's sons. Both his adopted son and his illegitimate children were minors at the time of his death. Two days prior to his death he executed a will by which he appointed his sister's sons, Hari Singh and Sital Prasad, as executors. Both of them obtained probate of his will on 8-10-1923 from the District Judge of Midnapore on an application made by them in January 1923. Shortly after the grant of probate Sital Prasad died and Hari Singh continued to be the sole executor.

2. On 22-11-1929 Puran Singh, then a minor represented by his next friend Dal Chand, who was his natural father, instituted a suit in the Court of the Additional District Judge at Nagpur in the Central Provinces against Hari Singh, and the legatees, who were to take under the will of Dhan Singh or their heirs. In the suit, Nazuk Bai and Fakir Singh, who were then minors, were represented by their mother Mustani Bai. Nazuk Bai was then a married girl, her husband being Abdul Majid Khan. The suit proceeded upon the basis that the properties dealt with by Dhan Singh in his will were not his self-acquired properties but were his ancestral properties and accordingly the said will, was illegal and inoperative. He

prayed for possession on the basis of his title as Dhan Singh's adopted son (Ex. 10). A consent decree was passed in that suit on 28-4-1930, (Ex. 10 (a)), Mustani Bai purporting to give consent on behalf of her minor children. By consent the will was declared, inoperative and invalid and the probate ineffective; some moneys were to be given to the other nephews of Dhan Singh or their heirs and Rs. 2500 to Mustani Bai and her children. Hari Singh took the liquor business and brick manufacturing business and Puran Singh got the rest of the properties. On 30th April following Dal Chand was appointed receiver by consent with power to realise all movables and debts due to the plaintiff of that suit and to place them at the disposal of the Court.

3. Dal Chand had already been appointed guardian of the person and property of Puran Singh by the District Judge of Midnapore, On Puran Singh attaining majority he was discharged from his guardianship in 1931 and Puran Singh admitted in his petition to the said District Judge that he had received on 10-10-1931 all his properties from his ex. guardian, Dal Chand.

4. In 1934, Nazuk Bai and Fakir Singh by their next friend Abdul Majid Khan, the husband of Nazuk Bai, filed a title suit, being No. 2 of 1934 (later on numbered as 9 of 1937) in the Court of the Subordinate Judge at Midnapore against Hari Singh, Puran Singh and Mustani Bai for setting aside the consent decree passed in the Nagpur suit and for possession of certain properties on the basis of Dhan Singh's will. That suit was decreed by the learned Subordinate Judge, on the finding amongst others that the said consent decree was not binding on the said plaintiffs and had moreover been obtained by fraud and collusion. Against that decree Puran Singh alone preferred an appeal to this Court, being First Appeal No. 89 of 1938. In that appeal Hari Singh was by consent of parties appointed receiver on 21-3-1938 over the properties in suit. The said appeal ended in a compromise between Puran Singh on the one part and Nazuk Bai and Fakir Singh on the other and a consent decree in terms of the compromise was passed on 28-11-1938 (ex. j). On 5-5-1939, the suit in which this appeal arises, was filed by Nazuk Bai and Fakir Singh, the latter by his next friend, Abdul Majid Khan against Hari Singh for self and as executor and against others. The principal prayer against Hari Singh is a prayer for accounts. The learned Subordinate Judge decreed the suit in part. Hari Singh filed, this appeal and the plaintiff 1 has filed a memorandum of cross objections. Hari Singh died during the pendency of appeal and his heirs and legal representatives, Brij Kishore Singh and others, have on their own application been substituted in his place.

5. The points raised in the appeal and in the cross-objections are as follows: (I) Is the suit bad for defect of parties, and so not maintainable. (II) Is the prayer for account barred by the provisions of Order 2, Rule 2, Civil P.C. (III) For what period account can be demanded by the plaintiffs (IV). In respect of what properties account has to be given (V) Is the decree correct in form, that is to say, [i] is that decree as passed by the learned Subordinate Judge for possession of movables correct, and [ii] can a decree for accounts be passed against the

legal representatives of Hari Singh, the executor.

