
(1940) 04 CAL CK 0034
In the Calcutta High Court

Mohini Mohan Majumdar and Another	APPELLANT
Vs	
Maharaja Bir Bikram Kishore Manikya Bahadur	RESPONDENT

Date of Decision : 30-04-1940

Acts Referred:

Limitation Act, 1963 — Section 19
Penal Code, 1860 (IPC) — Section 409

Citation : AIR 1941 Cal 257

Hon'ble Judges : Roxburgh, J; R.C. Mitter, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—Defendant 1, Mohini Mohan Majumdar, was the plaintiff's law agent for looking after his cases at Kasba. He was appointed as agent by an order of the plaintiff's father dated 15th December 1909. He actually joined his office on 15th January 1910. On 12th March 1911, the plaintiff's father gave him an ammokternama for the purpose of enabling him to discharge the duties of his office. On 28th May 1911, he executed his service kabuliat in favour of the plaintiff's father and had it registered. The service kabuliat is printed at p. 13 of Book c. It is unnecessary to recite here all the terms of the service kabuliat. It is only necessary for this appeal to notice the following conditions of service: (a) he was to look after suits and executions and to withdraw the moneys deposited in Court on account of the decrees passed in favour of his employer; (b) not to spend a single cowrie out of the sums that he withdrew from Court on account of these decrees; (c) he was to send every week to his employer's treasury the decretal amounts so withdrawn accompanied with barid chalan; (d) at the end of his service he was to make good all losses

if after checking accounts and on examination of other papers in the sherista any money was found to have been defalcated or any decree allowed to be barred or any claim allowed to be time-barred on account of non-institution of suit or any kind of injury to the estate

and he made himself liable to repay the defalcated money within one month from

the date of ascertainment of the amount; and (e) he was to submit monthly and yearly accounts to his employer's agents. On the terms of this service kabuliat he continued in office till his dismissal on 13th November 1923.

2. The plaintiff's father had demanded security, either in property or personal, to the amount of Rs. 2000 from him. On 13th June 1912, in pursuance of the said order he and his wife, defendant 2, executed a jamanatnamah and had it registered. By the said jamanatnamah, eight annas share belonging to him in a certain property and five annas odd share in the same property belonging to his wife, defendant 2, were charged. This jamanatnamah is printed at p. 18 of Book C. We shall have hereafter to consider this jamanatnamah in some detail when dealing with some of the points raised before us in the appeal. In 1928, in the course of inspection conducted by the plaintiff's assistant manager Mr. Mahendra Chandra Pal, it was discovered that defendant 1 had withdrawn from Court large sums of money deposited by the judgment- debtors of the plaintiff's father on account of decrees from 1914-22 that he had not credited the same to the estate. Explanations were called for from him but these explanations were not considered satisfactory. A man was deputed to take notes from the Munsif's Court at Kasba of the moneys withdrawn by defendant 1 and not credited to the plaintiff in his books, and from the said notes the amount misappropriated by defendant 1 was ascertained by the plaintiff's officer Mr. Mahendra Chandra Pal. The figure came to Rs. 9704-6-3. For this defalcation criminal proceedings were started against him u/s 409, Penal Code. While this prosecution was pending, there was a compromise between defendant 1 and the plaintiff. Defendant 1 admitted his liability to the extent of Rs. 9704 odd as the amount of his misappropriations and paid to the plaintiff a sum of Rs. 4500. For the balance he and his wife, defendant 2, executed an instalment mortgage bond in favour of the plaintiff. This mortgage bond is printed at p. 138 of Book O. By the said mortgage bond, full 16 annas of the properties hypothecated by the jamanatnamah was mortgaged. Thereafter the criminal proceedings were dropped.

