

CALCUTTA HIGH COURT

Maharaja Srish Chandra Nandy

Vs

Supravat Chandra

(Henderson, J.)

05.01.1940

JUDGMENT

Henderson, J.

1. Three persons, Paramsuk Chandra, Ashutosh Chandra and Harihar Chandra were heavily involved in debts in the year 1904. On 28th April 1904, they executed a trust deed by which they conveyed all their properties to Maharaja Manindra Chandra Nandi as trustee for payment of their debts (Ex; B, C 115). We have marked Part I, Vol. I as A; Part II Vol. I as B; Part II Vol. II as C; supplementary paper book Part I as D and supplementary paper book Part II as E. The trustee accepted the trust and was in possession of the trust estate up to his death in November 1929. He did not however render account of trust estate. While he was trustee some of the immovable properties of the trust estate, Sribati and others, were sold at the instance of creditors and were purchased by him. He also redeemed the ornaments which had been pledged by the Chandras to others and kept them in his possession as trustee. There is now no controversy regarding the title to mehals Sribati and others which he had purchased while he was trustee. They still formed part of the trust estate notwithstanding his purchase. Before the date of the suit, Paramsukh, Ashutosh and Harihar had died. The original plaintiffs - plaintiffs 1 to 5 - are the sons of Paramsukh. The added plaintiff - plaintiff 6 - is a son of Harihar, pro forma defendants 2 to 4 are the sons of Ashutosh and pro forma defendant 6 is the remaining son of Harihar. Defendant 1, the principal defendant, is the son and heir of Maharaja Monindra Chandra Nandi.

2. After the death of Maharaja Monindra Chandra there were disputes between the Chundras and the Maharaja Srish Chandra over the possession of Sribati. The Chundras claimed the same as part of the trust estate but the Maharaja set up a personal title. A large number of criminal cases cropped up in which their servants and officers were involved. In 1931 many criminal cases were pending against the servants and officers of the Chundras in the Court of the Sub-Divisional Magistrate of Katwa. Some of the Maharaja's men had been convicted and appeals were pending

in the Court of the District Magistrate of Burdwan. Some of the cases related to non-compoundable offences. The District Magistrate arranged a meeting at the Katwa Dak Bunglow at which he himself, the Sub-Divisional Magistrate of Katwa, persons representing the three branches of Chundras and two representatives of Maharaja Srish Chandra were present. The object of the District Magistrate was to bring about peace and harmony between the parties. At that meeting a compromise was effected and the result thereof was embodied in a memorandum of agreement dated 3rd May 1931. (Ex. Q.E-30). Paramsukh, who was then alive, and his son Supravat signed. Dharmadas, a son of Ashutosh, who was then dead, signed on his own behalf and on behalf of his brothers, and Dhanapati, a son of Harihar, who was also dead at the time, signed on his own behalf and on behalf of his brother. Harendra Kristo Boy, Chief Secretary, and A.G. Sen, Private Secretary of Maharaja Srish Chandra signed on the latter's behalf. The pleaders of the respective parties and the District and the Sub-Divisional Magistrate signed as witnesses. The evidence is that the District Magistrate dictated the terms to his confidential clerk who prepared the memorandum. A sum of Rs. 30,000 was settled as the liability of the Chundras to Maharaja Srish Chandra "on trust and all other accounts," and each branch of the Chandras was to pay Rs. 10,000 to the Maharaja. Paramsukh was to pay the latter an additional sum of Rs. 9000. Each branch was to pay Rs. 1000 to the Maharaja for "costs of litigation," that is, the costs of the criminal cases. These are the provisions of the three clauses of para. 1. The next three paragraphs deal with the mode of payment of the said sums, and with the appraisal and sale of the ornaments which the late Maharaja held as trustee. Para. 4 provides that the mehals Sribati and others would remain in the possession of the Chandras and that Maharaja Srish Chandra would give up all rights therein in favour of the Chundras provided that the criminal cases then pending between the parties including the criminal appeals were "all with-drawn and dropped and compromised."