6. We will record our findings on the aforesaid points in the order stated above.

7. I. The plaint as originally filed was against Hari Singh and Puransingli only. By an amendment made on 2-10-1989 Hari Singh was described in the cause title as being sued "for self and as executor." In paragraph 7 of his written statement filed on 26-6-1939 Hari Singh pleaded that the suit was bad for defect of parties, as the other legatees mentioned in Dhan Singh's will had not been made parties by the plaintiffs. Thereafter on the plaintiff's application defendants 3 to 5 were added as defendants on 11-7-1939. They are respectively Sitaram, Lachman and Chandan Singh Sital Prasad was then dead and Chandan Singh was his sole heir. It is admitted in evidence that Asaram was then dead and Hari Singh was his sole heir the plaint contained an averment that Mustani Bai was dead and that averment has not been denied. That is also the evidence of plaintiffs' witness No. 1. Mustani Bai's heirs would be the plaintiffs only as there is no evidence in support of Hari Singh's statement made in his written statement that she had married Abdul Majid Sheik. Moreover the plaintiffs' witness No. 1's evidence that Abdul Majid Sheik was her paramour only is un-contradicted. All the legatees and persons interested under the Will except Dhan Singh's widow and sister, were thus added as parties by this amendment. There is, however, no evidence that those two persons were alive at the date of the suit. Puran Singh would be the sole heir of Dhan Singh's widow and there is no evidence that his sister had left any heirs. Moreover, Hari Singh admitted in a way in his petition filed on 5-8-1939, that after the addition of those three persons as defendants 3 to 5, the defect of parties had been removed. This point is accordingly overruled.

8. II. The contention of the appellant is that the plaintiffs were bound to include the claim for account against Hari Singh in the suit that they had brought in the Midnapore Court. Order 2, Rule 2, Civil P.C., does not require (except in those, cases which fall within the explanation), the plaintiff, to join at his peril all the causes of action he may have at the time against the same defendant or the same set of defendants. He is bound at his peril, unless leave has been reserved, to include the whole of his claim, that is, ask, for all the reliefs, in respect of the cause of action¹ on which he had brought the suit. The initial difficulty in the case before us in the way of the appellants is that the plaint of the Midnapore suit is not an exhibit and so we are left to gather what was the cause of action in that suit from the statements made by the learned Subordinate Judge in the judgment delivered, in that suit, and from what appears in the decree. The decree (Exh. 11) shows that the suit was against Puran Singh, Mustani Bai and Hari Singh in his personal capacity, and not as executor. The compromise decree in the Nagpur Suit. (Ex IDA) shows that the will of Dhan Singh was in express terms ignored, declared invalid and inoperative and the parties to that suit including Puran Singh and Hari Singh divided amongst themselves according to their liking the assets or what in law could be regarded as the assets of Dhan Singh. The object of the Midnapore suit, as would appear from the statements in

the judgment of the Subordinate Judge, was to declare the said consent decree to be not binding on the plaintiffs and for consequential relief which would flow from that declaration, namely, recovery of possession on the strength of Dhan Singh's will, which had been given a go-by by the said consent decree, It is for this reason that Hari Singh was sued in his personal capacity. If he had been sued also in his capacity as executor the suit would have been bad for misjoinder of parties and causes of action. It was in no sense an administration suit. The other legatees who were interested in Dhan Singh's estate on the basis of his Will were not made parties. The relief which is being claimed in the suit before us against Hari Singh could not have been claimed by the plaintiff on what can be inferred to have been the cause of action which was the subject-matter of the Midnapore suit. This point is accordingly overruled.