3. In 1926, the plaintiff brought a suit on this mortgage against defendants 1 and 2. A defence was taken by them that the mortgage could not be enforced as the consideration for the mortgage was unlawful. The Court of first instance gave effect to this defence and dismissed the suit by its judgment dated 29th January 1929. Against the said decree passed by the Court of first instance, the plaintiff preferred an appeal to this Court on 3rd May 1929, being First Appeal No. 115 of that year. While that appeal was pending in this Court, the present suit was filed by the plaintiff on 23rd July 1929. On 22nd July 1932, First Appeal No. 115 of 1929 came up for hearing. On that date, the plaintiff-appellant made an application to this Court to withdraw his mortgage suit. That application was allowed. The order allowing that application is Ex. 102 and is printed at p. 205 of Book B. After making an observation that at least a part of the consideration for the mortgage was unlawful, this Court made the following order:

At the same time we think that merely because of the ekrarnama (mortgage) and the suit that has been brought on it, the appellant has not lost remedy against the respondent (defendant 1) for such liability as may be found on the part of the latter upon proper accounts being taken. The subordinate Judge, in our opinion, was right in his view that the present suit, regarded as one founded on such liability, is premature.

The appellant, we are informed, has now instituted a proper suit for that purpose. He desires to withdraw from the present suit with leave to pro secute the other one. This leave we readily grant. The present suit is allowed to be withdrawn and will be regarded as not having been filed.

4. Thereafter the present suit was continued and it has resulted in a decree in favour of the plaintiff and against both defendants 1 and 2. The Court below has however limited the liability of defendant 2 to Rs. 2000 to be realised from her property secured by the jamanatnamah of 1912. Both the defendants have preferred this appeal. The finding of the learned subordinate Judge that Rupees 9000 odd had been misappropriated by defendant 1 has not been challenged before us by the appellants. In order to decide many of the points raised in the appeal by defendant 1, it is necessary to set out relevant portions from the plaint and the written statement of defendant 1. In the plaint, the plaintiff after reciting the fact that defendant 1 had been appointed law agent in December 1909, and had taken up the duties of his office from January 1910, gives the terms of defendant 1's service kabuliati and of the jamanatnamah. Then in paras. 7 and 8, he states that there were settlements and adjustments of accounts with defendant 1. In para. 8 he sets out the fact that at the time of adjustment of his accounts, large sums of money which had been realised by him in respect of 151 decrees described in Schedule 2 to the plaint had not been shown in his accounts and the adjustments proceeded on the footing that they had not, in fact, been withdrawn by defendant 1 from the Court.

5. In the subsequent paragraphs of the plaint statements are made indicating that fraud committed by defendant 1 by which he actually concealed from the plaintiff's officer the fact that large amounts had, in fact, been withdrawn from the Court and not credited to the plaintiff in the accounts. The facts which led to the discovery of the fraud by the plaintiff's officer, Mr. Mahendra Chandra Pal, are also set out in some detail in the plaint. The plaint also summarises the explanation which defendant 1 gave to Mr. Mahendra Chandra Pal when he was asked to explain the defalcations, the explanation given by defendant 1 being to the effect that he had advanced large sums of money out of his own pocket and if these sums were adjusted he would not be liable to refund any money to the plaintiff. The plaintiff further avers in effect that the fact that the accounts had been adjusted and settled in the past would afford no defence to the defendants for the amount claimed by the plaintiff in the suit on account of the misappropriations, the details of which are specified in Schs. 2 and 3 of the plaint. In para. 16, the plaintiff gives the defendants credit for Rs. 4500 that was

paid at the time when the criminal proceedings against defendant 1 were dropped. In prayer ka, he claims a decree for the balance of Rs. 6249 odd specified in the schedules to the plaint,

or for such sum for which it will be found the defendant had not submitted accounts during the period of his service and which, it will be found, the defendant had misappropriated to his own use or taken by drawing false bills or the same bill twice, by surcharge and falsification of accounts by permitting the accounts to be surcharged and falsified which will appear on perusal of the papers submitted by the defendant.