3. After this memorandum was executed differences arose between Maharaja Srish and the Chundras relating to the quantity and the value of the ornaments. The Chundras could not also pay the moneys to the Maharaja within the time provided for in the memorandum with the result that many petitions were filed before the District Magistrate, who started a regular file in connexion therewith and whatever he did in connexion with these applications is embodied in an order sheet (Ex. J-C 236 to 244) which runs from 16th June 1931 to 1st February 1932. The suit in which this appeal arises was filed on 10th November 1933. At this stage it would be convenient to summarize the pleadings.

4. The plaintiffs charge the late Maharaja with liability to render account of the trust estate and state that as no accounts had been rendered by him during his life-time it is necessary that they should be taken. They got only some account papers, original and copies, but the rest were with the late Maharaja and are now with defendant 1. They seek to avoid the abovementioned

memorandum of agreement (Ex. Q) as being illegal, and that document being out of the way, the amount due to them can only be ascertained by taking accounts. They accordingly ask the Court to direct defendant 1 to file the account papers which are with him, so that the amount of trust money left with the late Maharaja may be ascertained and a decree for payment out of his assets may be passed. They further charge the late Maharaja with negligence and wilful default, and claim that the loss so caused should be made good by defendant 1 from the assets inherited by him from the late Maharaja. They also claim the return of their share of the moveables or payment of their value. One thing is noticeable. The plaintiffs do not charge defendant 1 with liability to account. He is to produce the account papers, because according to the plaintiffs, they are with him. After the account papers are produced the trust money which was or ought to have been with the late Maharaja is to be ascertained from the account papers. This is one part of the plaintiffs' case. The other part of their case (leaving aside their claim to the ornaments and other moveables or their value) is that defendant 1 is to make good from the inherited assets the loss caused to the trust estate by his father by his negligence and wilful default. This claim sounds in damages resulting from breach of fiduciary duties. Dhanapati, who was a pro forma defendant, was on his application made a co-plaintiff. He limited his claim to the other reliefs except the relief relating to the ornaments and moveables.

5. It is unnecessary to refer in detail to the written statement which is very prolix. The pleas necessary for the determination of the points in controversy in the appeal can be summarized thus: (i) that the plaintiffs and their co-sharers have all the account papers of the trust estate in their possession. The suit is not maintainable as those papers have not been filed or disclosed; (ii) that the memorandum of agreement, Ex. Q, is binding on the parties and in view of its terms the plaintiffs are not entitled to have accounts re-opened again; (iii) that the late Maharaja repaid the creditors of the plaintiffs and their co-sharers by advancing large sums of money from his personal tahabil. Defendant 1 expressly reserved the right to bring a suit for the recovery of whatever may be due to the late Maharaja; (iv) that trust moneys never came into the hands of the defendant and the suit against him was accordingly not maintainable; (v) that the late Maharaja had not acted negligently, and if he did act in such a way as to cause loss to the cestui que trusts the terms of the trust deed absolved him from liability. Other defences raising the question of title to Sribati and other properties and the question as to whether the late Maharaja was a mere figure head, who had left the management in the hands of the Chandras, need not be detailed as the findings of the learned Subordinate Judge on these questions have not been challenged before us by the appellant's advocate.

6. The learned Subordinate Judge held that the plaintiffs had disclosed all the papers they and their co-sharers had received from the late Maharaja and had filed them in Court and the remaining papers were with the late Maharaja and are now with defendant 1. He further held that

the memorandum of agreement, Ex. Q, was a void document; that the late Maharaja acted as trustee and 'managed the trust properties with the help of his own officers, that he was not a figurehead, that no accounts had been rendered by him, that the terms of the trust deed did not absolve him from the consequences of his negligent acts or for his wilful defaults, that mehal Sribati and other mehals purchased by the late Maharaja either in his own name or in benami were trust properties and that he had received the ornaments and move-able as per lists given in the plaint. He accordingly passed a preliminary decree directing accounts. He decreed that the original plaintiffs would get one third and the added plaintiff one sixth of the sum which they could prove remained in the hands of the late Maharaja on account of the management of the trust estate and the same share in the sum of money which would represent the loss caused by the late Maharaja by his wrongful mismanagement of the trust estate. In taking accounts the commissioner was to proceed on the Court's findings relating to the custody of the account papers. The commissioner was also directed to ascertain the value of the ornaments and moveables given in the schedule to the plaint and the direction was that the original plaintiffs should get a decree for one third of the said sum.