9. III. It is conceded before us by the learned Advocate for the appellants that Hari Singh was bound to render accounts from the death of Dhan Singh till, 30-4-1930, when he is said to have made over possession to Dal Chand as receiver appointed in the Nagpur Suit. The order for the appointment of Dal Chand as receiver which followed the consent decree was also a consent order, but the consent given on behalf of the minor Nazuk Bai and Fakir Singh was no consent, as it has been held in the Midnapore Suit that the person appointed as their guardian-ad-litem in that suit could not have in law represented them. The order for receiver therefore was not an order passed with the consent of all the legatees. The order also cannot be regarded as an order of a Court passed in an administration suit by which the executor is directed to make over possession to a receiver for in the consent decree which preceded the said order Dhan Singh's Will was declared void and inoperative and the probate ineffective. The case was therefore not the case where the executor had distributed the testator's assets either under an order of Court or by consent of all the legatees and persons interested in the estate under the terms of the Will. The case before us is the case where an executor sheds his character as executor with a view to commit fraud upon the rights of some of or all the legatees and to gain a personal advantage by either arranging or participating in a distribution on the basis that there was no valid Will. It is moreover a case of a more serious nature, as Dhan Singh's Will had then been probated, probate having been taken by Hari Singh himself and the properties left by him were to a very large extent, if not wholly, Dhan Singh's self acquired proper, ties. Moreover Hari Singh admits on his deposition given in the case before us that he received no orders from the Nagpur Court to make over possession to Dal Chand. He must, therefore, account till 21-3-1938 when he was appointed receiver by this Court in First Appeal No. 89 of 1938 in respect of the assets of Dhan Singh except the liquor business, That business was not the subject-matter of the Midnapur suit and so Hari Singh was not appointed receiver in the said first appeal over the same. The accounts must be taken in respect of that business up to date of our decree as we are holding that that business is to be regarded as part of the assets of Dhan Singh, though it was carried on by Hari Singh after Dhan Singh's death on the

strength of a license issued under the Bengal Excise Act by the Collector to him personally.

10. IV. In his will Dhan Sing enjoined his executors to keep intact and continue his liquor business. The said business was carried by Dhan Singh on a piece of land let out to him by the Station Committee of Kharagpur of the Bengal Nagpur Railway Company Ltd. in a two storied building erected by him at his cost, the agreement with the Station Committee being that if he failed to obtain a license from the excise authorities he would not be able to remove the building but would be bound to sell the same to the incoming licensee at a valuation to be made by the Station Committee. Dhan Singh had the license to sell liquor there till his death. In fact he died during the currency of the last yearly license. On Dhan Singh's death Hari Singh applied on 23-10-1922 to the excise authorities for license to sell liquor there (Ex. f(1)). In that application he mentioned the will of Dhan Singh and the fact that he was an executor under that will. He also stated that the adopted son of Dhan Singh was then a minor, that he was a nephew of Dhan Singh and had helped the latter in his liquor business. He applied for a license as the "chief legal representative" of Dhan Singh. The Collector by an order dated 23-10-1922 directed a license to be issued to Hari Singh personally and not in his character of legal representative of Dhan Singh. The Will was not probated then. It was probated by Hari Singh and his brother later on. It is Hari Singh's case that thereafter he bought the stocks left at Dhan Singh's death at a valuation made by himself and the shop building at a valuation made by the Station Committee, and credited Dhan Singh's estate with the amounts by making an entry in the account books kept by him, and carried on the business thereafter as his personal concern on the personal licenses given to him by the excise authorities.

11. A liquor business can only be carried on a license, which is an yearly one generally issued by the Collector under the Bengal Excise Act (5 V of 1909) and the license 13 a personal one (Sections 19 to 23, Bengal Excise Act) and the person holding a license has no right of renewal (Section 44A). Rule 209 of the Excise Manual does not confer any right on the legal representative of a deceased license but only gives discretion to the Collector to issue a license in his favour. Those Sections of the Excise Act define the relation of the license-holder vis a vis the Government, but in our judgment have little bearing on the question as to whether the business carried on by Hari Singh is to be regarded as part of the assets of Dhan Singh. The actual decision as given in *Keech v. Sanford* 2 W.& T. 640 which has been applied to executors (33 Halsbury's Laws of England, Section 808, page 426, 2nd edition) may be applicable only to cases where there is a right of renewal by contract or custom. The particular rule that what is obtained by the trustee, executor or any other person in a fiduciary position is to be regarded as "a graft on the old stock" may not be applicable to cases other than cases where by reason of renewal by contract or custom, property is obtained by such persons. But besides the said rule there are other principles recognised and applied by Courts in England. The principles relevant to matter

