

**(1935) 05 AHC CK 0016**  
**In the Allahabad High Court**

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|-----------------------------------------------|------------|
| Dehra Dun Mussoorie Electric Tramway Co. Ltd. | APPELLANT  |
| Vs                                            |            |
| Hansraj and Others                            | RESPONDENT |

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**Date of Decision :** 09-05-1935

**Acts Referred:**

Probate and Administration Act, 1881 — Section 89  
Succession Act, 1925 — Section 306

**Citation :** AIR 1935 All 995 : 159 Ind. Cas. 977

**Hon'ble Judges :** Niamatullah, J;Allsop, J

**Bench :** Full Bench

**Final Decision :** Disposed Of

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## Judgement

Niamatullah, J.—The facts of this case are stated in detail in the judgment delivered by my brother, Allsop, J., with whose conclusions I find myself in entire agreement. I desire to make a few observations on the important question of fact on which the decision of the case largely depends. I have taken time to consider the point in all its aspects and made due allowance for the fact that the Subordinate Judge arrived at a different conclusion. I may however point out that the case is not one in which the trial Court is in a peculiarly better position than the Court of appeal in recording a finding on a question of fact. The conclusion rests on inferences to be drawn from proved circumstances of the case, and not on believing or disbelieving witnesses. Excepting the evidence of Mela Ram, whose good faith is in controversy, the evidence bearing on the point is all circumstantial.

2. In all cases of fraud which is not capable of proof by direct evidence, we have to fall back upon inferences to be drawn from circumstances established by evidence. The party alleging fraud is nevertheless bound to establish it by cogent evidence, and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. I have approached the case with this point of

view, and have been driven to the conclusion that the evidence as a whole, excludes all hypothesis of good faith on the part of Mela Ram in granting the three receipts to Beltie Shah Gilani.

3. The plaintiff's case, in the first instance, is that there was a conspiracy between Mela Ram and Beltie Shah Gilani, in pursuance of which the sum of Rs. 39,750 was embezzled. I may say at once that the evidence falls far short of establishing any such conspiracy. I am convinced that Mela Ram was not in Beltie Shah's confidence when the latter misappropriated the various sums making up Rs. 39,750. The embezzlement took place as follows. (After giving the details as to embezzlement, his Lordship considered questions of fact and then proceeded). I agree with my learned brother that the plaintiff's plea is not barred by limitation or by the fact that in proceedings under the Companies Act certain sums were awarded, in winding up proceedings, against the auditors. I also agree that Mela Ram acted within the scope of his authority when he gave receipts to Beltie Shah. It was not disputed that, if Mela Ram had the authority to grant the receipts and if his conduct amounted to fraud, his principals are liable to the company for the fraud of their agent.

4. One of the pleas taken by the defendants other than Mela Ram is that the estate of Raghu Mal, which is now represented by his executors, is not liable for damages as the cause of action did not survive against the legal representatives of the deceased wrongdoer. The contention is based on the maxim "*actio personalis moritur cum persona*." The English Law is undoubtedly in favour of the defendant's contention. It is thus summarised in Halsbury's Laws of England (Vol. 14, paragraph 726):

The general rule is that the representative cannot be sued for wrong committed by the deceased for which unliquidated damages only would be recoverable; the rule is expressed in the maxim *actio personalis moritur cum persona*, and the principle is applicable both at law and equity. Thus an action for deceit will not lie against the representatives of a person who has fraudulently induced another to take shares in a company or even to purchase shares from the deceased himself.

5. The maxim has been the subject of adverse comments, in that it is too broadly stated and leads to inequitable results in many cases. By some Judges it has been characterised as "barbarous." In India there is no statutory law of torts and the Courts are expected to administer rules of justice, equity and good conscience. They however apply English law which is taken to embody rules of justice, equity and good conscience. If all that has been said about the maxim is even partially true it cannot be applied as embodying those high sounding principles. The Indian legislature seems to have recognised this drawback and attempted to provide against an indiscriminate application of the maxim. The Legal Representatives Act (12 of 1855) allows an action to be maintained against the legal representatives, of a wrong-doer for damages for wrongs committed within one year before his death. This left a big loophole for application of the maxim, inasmuch as the Act covers only torts committed by a person since

deceased, during the year preceding his death. In the case before us Raghu Mal died in 1926 and the alleged fraud committed by his servant occurred in 1923. The Act therefore does not help the plaintiffs. Another inroad made on the maxim by the Indian legislature was the rule enacted by Section 89, Probate and Administration Act (5 of 1881) since re-enacted in Section 306, Succession Act (39 of 1925) which provides:

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party the relief sought could be enjoyed or granted it would be nugatory.