6. In prayers kha and ga, the plaintiff prays for a decree for sale of the properties charged by the jamanatnamah and for a personal decree against defendant 1 only if his claim is not satisfied from the sale proceeds of the properties charged by defendants 1 and 2 by the jamanatnamah of 1912. Schedule 2 contains the details of the decrees, 151 in number which formed the subject-matter of inquiry in 1923 by the plaintiff's officer, Mr. Mahendra Chandra Pal. Schedule 3 contains descriptions of two further decrees in respect of which defendant 1's defalcation was found out after the inquiry conducted by the said Mahendra Chandra Pal. Schedule 4 contains the items of advances said to have been taken by defendant 1 and which had not been accounted for. In the course of the hearing in the lower Court, the plaintiff abandoned his claim to items mentioned in Schedule 4. It is unnecessary to go into the details of the written statement filed by defendant 1. He denied the fact that he had misappropriated the plaintiff's money and stated that he was not liable to pay the sum claimed in the plaint or any sum to the plaintiff. He set up his old story that he had advanced more moneys out of his own pocket to the plaintiff and if the accounts were gone into he would be found in credit. In paras. 24 and 30 of the written statement, he stated that he had submitted accounts every year and the said accounts were duly examined by the officers of the plaintiff's estate, and jama-kharach in respect of account (?) thus examined was also made and that after so long a period the said accounts could not be surcharged or falsified. In these two paragraphs he admitted the statement made in the plaint that in the past accounts had been adjusted with him. For the purpose of defeating the plaintiff's claim, he averred that his account papers had been tampered with and mutilated by the plaintiff's officers who had a grudge against him.

7. The contentions of defendant 2 necessary for consideration in this appeal are of a twofold character. We do not set out here all the defences taken by her but only those defences which are material for the purpose of this appeal. They are: (1) that she is not bound by the terms of the jamanatnamah, because being a purdanashin lady she did not know the nature and the effect of that document, because no one had explained the position to her and (2) that even if she was bound by the jamanatnamah she had executed with her husband she had discharged her liability under the jamanatnamah by making a payment to the plaintiff through her husband of the sum of Rs. 3000, which represented her

money, out of Rs. 4500 paid to the plaintiff in 1924. This last-mentioned defence was taken in her additional written statement filed on 13th March 1935 and printed at p. 204 of Book A. This additional written statement was however rejected by order No. 88, dated 18th March 1935, printed at p. 10 of Book A. Mr. Roy appearing for defendant 1 has raised a number of technical objections on the frame of the suit. He has also urged that the suit is barred by limitation and that, in any event, a sum exceeding Rs. 2000 could not have been thrown on the charged properties by reason of the terms of the jamanatnamah.

8. For the purpose of supporting the technical points raised on the frame of the suit Mr. Roy is inconsistent. For the purpose of arguing some points he said that the suit was not a suit for accounts. For the purpose of supporting other technical points he said in the same breath that the suit was a suit for taking accounts. How he could adopt the attitude in this Court that the suit was a suit for accounts is difficult to follow in view of the attitude which his client took in the lower Court when the plaintiff wanted to amend the plaint. His attitude in the lower Court is indicated in his objection to the said amendment printed at page 58 of Book A. On the basis of the assumption that the suit is not a suit for accounts he submits: (a) that this suit for specific sums of money is not maintainable without the plaintiff claiming general accounts; (b) that as the plaintiff has not established that accounts were settled and adjusted his prayer for leave to surcharge and falsification of accounts is a misconceived one; (c) that in terms of the leave granted by this Court on 22nd July 1932, in First Appeal No. 115 of 1929, the plaintiff was entitled only to sue defendant 1 for accounts and a suit of another description is not accordingly maintainable by him.

9. On the basis that the suit is a suit for accounts his points are : (a) that it is not maintainable as all the account papers submitted by defendant 1 have not been produced by the plaintiff; and (b) that, in any case, the form of the decree is bad, the decree ought to have directed an examination by the Commissioner of all the accounts for the whole period of service of defendant 1. Having regard to the inconsistent position adopted by Mr. Roy before us it is difficult to follow him in all the details of his arguments; but in having regard to our view of the nature of the suit as already indicated in the course of the analysis of the plaint, we do not accept his contention that the suit is a suit for accounts, and hence the two grounds which he urged before us on this latter basis that the suit is a suit for accounts accordingly fail. With regard to Mr. Roy's contentions on the basis that this is not a suit for accounts, it is our view that the suit is one for recovery of specific items of money which according to the plaintiff had been misappropriated by defendant 1. For the purpose of substantiating the charge for misappropriation, the plaintiff relies upon the accounts of defendant 1 submitted by him and settled. He charged the defendant with fraud, which on the evidence he has established, for the purpose of meeting the defence which, in fact, was ultimately taken by him, namely, that the adjustment of accounts was final between the parties. This disposes of the arguments (a) and (b) urged before us by Mr. Roy on the hypothesis that the suit was not a suit for accounts, but should

have been one.