before us are firstly, that an executer is absolutely debarred from purchasing either directly or indirectly any part of the testator's assets. This rule has been rested on public policy by Courts of Equity. The second is that a person in a fiduciary position cannot hold for himself but must hold as a trustee, a thing which he may have acquired through the opportunity afforded to him in his fiduciary capacity. This doctrine, as also the third doctrine that a Court of Equity will not allow a person holding a fiduciary position to place himself in such a position where his duty conflicts with his interest is also based on public policy," which is the real foundation of the doctrine of constructive fraud. The purchases by Hari Singh of the stocks left by Dhan Singh and the shop building are ineffective. In law he must be deemed to be carrying on the liquor business in the house which is still a part of Dhan Singh's assets and in law it has to be held that he has utilized Dhan Singh's assets in carrying on the said business. By the direction in Dhan Singh's Will that the executors would keep intact his liquor business and continue the same, Hari Singh as executor was placed under a duty to carry on the said business for the benefit of the legatees and by taking the proceeds of the business for his personal use he committed a breach of the duty so cast on him. We accordingly hold that account must be given not only of the stocks left by Dhan Singh but also of the profits of the business from the date of death of Dhan Singh up to the date of our decree.

[12-13]. By his Will Dhan Singh devised every thing he had to eight persons including Nazuk Bai and Fakir Singh. He also gave those eight persons the right to participate in the profits of his businesses in equal shares. He then provided that in case "they disagree amongst themselves and separate" then his adopted son was to get the liquor shop, the shop house and his dwelling house, Mustani and her son and daughter were to get all his other remaining houses absolutely, and his wife and sister" on a partition taking place amongst the legatees" were to get each one of them, properties fetching a net monthly income of Rs. 100/. In paragraph 13 of the plaint the plaintiffs claimed from Hari Singh share of the income and profits of Dhan Singh's estate. This claim was obviously on the footing that the aforesaid contingency namely, separation etc. had not happened. The original written statement of Hari Singh is silent on the point. He first gave his deposition on 15th and 16th February 1940. He stated then that Mustani and her children used to mess separate from Dhan Singh and occupied during his life time a separate building. That is natural, for Dhan Singh was a Hindu and had a wife living with him and Mustani besides being a mistress was a Mahomedan. The plaint was thereafter amended on 28-2-1940 on the plaintiffs' application and Hari Singh was allowed to file an additional written statement which he did on 1-3-1940. In para 2 of the additional written statement he pleaded that there was disagreement amongst the legatees from the date of Dhan Singh's death and they separated in mess. Thereafter he was examined again on 13-1-1940 but made no further statement on the point. The words "in case they disagree amongst themselves and separate" used in the Will must be construed in the light of the facts existing at the time when the Will was made and while Dhan

Singh was living. At that time two of legatees Nazuk Bai and Fakir Singh, were in separate 2aes9 and were living in a, separate house, separately at least from Puran Singh and Hari Singh and it may be that some of the other legatees were living, separately and had separate arrangements for food. Those words cannot therefore mean separation in food and residence. The context further shows and especially para. 2 of the Will, that the contingency contemplated by the testator was disagreement with regard to management of properties and separation in the enjoyment of the properties. There is no proof that such a contingency had ever happened. The plaintiffs and other legatees had had no opportunity to manage jointly and so no question of disagreement or separate management amongst them could have arisen. We accordingly hold that the plaintiffs' claim as laid in para. 13 of the plaint is a valid one.

14. V (i). We have already held on a construction of Dhan Singh's will that plaintiff 1 is entitled to have one eighth share of all the assets left by him and of the income and profits thereof as the contingency mentioned in the Will (namely disagreement and separation) has not happened yet. But by reason of the compromise between him and Puran Singh in First Appeal No. 39 of 1938 he gave up his title in favour of the latter in all the movables described in Sh. B of the decree passed in Title Suit No. 9 of 1937 (the Midanpore suit) save and except to the sum of its. 6000/ which was cash left by Dhan Singh. This compromise was on 28-11-1938, and so plaintiff 1 has lost title to those properties from that date. He is however entitled to the income accruing from the movables which included Government Promissory Notes and moneys deposited in Banks from the time of Dhan Singh's death up to 21-3-1938 when Hari Singh was appointed receiver by this Court. The decree in favour of plaintiff 1 must therefore be in respect of his one-eighth share in the movables save and except those mentioned in the said Schedule B of the decree passed in Title Suit No. 9 of 1937. He has already got a decree for the said sum of Rs. 6000/ against Hari Singh.