6. This again abrogates the maxim only partially; legal representatives other than executors and administrators are outside the section and certain causes of action are expressly excluded from the operation of the section. This gave rise to an interesting question of interpretation of the exception, on which there is a difference of opinion between the Calcutta High Court on one side *Krishna Behari Sen v. Commissioner of Calcutta* (1904) 31 Cal. 993, and the High Courts of Bombay, Madras, Allahabad and Patna, on the other *Rustomji Dorabji v. nurse* 1921 Mad. 1, *Haridas Ramdas v. Ramdas Mathuradas* (1889) 13 Bom. 677 *Mahtab Singh v. Hub Lal* 1926 All. 610 and *Punjab Singh v. Ramautar Singh* 1920 Pat. 841. In all these cases the question was whether the cause of action for a suit for damages for malicious prosecution survives against the executors and administrators of the deceased wrong-doer and the exception, contained in the Probate and Administration Act or the Indian Succession Act, applied or not. The Calcutta High Court interpreted the exception strictly and held that no cases except those of "defamation, assault, or other personal injuries not causing the death of the party" were outside the section. They construed the words "personal injuries" as physical injuries. Malicious prosecution which, according to them, is distinct from defamation, is not within the exception. The other High Courts, on the contrary maintain that the words "personal injuries" should be taken ejusdem generis with defamation and are not confined to strictly physical injuries. Some Judges have gone so far as to hold, that malicious prosecution is an aggravated form of defamation. All of them are of opinion that injury to a man's reputation which is involved in malicious prosecution is a personal injury.

7. It seems to me that the case before us is free from the difficulty which is involved in cases of malicious prosecution which is akin to defamation and may be personal injury in that it affects a person's reputation and causes mental pain and physical discomfort and therefore within the exception. But a fraud of the kind alleged in this case is not by any means, akin to defamation, nor is it personal in the sense of being an injury to a person's reputation, mind or body. It has no reference to his person in the widest sense of the term. The fraud

complained of in this case prevented a timely disclosure so as to deprive the company of a chance of recovering more than it was able to do later when the fraud came to light in another manner. It is a wrong which affected the company's property. The advocate for the defendants seemed to suggest that personal injury includes injury to the "personal property" as distinguished from "real property" as known to English law. This is too farfetched a construction of the simple words "personal injuries" occurring in an Indian statute book which does not recognise the classification of property adopted in the English law. I cannot persuade myself to accept such interpretation of the words in question. I would hold that the executors of Raghu Mal are liable for damages just as he would have been liable if he had been alive. In other words the cause of action survived Raghu Mal and his estate should pay such damages as can be awarded to the plaintiffs.

8. The only question that remains to be considered is as regards the amount of damages to which the plaintiffs are entitled. They claim the entire sum embezzled by B. Section Gillani and might have been held to be entitled to it if it had been established that Mela Ram aided or abetted the misappropriation thereof. As already found, the evidence does not take us as far as that. Mela Ram's part in the fraud commenced long after the embezzlement was complete. His complicity merely prevented the disclosure of the already accomplished fraud which would have been but was not discovered by the auditors in July and August 1923. It should be remembered that all the sums making up the entire amount of Rs. 39,750 had been misappropriated by Belti Shah Gillani during the period between April 1922 and January 1923. The plaintiffs are, in my opinion, entitled to recover from the employers of Mela Ram such loss as can be said to have arisen from the wrongful act of the latter. This view is in consonance with the principles on which damages are assessed under the English law:

Where damages are not merely nominal, and are not fixed by statute, or by agreement of the parties, but are to be assessed by the Court, or jury, the cardinal principle is that only such damages are recoverable as arise naturally from the act complained of and this rule applies both in contract and tort : Halsbury's Laws of England, Vol. 10, para. 571.

Damages in order to be recoverable must be the immediate or proximate consequence of the act complained of. If they are not the immediate or proximate consequence of such act, they are termed too remote and are not recoverable : Ibid, para. 572.