10. We do not also see any force in the argument (c) of Mr. Roy that the suit as framed was not maintainable because of the form of the order of the Court by which the mortgage suit was allowed to be withdrawn. The cause of action in this suit is not the same as the cause of action on which the mortgage suit was brought. In this Court, as also in the lower Court, the plaintiff made an attempt to argue that the plaint in the mortgage suit would also enable him to get accounts from defendant 1. The learned Judge, however, held that the subordinate Judge was right in considering that such a prayer was then premature. Ultimately, however, this Court granted the plaintiff leave to withdraw from the mortgage suit and the leave was granted on the express reason that the present suit was then pending. This Court accordingly had no occasion to consider or express any opinion on the frame of this suit or on the question whether this suit was maintainable or not. That was not the question then. We cannot accordingly give effect to any of the aforesaid contentions raised before us by Mr. Roy.

11. The next question is a question of limitation. The contention of defendant 1 is that the suit is governed either by Article 62 or Article 89 or Article 90. It is not governed, says Mr. Roy, either by Article 116 or Article 132. For the purpose of deciding the question of limitation, the following facts and dates are material. Defendant 1 was appointed law agent by Maharaja Birendra Kisore Manikya Bahadur. The plaintiff in the present suit, Maharaja Bir Bikram Kisore Manikya, is his son. The plaintiff succeeded to the gudee on the death, of his father which occurred on 13th August 1923. After the death of Maharaja Birendra Kisore Manikya Bahadur, defendant 1 continued to be the law agent of his son, Bir Bikram Kisore Manikya Bahadur. He was the law Agent at Kasba up to 1922, but he was transferred later on to Comilla as the head law agent. He was dismissed from service by the plaintiff on 13th November 1923. Just before his dismissal, his fraud was discovered by Mr. Mahendra Chandra Pal on 27th October 1923. That fraud consisted in keeping concealed from the plaintiff and his predecessor the fact of the Large misappropriations made by him. The present suit was filed on 23rd July 1929. Three other dates were mentioned to us but we do not think that they are of any importance on the view that we are taking on the question of limitation, because it is not necessary for the plaintiff to rely upon any acknowledgment of liability by defendant I. These three dates are these: the first date is 21st July 1924, the date of the mortgage by the defendants to Basanta Kumar Ghosh. In this mortgage, the defendants acknowledged their liability to the present plaintiff. The second date is 20th September 1924, the date of the mortgage bond executed by the defendants in favour of the plaintiff. That deed also contains an acknowledgment of their liability. The third date is 2nd December 1925, when defendant 1 made an application to the Maharaja's officer for reconsideration, in which also there was an acknowledgment of liability by him. But as we have said, in the view that we are taking on the question of limitation, it is unnecessary to examine these documents in detail because the

plaintiff has not to rely on the provisions of Section 19, Limitation Act.

12. There are two prayers in the plaint. The first prayer is to enforce the charge created by the jamanatnamah of 1912. That prayer comes within the terms of Article 132, Limitation Act, but the decision of a Division Bench in Jogesh Chandra v. Benode Lal Roy (10) 14 CWN 122 has been cited before us by Mr. Roy in support of the proposition that Article 132 would not be applicable in a suit by the principal against an agent although the agent had charged his immovable property for the due performance of his service. It is, however, pertinent to observe that in that case Article 89 was not applied but it was said that the suit would be governed either by Article 115, if the service kabuliat was not registered, or Article 116, if it was registered, when one of the terms of service was to render accounts at stated periods as for instance, at the end of each year. If the aforesaid proposition be correct, this suit is clearly within time as in the service kabuliat there is a clause for rendition of accounts at the end of every year and as it has been brought within six years of the discovery of the fraud. Section 18, Limitation Act, on the facts of this case, would have made time run from the date of the discovery of fraud by Mr. Mahendra Chandra Pal in October 1923. In the last part of that judgment, however, it was held that Article 132 was not applicable although the plaintiff in that suit wanted to recover the amount that would be found due from his agent on taking accounts by the sale of the properties charged in his jamanatnamah. If this was the only authority on the point of the applicability of Article 132 to such a suit, we would have either to follow it or in the case of our dissent to have the question decided by a larger Bench. But we are relieved of the latter course because that decision of the said point has been dissented from in express terms in a series of later decisions of this Court.