15. V (ii), It is next contended by the appellants that the decree in the form made by the learned Subordinate Judge against Hari Singh on the claim for account cannot stand as against his legal representatives, that there can in law be no direction on them to render account of the management of Dhan Singh's estate by Hari Singh and that the decree now to be made by us can only direct them to make good to the plaintiffs in their share the loss which they, the plaintiffs might be able to establish by evidence led by them to have been caused by the negligence and misconduct malfeasance and misfeasance: of Hari Singh, out of the assets of Hari Singh in their hands. A number of decisions both of Indian and English Courts have been cited before us and the matter has also been argued on general lines. We will first summarise the argument of the appellants' Advocate. His submissions are as follows: (I) That the liability to account of an agent, guardian, or executor or any other person occupying fiduciary position is a personal one, and so the cause of action for account against such a person does not survive his death. (II) That it follows as a

necessary corollary therefrom that (a) a suit for account in the strict sense of the term would not lie against the legal representative of such a person; (b) that if such a person dies during the pendency of a suit for account the suit as framed must come to an end, and it is immaterial whether death occurred before or after the preliminary decree; (c) that an entirely different cause of action arises against the legal representative?the right to recover from him out of the assets of the deceased agent, guardian, executor etc. in their hands the loss that had been occasioned to the plaintiffs by the mishandling misappropriation or misconduct by the agent, guardian or executor in respect of The plaintiffs' property or the property to which he is entitled.

16. He seeks to support the last mentioned proposition under the second head by referring to the majority judgment in Phillips v. Homfray (1883) 24 Ch. D. 439 the decision in Kumeda Charan Bala v. Ashutosh Chattopadhyaya 17 C.W.N. 5 and other Indian decisions. The correctness of the proposition formulated by him under the first head will have to be examined first.

17. The following facts must exist for raising an obligation to account: (1) the person upon; whom such an obligation is sought to be imposed (hereafter called the obligor) must have received, some property not his own; (2) the person seeking to impose the obligation (hereafter called the obligor) must be the owner of the property in respect of which the obligation is sought to be imposed; (3) the obligor must not have received the property as mere bailee; (4) the obligor must have received it into his possession and under his control. Custody like that of a servant is not sufficient; and (5) there must be a fiduciary relation between the obligee and the obligor, or to use the expression used in English Common Law, there must be privity between them. For the question raised before us it is necessary to examine the fifth element only and that in some detail.

18. The English Common Law recognised privity only in respect of three classes of persons namely agents bailiffs and receivers and in Common Law this privity was considered so strictly a personal relation that neither the right created nor the duty imposed by the obligation could be transferred even by an act, of law. Hence upon the death of the obligee, the obligation could not be enforced by his executor or administrator, and on the death of the obligor, it could not be enforced against the latter's executor or administrator (Coke on Littleton Subheading "The heir is without remedy" under the heading "On Socage" (Section 125, P. 90 (b), Edn. 19 by Hargrave). Those Common Law Rules were abrogated by early statutes. 13 Edw. I.C. 23 ("Statutes at Large", Vol. I, p. 196 by Dandy Pickering) entitled the executor of the obligee to have a "writ of account" and Section 27 of 4 Anne, C. 16 ("Statutes at Large," vol.xi, p. 153, by Dandy Pickering) provided that:

Actions of account shall and may be brought and maintained against executors and administrators oil every guardian, bailiff and receiver; and also by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than cornea to his just share or proportion,

and against the executor and administrator of such joint tenant or tenant in common.