9. These principles have been recognised and enacted by the Indian legislature for cases in which damages have to be assessed for breach of a contract (cf. Section 73, Contract Act). Applying these principles to the case before us we have to determine what would have been the position of the company if Mela Ram had not lent himself to the machinations of Belti Shah when he was devising means to deceive the auditors for concealing the embezzlement previously made by, himself. Assuming that Belti Shah had no other means of preventing the

disclosure of his fraud at the time of the audit, it is fair to accept that the company would have promptly endeavoured to recover through the Court such amount as could be realised by attachment and seizure of his property and cash. We do not know what property and cash Belti Shah Gillani possessed at the time of the audit. The lower Court has not recorded any finding on this point. We think that we should have the benefit of the finding of the Court below on this question of fact. The issue to be remitted by us should be decided by the lower Court with due regard to the observations contained in our judgments.

Allsop, J.

10. This is an appeal against a judgment and decree of the Subordinate Judge of Dehra Dun who dismissed a suit instituted by the Dehra Dun Mussoorie Electric Tramway Company, Ltd., (in liquidation) through its official liquidators for the recovery of a sum of Rs. 39,750 against the defendants. These defendants were six persons, Hansraj and four others were the representatives-in-interest of Lala Raghu Mal, deceased and the sixth was Lala Mela Ram. The defendants are the respondents in the appeal and the official receiver of Bengal has also been impleaded as a respondent as the estate of Raghu Mal is the subject of dispute and the receiver is in possession of it. The plaintiffs are the appellants.

11. The Dehra Dun Mussoorie Electric Tramway Company was floated in the year 1921 by Belti Shah Gilani who acted as the managing agent of the company. In the month of March 1926 the company went into compulsory liquidation. Thereafter, as the result of misfeasance proceedings Belti Shah Gilani and the auditors were directed to make certain contributions. A criminal prosecution was also lodged against Belti Shah and he was sentenced to imprisonment for a period of five years. Lala Raghu Mal carried on business in Calcutta under the style of Madho Ram Hardeo Das and in Delhi under the style of Madhu Ram Budh Singh. Mela Ram was the agent of Lala Raghu Mal and as such was in charge of the Delhi business. There were certain relations between Lala Raghu Mal and the Dehra Dun Mussoorie Electric Tramway Co. At this stage it is sufficient to say that Raghu Mal was a shareholder in the company and that he received certain contracts for the supply of materials. It is contended by the appellants that Belti Shah and Raghu Mal entered into various transactions for their mutual benefit at the expense of the shareholders. This however is a subsidiary point and is not directly in issue in the appeal. It appears that Belti Shah in the years 1922 and 1923 converted three sums of Rs. 21,750, Rs. 12,000 and Rs. 6,000 to his own use. The gravamen of the charge against the defendants is that Mela Ram assisted Belti Shah in concealing these embezzlements from the auditors by executing false receipts and that he is therefore liable to the company, who could have recovered the money from Belti Shah at that time if the receipts had not been executed. The representative-in-interest of Raghu Mal are, it is claimed, also liable because Mela Ram executed the receipts in exercise of his duty as the servant of Raghu Mal, and Raghu Mal as the master was liable for the fraud of his servant. The learned Subordinate Judge has found that Mela Ram did by

executing the receipts enable Belti Shah to conceal his misappropriations for a number of years, but has dismissed the suit because he has also found that Mela Ram was an innocent dupe of Belti Shah's and was not acting deliberately in bad faith when the receipts were executed. (His Lordship then examined the evidence and proceeded). Haying held that Mela Ram deliberately issued false receipts in order to deceive the auditors and to conceal Belti Shah's embezzlement I have now to consider whether that wrongful act gave rise to any claim for damages. I should make it clear that two alternative causes of action were set up in the plaint. The first was based upon the allegation that Mela Ram and Raghu Mal had entered into a conspiracy with Belti Shah to misappropriate the money claimed. The second was based upon the allegation that Mela Ram issued false receipts in order to conceal the embezzlement. The learned Subordinate Judge found that the allegation of conspiracy had not been proved and that it had not been established that any part of the money embezzled by. Belti Shah had passed to Mela Ram or Raghu Mal. No such evidence has been brought to our notice as would justify us in differing from the learned Subordinate Judge and I hold that he was right in the conclusion to which he came. We are thus left with the second allegation that the wrongful act which gave rise to the claim for damages was the issue of the false receipts and the concealment of the defalcation.