13. Before the said decision in Jogesh Chandra v. Benode Lal Roy (10) 14 CWN 122 the same point came up for consideration before Sir Francis Maclean C. J. and Coxe J. in Hafezuddin Mandal v. Jadu Nath Sen ('08) 35 Cal 298. It was held that where the suit was not merely one for accounts but one to enforce in the plaintiff's favour the charge created to secure moneys which might be found due from the agent to his principal, the case fell within Article 132, Schedule 2, Limitation Act, and not under Article 89 or under Article 116. Hafezuddin Mandal v. Jadu Nath Sen ('08) 35 Cal 298 was not brought to the notice of the learned Judges who decided Jogesh Chandra v. Benode Lal Roy (10) 14 CWN 122. The matter again came up for consideration before Fletcher and Richardson JJ. in Troilukhyanath Mandal Vs. Abanish Chandra Roy, . The case in Jogesh Chandra v. Benode Lal Roy (10) 14 CWN 122 was cited before the Bench. Fletcher J. pointed out that the case was decided without reference to earlier decisions of this Court, preferred to follow Hafezuddin Mandal v. Jadu Nath Sen ('08) 35 Cal 298 and recorded his emphatic dissent from the decision on the said point in Jogesh Chandra v. Benode Lal Roy (10) 14 CWN 122.

14. The matter again came up for consideration in Madhu Sudan Sen v. Rakhal

Chandra ("16) 3 AIR 1916 Cal 680. The view adopted in Jogesh Chandra v. Benode Lal Roy(10) 14 CWN 122 was again placed before the Court but the Court refused to follow it and followed the cases which had taken a contrary view. In our view, apart from the authorities, the language of Article 132 is clear. We hold therefore that so far as the prayer to enforce the charge on the immovable properties is concerned the suit is governed by Article 132. In accordance with the terms of the service kabuliat the cause of action would arise from after a month of the ascertainment of the money defalcated. The amount was ascertained in October 1923 and the suit was filed in 1929 so well within time so far as the enforcement of the charge is concerned apart from any question which arises on the question of the applicability to the facts of this case of Section 18, Limitation Act.

15. The question of limitation with regard to the balance if the sale proceeds of the charged property are not sufficient to meet the decretal amount will now have to be considered. We do not think that any of the articles on which the appellants rely has any application to this case. Article 62 is clearly inapplicable. The conflict is between Article 89 or Articles 90 and 116, Limitation Act. In some cases it has been held that where there is a contract by the agent to submit accounts at stated intervals as for instance either at the end of every month or at the end of every year a suit for accounts would fall either within Article 115 if the contract was unregistered or Article 116 if it was registered. The other view is that Article 89 being the more specific article should apply even in such a case. It is not necessary to examine these cases to decide on the conflict of authorities because the case before us is not a suit for accounts. It is a suit, as we have already pointed out, for recovery of specific sums of money said to have been misappropriated.

16. As we have already pointed out, the account papers submitted by the defendant are only relevant for the purpose of determining the fact and the amount of defalcation. In the service kabuliat executed by defendant 1 in the year 1911, he specifically undertook to keep separate the amounts withdrawn from Courts and to remit them by barij challans without spending a single cowri out of it for or on behalf of the Maharaja or for the benefit of the estate. In the said kabuliat he also undertook after the termination of his service and after the accounts were checked, to repay the amount found to have been misappropriated within a month of the ascertainment of the amount. The right to sue for the misappropriated amounts accordingly accrued, on the basis of the said kabuliat, in November 1923. By not paying the said amount the defendant has broken his part of the contract as evidenced by the service kabuliat. As the service kabuliat is a registered one, the plaintiff would get six years from the said date under the provisions of Article 116, Limitation Act. The suit being within six years of the said date is in time for the balance that may be found due after the sale of the charged property. In the view that we have taken above, it is unnecessary to consider the effect of the death of the late Maharaja Birendra Kisore Manikya Bahadur, for the suit was not for accounts and all the defalcations

were at a period before his death.