19. In two respects the Courts of Equity went beyond the Common law. The liability to account was imposed on all persons occupying fiduciary positions and even before the above mentioned statutory change in the reign of Queen Anne those Courts held that the legal representative of the obligor was also under the obligation to account. We may refer to some of the earlier cases on the subject. The case in *Lee v. Sarah Bowler* (1664) Cases T. Pinch 125 was decided in 1664. John Bowler was entrusted with the management of the plaintiff's plantation at Virginia, and goods of the plaintiff were entrusted to him, for which he was under an obligation to account as factor. He died and his mother Sarah Bowler was his administratrix. A bill of account was filed by the plaintiff against her. The Court decreed her to account. The case in *Holscombe v. Rivers* (1735) 1 Ch. 127 was decided five years later. The facts material for our purposes were as follows. The defendant and one Collins were factors for the plaintiff in Spain. Plaintiff filed a bill of account against the defendant only and not against the executrix of Collins, who was then dead. The Court held that the surviving factor, (namely the defendant) was to account for what was made by himself or his co-factor; and further observed that an "account lies against the executrix of the dead factor". At no time a bill of account was regarded by the Courts of Equity as a "personal action" within the rule "*actio personalis moritur cum persona*". That rule is an archaic relic of the English Common Law and has been frequently subjected to criticism both in England and in India. In *D.K. Cassim v. Sara Bibi* AIR 1936 Bang. 17 Page, C.J. made the following observations:

Now, I have never heard it suggested that the rule *actio personalis moritur cum persona* is based upon justice or common sense, or that it can be supported upon any principle of law? It is natural, I think, that during the centuries in which the rule has formed part of the Common law of England it should from time to time have been severely animadverted upon by Judges. Lord Sumner has pointed out *Admiralty Commissioners v. America (Owners)*(1917) A.C. 38 that "the maxim itself has many critics; it has been coldly disparaged as post-classical, meaning thereby that it is bad Latin: *F inlay v. Chirney* (1888) 20 Q.B.D. 494 it has been suggested to be a mistake for *actio poenalis* (*Poste's Gaius*, 2nd edition p. 493), whence it is sometimes insinuated that it is bad law; and it has been peevishly described (as a wretched law) and "as a purely identical proposition" (*Austin Jurisprudence*, 3rd edn., Vol. 2, 1013): I need only pause to point out that in some cases more approbrious epithets have been applied by Judges to this rule of law.

20. The Indian Legislature has in Section 306, Succession Act, adopted the rule in a very restricted form. A suit for account does not fall within the named exceptions in that Section and in our judgment it does not fall within the general exceptions, for, it cannot be said that on the death of the obligor the granting of the relief sought in such an action would be nugatory. The object of the plaintiff

in an action for account is to recover from the obligor his property or its value or money appropriated by latter and so the relief sought by the plaintiff in such an action is in substance a relief to recover property or its value or money. On the death of the obligor the recovery can and would be from his assets in the hands of his legal representative. Even in the case of a suit based on tort, where accounts had been directed Bowen, L.J. (with whom Cotton L.J. agreed) in delivering the judgment of the majority observed thus:

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who had done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action is, it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substance: *Phillips v. Homfray* (1883) 24 Ch. D. 439.

These observations furnish an authority for holding that in a suit for account death of the obligor would not render nugatory the granting of the relief sought by the plaintiff.

21. We may observe that the statement of the law on the question of the survival of the cause of action as made in the first part of the aforesaid passage in Lord Bowen's judgment is not complete, and that for the reason that the case before their Lordships was a case of tort and not an action for a wrongful act done by a person holding a fiduciary position in breach of his trust. The omission has been supplied in *Concha v. Murieta* (1889) 40 Ch. D. 543. The law on the subject as recognised by Courts in England is stated thus by Cotton L.J. at page 553 of the report:

It is true, that no action for a tort can be revived or commenced against the representatives of the person who committed it; but the case is quite different where the act is not a mere tort, but is a breach of a quasi contract, where the claim is founded on the breach of a fiduciary relation, or on failure to perform a duty. Here the father, though I do not call him a trustee, was in a position in which he owes duties of a fiduciary character to his daughter. In the very careful judgment of Lord Justice Bowen in *Phillips v. Homfray* (1883) 24 Ch. D. 439 cases depending upon breach of contract express or implied, are exempted from the judgment. Here there is what we call a quasi contract the law implying a contract that a man will faithfully perform the duties which he has undertaken.