12. The respondents argue that there can be no decree because this wrongful act did not cause any loss. The money, they say, had already passed into the possession of Belti Shah and had been lost to the company before the receipts" were issued, and even if it cannot be said that it was lost beyond re-call, still they are not liable unless it can be shown that all of it or some definite part of it could have been recovered from Belti Shah if the embezzlement had been discovered at the audit.

13. It is true that it has not been established or, at any rate, that there is no finding that a certain particular sum might have been recovered by the company from Belti Shah if Mela Ram had not deceived the auditor's by using false receipts and thus prevented them from making further enquiry and discovering the embezzlement. It may perhaps be said that Mela Ram is responsible only for the direct loss which was incurred because the embezzlements were not brought to light at the time when the audit took place. In any case it is desirable that there should be a finding upon this question of fact, namely, whether any amount, and if so, what amount would have been recovered if the receipt had not been issued. There does not seem to have been any clear issue before the parties upon this point in the Court below. I would therefore remit an issue on this point and allow the parties to produce evidence upon it if they wish to do so. It cannot be said that it is certain that no sum was recoverable from Belti Shah because it appears that he had to his credit a sum of about Rs. 4,000 in his ledger in the company's books in the middle of August 1923. This apparently was a sum which he might at least have been prevented from withdrawing. I would not express any definite opinion so as to hamper the Court below in coming to its findings, but as there is this prima facie evidence I think it is

advisable that the matter should be enquired into.

14. The respondents allege that the claim of the appellants is barred by certain orders which were passed in proceedings under the Companies Act. One of these orders was to the effect that Belti Shah should refund something over three lakhs of rupees to the company. The other directed the auditors to refund three sums of money. Two of these sums when added together amounted to something over Rs. 20,000. By the order of the Court that sum was to be paid immediately. The third item was that of Rs. 39,750 now in dispute. The Court was informed that the suit which has given rise to this appeal was pending and it directed that execution in respect of the sum of Rs. 39,750 should be stayed as against the auditors till the suit was decided and should then proceed only in respect of any part of the sum which was not recovered from the defendants. The auditors obtained leave to appeal to their Lordships of the Privy Council, but when matters had reached that stage the parties with the leave of the company Judge settled their dispute, out of Court. The liquidators of the company accepted a sum of between Rupees 18,000 and Rs. 19,000 in full satisfaction of their claim and the auditors withdrew their appeal.

15. The respondents argue that the appellants' right to institute a suit has merged by these orders in rem judicatam. The appellants rely upon the rule in the case, *Koursk* (1924) P. 140, that a suit against one wrong-doer does not bar a suit against the other when there are two wrongs which jointly cause a single loss and the rule in *Gouldrei, Foucard & Sons v. Sinclair and Russian Chamber of Commerce in London* (1918) 1 K.B. 180 that a suit to recover a specific sum of money paid does not bar a suit to recover damages for the deceit which led to the payment. It may be that the former rule applies to Mela Ram and the auditors and the latter to Mela Ram and Belti Shah, but I do not think that it is necessary to express any definite opinion upon these points. The fact in this case is that the liquidators never sought and never obtained any decree for damages for tort either against Belti Shah or against the auditors. The proceedings u/s 235, Companies Act, were, if I may so describe them, domestic proceedings between the company and its officers and the orders were passed in a special jurisdiction investing the Court with certain powers over the internal affairs of the company. If any sums had been recovered under those orders Mela Ram might have escaped liability wholly or in part upon the ground that the loss had disappeared or had been diminished, but there can be no question of the disappearance of a cause of action because it has been the basis of a suit. Nothing has been recovered from Belti Shah and one of the liquidators has made a statement which I see no reason for not accepting that he is now a pauper. The auditors or one of them has paid between Rs. 18,000 and Rs. 19,000. but there was an immediate liability of over Rs. 20,000 apart from the possible deferred liability of this Rs. 39,750 which is now in issue. The respondents suggest that the compromise must be interpreted to mean that the whole claim was satisfied. I cannot accept this suggestion. It has been explained by one of the liquidators that there were doubtful questions of law involved in the Privy Council appeal

and that inquiries had disclosed that the auditor concerned would not have been able to pay more than the sum he preferred while the other auditor had left the country and had no property available to the liquidators. That being so, the liquidators wisely accepted all that they could hope to get. As against the auditor with whom they came to terms they can claim no more, but that is no reason why we should constructively hold something which is not true, namely, that the company has recovered a sum of money which it has not recovered. The company is still out of pocket to the extent of Rs. 39,750. Mela Ram is in whole or part responsible and he must make good the loss to the limit of his responsibility.