17. It now remains to consider the appeal preferred by defendant 2. The rejection of her additional written statement prevents her from raising the point that by reason of the payment of Rs. 4500 to the plaintiff at the time of the withdrawal of the criminal proceedings any liability she had under the terms of the jamanatnamah had been discharged. The only defence open to her is the defence based on the fact that she was a pardanashin lady. In her evidence she attempted to make out a case of complete ignorance. On going through her deposition it appears to us that she is a highly intelligent lady. She admits that she was asked by her husband to execute a document in favour of the late Maharaja and that document was necessary in order to enable her husband to get the employment. Her evidence also makes it quite clear that she was interested in her husband's worldly affairs, as would be natural, and that she was on good terms with her husband. The evidence adduced on the side of the plaintiff is that the document was read over to her. In spite of her denial we believe this evidence to be true. She knew that her husband had been asked to furnish security, either personal security or security in immovable property. If the document was read over to her having regard to her intelligence she would understand that she was executing with her husband a security bond by which she was charging her own property in addition to the property of her husband. These facts have been established on the evidence.

18. The jamanatnamah opens with the recital that the Maharaja had demanded security from her husband to the extent of Rs. 2000 and. that security was to be either security in immovable property or personal security. The terms of the jamanatnamah are ambiguous in some respects. After the recital it is stated that the executants would be liable for the whole of the loss that may be caused by defendant 1 either by his negligence or by reason of his misappropriations. That clause although couched in wide terms would according to the principles of interpretation have to be construed so far as defendant 2 is concerned with the recitals. On the principles of interpretation, defendant 1 would be liable to the fullest extent for his misappropriation and his properties charged in that document would also be liable to the fullest extent. But so far as defendant 2 is concerned, she was really in the position of a surety. Those terms must be limited in her ease, as we have already stated above, by the recitals and her property would only be liable along with the property of defendant 1 to the extent of Rupees 2000.

19. On the evidence we hold that she must have understood the effect of this document in the manner indicated above, that is to say, her understanding of the document would be in accordance with the interpretation which a Court of law would put upon it. But there is one clause in the last portion of the document which creates difficulty. That clause is that if the entire amount of the plaintiff's dues from defendant 1 was not realized from the property charged as security, then the properties of defendant 2 other than the property charged by the

jamanatnamah was to be liable for the balance, the balance of Rs. 2000 according to the rules of interpretation. That was placing on her an extra liability beyond the liability indicated by the recitals. There is no evidence on the record that the effect of the document was explained to her, that is to say that it was brought to her notice that on the terms of the document she was incurring this extra liability. In these circumstances, we think that it would not be light to hold her bound by the terms of the jamanatnamah. We accordingly discharge the decree as against defendant 2.

20. The result is that so far as the appeal of defendant 1 is concerned, it is entirely dismissed but the appeal of defendant 2 succeeds. The form of the decree however is a little defective. The decree against defendant 1 would be for the amount of Rupees 6287-10-6 pies with costs and interest. Let a preliminary decree be drawn up against defendant 1 for the said sum together with costs awarded against him in the lower Court and the costs of this Court with interest at the rate of six per cent. per annum from the date of the lower Court's decree on the first two items and from the date of the decree of this Court on the last mentioned item. If the amount be paid by defendant 1 within two months from this date the property charged by him by the jamanatnamah will not be sold. If however the amount be not paid within the time aforesaid the lower Court will draw up a final decree and the property charged would be sold. If there is any balance due to the plaintiff after the sale of the said property the lower Court will prepare a decree under Order 34, Rule 6, Civil P.C. The appeal of defendant 1 is dismissed with costs. Defendant 2 will bear her own costs in this Court and in the Court below.

Roxburgh, J.

21. I agree.