22. As early as 1868 this Court held that a cause of action in a suit for account against an agent survives his death and can be enforced against his legal representative. *Hills v. Shokhee Moyee Dossee* (1868) 10 W.E. 59. The observation of Wilson J. in *Lawless v. Calcutta Landing and Shipping Corporation Ltd.* (1981) 7 Cal 627 where two cross suits, one by the executor of an agent against the company and the other by the company against him, were tried

together, to the effect that on the death of the agent, "the Company acquired a fresh right to have an account rendered by his representatives", an observation which had the approval in *Kumeda Charan Bala v. Ashutosh Chattopadhyaya* 17 C.W.N. 5 does not militate against the view we are taking that the cause of action for account against the obligor, survives his death. The cause of action thus formulated by Wilson J. may be an additional one. *Kumeda Charan Bala v. Ashutosh Chattopadhyaya* 17 C.W.N. 5 in our opinion militate Mookherjee J. nowhere says in his judgment that the cause of action for account against the obligor does not survive. All he says is that the representative of a deceased agent cannot be ordered to render account in the same form as the agent himself. In *Manmothonath Bose v. Basanto Kumar Bose* (1900) 22 All. 332 on which reliance was placed in *Kumeda Charan Bala v. Ashutosh Chattopadhyaya* 17 C.W.N. 5 no general principle was laid down, but the decision was rested on the interpretation of Section 21, Guardians and Wards Act made in the light of an earlier decision of that Court before the said Act was passed. In any view of the matter we prefer to follow the view expressed in our Court in *Hills v. Shokhee Moyee Dossee* (1968) 10 W.E. 59.

23. The obligation to render account involves the following duties; (a) to keep accounts (b) to keep them ready and to deliver them (c), to vouch after delivery to the obligee and (d) to explain them if explanation is needed or called for.

24. *Kumeda Charan Bala v. Ashutosh Chattopadhyaya* 17 C.W.N. 5 lays down the principle that a decree of this Court should not direct what is impossible to perform. That is a sound principle. No trustee should be ordered by the Court to find out at the suit of the cestui que trust a valuable heirloom, a historic jewel, for instance, which he may have in a fit of anger thrown into the bottom of the sea and to restore it to the trust. On that principle, it may at most be said that the legal representative of an agent or other person holding a fiduciary character cannot be directed by the Court to explain the accounts kept by the dead agent or the other person. But there is no inherent impossibility in the performance of the other acts by the legal representative, namely to deliver the account papers and support them by vouchers for the hand of death does not remove papers. To that extent a departure may have to be made from the general principle that a suit is to be tried through out in all its stages on the cause of action as laid in the plaint and the relief appropriate thereto is to be given, and that a person substituted as legal representative can only take a defence appropriate to his character as legal representative of the deceased defendant. As the respondent's Advocate has stated before us that his client does not wish to call for any explanation of the accounts and would be satisfied if the account papers kept by Hari Singh and vouchers in support are directed to be produced by the legal representatives of Hari Singh, we need not further examine the position of the legal representative, where the obligor had died after the preliminary decree for rendering accounts had been passed. The form in Seton on Judgments and Orders at p. 114 and 115, Vol 1 (7th Edn.) would seem to suggest that the preliminary decree so passed would Stand. In *Kumeda Charan Bala v. Ashutosh*

Chattopadhyaya 17 C.W.N. 5 Maharaj Bahadur Singh v. Basanta Kumar Roy 17 C.W.N. 695 and Sasi Sekhareswar Roy v. Hajirannessa Bibi AIR 1918 Cal 276 death of the agent took place before the preliminary decree, and Phillips v. Homfray (1883) 24 Ch. D. 439 was a case of tort, and the preliminary decree in so far as it had directed accounts on the second, third and fourth heads fell through, as it was held by the majority of the Lord Justices that the cause of action which would have sustained them did not survive the death of B. Fothergill.

25. During the pendency of the appeal plaintiff No 2, Fakir Singh, who is a major now, compromised the matter with the appellants. We certify the compromise to be beneficial to the minor appellants and record the same. The decree in favour of Fakir Singh would be in terms thereof.