16. The respondents plead that the suit is barred by limitation because it was instituted in June 1929 and the wrong, if any, was done in 1923. They wish to apply the provisions of Article 36, Limitation Act. That is a residuary article. This is clearly a suit for a relief on the ground of fraud and Article 95 applies to it. That being so, time begins to run from the date of the knowledge of the fraud. The respondents argue that the company must be deemed to have had knowledge at least on the date (7th November 1924) when the directors passed their resolution sanctioning the transfer of this sum from the ledgers of Madho Ram Budh Singh and Madho Ram Hardeo Das to the Materials Purchased Awaiting Delivery Account because the directors should have known then that no cash payment had been made to the two firms. There is no force in the argument. It is clear that the directors were deceived and had not knowledge. The liquidators have established that the fraud came to light only when Mela Ram made a statement in 1928 in the course of misfeasance proceedings. The liquidators were appointed in April 1926 and one of them has stated that they first became suspicious about the transactions in dispute in December 1926 after making an investigation into the affairs of the company. There is no reason to doubt this statement. Even if time began to run in December 1926 the suit was within time. The appellants also relied upon the provisions of Sections 14 and 18, Limitation Act, but it was not necessary to invoke the aid of these provisions. I hold that the suit was not barred by limitation.

17. It was one of the points taken by the respondents in the Court below that the appellants were barred from suing because the directors had sanctioned the transfer of the liability from one account to another and had thus, countenanced the whole proceeding. This point was not argued before us. It is difficult to see why the liquidators should not be allowed to recover because Belti Shah had deceived : the directors and had thereby induced them to sanction the transfer. The directors, as one of them has explained in evidence, had no idea that they were dealing with anything but a formal matter.

18. On the findings which I have recorded Mela Ram is certainly liable-for the amount which was lost owing, to his action. There still remains the, question of the liability of the estate<sup>1</sup> of Ragghu Mal, as represented by the other respondents. Ragghu Mal himself would, I have no doubt, have been, liable if he



had been alive. Learned, counsel for the respondents is not prepared to admit that Mela Ram had authority to issue receipts, but he had to concede that Mela Ram did issue receipts and that his right to do so was never questioned. There are also letters and telegrams which give him full authority to deal with the company on behalf of Ragghu Mal. I hold that Mela Ram was the servant of Ragghu, Mal and that in giving the receipts he acted within the scope of his employment.

19. It remains then to be decided whether the cause of action against Ragghu Mal survives against his executors and administrators. According to the principles expressed in the maxim "*actio personalis moritur cum persona*" the right of action would not survive. We are however not concerned so much with those principles as with the statutory provisions in Section 306, Succession Act. According to that section the liability of a deceased wrong-doer survives except in case of defamation, assault as defined in the Indian Penal Code and other personal injuries not, causing death. The question is what, the term "other personal injuries" is intended to mean. In *Krishna Behari Sen v. Commissioner of Calcutta* (1904) 31 Cal. 993 and *Bhupendra Narain Sinha v. Chandra Moni Gupta* 1927 Cal. 277 the Calcutta High-Court gave the term the very restricted meaning of bodily injuries analogous to assault. In *Motilal Satynarain v. Harnarain Premsookh* 1923 Bom. 408, *Rustomji Dorabji v. Nurse* 1921 Mad. 1, *Punjab Singh v. Ramautar Singh* 1920 Pat. 841 and *Mahtab Singh v. Hub Lal* 1926 All. 610, the term was given a wider interpretation so as to include malicious prosecution. I would agree that these four cases were rightly decided, but they are not authority for the proposition that the word "personal" was used in the section in any technical sense. In my opinion "personal injury" is intended to mean injury to the person as distinguished from injury to property. Defamation, malicious prosecution, assault and bodily hurt may all indirectly cause financial loss or financial expenditure, but they are in the main injuries which are personal in that they directly give rise to mental or physical suffering or inconvenience. In the case before us there was no injury of that nature. Mela Ram's deception was the direct cause of pecuniary loss to the company. No mental or physical suffering was directly inflicted upon any person. I would therefore hold that Ragghu Mal's estate is liable to the plaintiffs in the same degree as Mela Ram himself.