26. The result is that plaintiff 1 would get a decree for one eighth share of the movables described in the schedule to the plaint other than those mentioned in Schedule B of the decree of Title Suit 2 of 1934 (subsequently numbered as 9 of 1937) of the Court of the learned Subordinate Judge, Midnapore, and we direct the Court below to assess the value of the plaintiff 1's one eighth share therein as at the date of this suit and to pass a decree for the said sum of money. For this purpose of determining the value further evidence by the parties may be admitted.

27. The appellants are also directed to file in the Lower Court within a month from this date the account papers kept by Hari Singh in respect of the movables and immovables left by Dhan Singh together with vouchers from the date of Dhan Singh's death upto 21-3-1938, and also of the liquor business together with vouchers which Hari Singh carried on in his own name from the death of Dhan Singh till this date That a Commissioner be appointed to take account of the whole estate of Dhan Singh and the whole of the liquor business for the aforesaid periods and a decree for one eighth of the sum that may be found due on the said accounts be passed in favour of plaintiff 1, to be realised in terms of Section 50, Civil P.C. If the account papers for the said periods or part thereof be not filed by the appellants, plaintiff 1 would be at liberty to adduce secondary evidence and or to adduce evidence to show what sums of money had been realised by Hari Singh and not paid to her or to a person on her behalf, and in that case the appellants would be allowed to adduce evidence to show that the sum or sums of money alleged by plaintiff 1 to have been realised by Hari Singh had not in fact been realised by him and to show what sum or sums of money had been paid to her or spent by him in due course of administration, as executor of Dhan Singh's estate. If the account papers and vouchers are not produced either for part of or for the whole period of accounting the Court would be at liberty to find if they are being withheld and make such inferences as may be proper. As the appeal fails and the cross objection succeeds the appellant must pay the costs of the appeal and of the cross objections to plaintiff 1, respondent. The hearing fee in the appeal would be as. 300. We assess the hearing fee in the cross objections at 10 gold mohurs.

28. Re: Misc. Appeal No. 224 of 1940. We have already stated that Nazuk Bai and Fakir Singh brought a Title Suit being Title Suit 2 of 1934 (subsequently numbered as Title Suit No 9 of 1937) in the Court of the Subordinate Judge, Midnapore against Puran Singh, Hari Singh and Mustani Bai for recovery of property after netting aside the compromise decree passed in the Nagpur suit and got a decree in the trial Court. The decree comprised a sum of Rs. 6000 which was the cash found in Dhan Singh's house at the time of his death. An appeal was preferred by Puran Singh alone being First Appeal No. 39 of 1938 and that appeal was compromised between Puran Singh on the one part and Nazuk Bai and Fakir Singh on the other and the decree against Hari Singh by the trial Court remained intact. On 28-9-1939 that decree was put in execution against Hari Singh for recovering the said sum of Rs. 6000 and costs. Hari Singh filed an objection u/s 47, Civil P.C., raising only one objection before the executing Court. That objection was that by the compromise in the said first appeal the applicants had relinquished their claim to the said sum of money. The executing Court by an order dated 8-5-1940 overruled that objection and allowed the execution to proceed. Hari Singh filed this appeal against the said order. The objection urged before the executing Court has not been urged before us by the appellants. They however, contend that as an account of the said sum has been claimed and directed to be taken in the suit which is the subject-matter of First Appeal No. 75 of 1941, in which we have just now delivered our judgment, the decree in question cannot be executed. We cannot give effect to this contention. The decree stands and the execution Court is bound to execute it. We, however, wish to make it clear that if the decretal amount of Rs. 6000 be realised in the course of the execution or is paid by the appellants, the appellants would be given credit the same in the accounts that we have directed in the aforesaid first appeal and in the final decree to be passed in favour of plaintiff 1.

29. The result is that this appeal is dismissed with costs to the contesting respondent. Hearing fee two gold mohurs. Let the records of these cases be sent down as soon as the decrees are signed.

30. F. Misc. Appeal 224, of 1940? During the pendency of the appeal, plaintiff 2 Fakir Singh who is a major now, compromised the matter with the appellants. We certify the compromise to be beneficial to the minor appellants and record the same. The decree in favour of Fakir Singh would be in terms thereof.