7. Before us the following points only have been taken by Dr. Basak, the appellant's advocate. I. That the suit ought to be dismissed as accounts of the trust estate had already been settled by Ex. Q which is a Valid document. II. That assuming that the suit is a good one, (a) the commissioner's hands ought not to be tied down by the findings of the Subordinate Judge relating to the custody of account papers. The learned Subordinate Judge ought to have left to the commissioner to decide if more account papers were with the plain-tiff and / or their cosharers, (b) that the learned Subordinate Judge ought to have reserved the right of the defendant to get a decree in the suit itself if the balance on taking account happened to be in his father's favour, (c) that the Subordinate Judge ought not to have given directions for ascertaining the amount of loss caused by the late Maharaja by reason of his mismanagement, negligence and wilful defaults, (d) that the direction on the commissioner to ascertain the value of the moveables and ornaments is bad. The Court itself ought to have determined it. In any event there was no necessity to refer the said matter to the commissioner. He ought to have made a decree for Rs. 2000 in favour of the plaintiffs which was the highest amount for which the plaintiffs could get a decree in view of their valuation of the relief.

8. We will now deal with the aforesaid points in the same order, with the exception that point II (b) will be dealt with last of all. We have already detailed the circumstances in which the memorandum of agreement, Ex. Q, was executed. The object of the District Magistrate was no doubt a laudable one - but some of the offences charged were serious and were absolutely non-compoundable, and could not be compounded even with the sanction of the trying Magistrate. The District Magistrate has given evidence to the effect that neither he nor the Sub-Divisional

Officer had put any pressure on, or had held out any threat to, any of the parties for inducing them to compromise. Neither he nor the Sub-Divisional Officer showed any indication that they would be displeased if the compromise was not effected. (A. 128) Suprobat has given a different version. There cannot, however, be any doubt that the agreement was not concluded in a free atmosphere. The District and the Sub-Divisional Magistrate, in whose Courts criminal cases were then pending, were taking leading parts. It may be that they never intended to coerce the parties to an agreement, or it may be that they were discreet enough, but the effect on the mind of the parties or their agents can be well imagined. However, be that as it may, as we are not basing our judgment on coercion, which has been negated by the Subordinate Judge, it is not necessary to pursue the matter further; All we say is that it was not proper for the District Magistrate or the Sub-Divisional Magistrate to take so much interest in the matter of compromise when criminal cases involving serious charges were pending in their Courts. We prefer to base our judgment on the ground that the agreement, Ex. Q, is an illegal one in view of the provisions of Section 23, Contract Act, as being opposed to public policy.

9. A number of cases dealing with agreements to stifle criminal prosecutions, has been cited before us. It is not necessary to notice all of them except five recent ones. They are *Dwijendra Nath v. Gopiram*¹ *Kamini Kumar v. Birendra Nath* ; *Deb Kumar v. Anath Bandhu* ; *Gopal Chandra v. Lakshmi Kanta* and *Sudhindra Kumar v. Ganesh Chandra* . The first mentioned case was decided about five years before the Privy Council pronounced its judgment in *Kamini Kumar v. Birendra Nath* and some of the observations made therein may have to be re-examined in the light of the last mentioned decision, if and when occasion arises. An act may involve a person in a civil as well as a criminal liability for a non-compoundable offence, the liability depending on proof. The mere fact that an agreement may be made with regard to the civil liability while a possibility of prosecution criminally is existing will not render the agreement void, *Flower v. Sadler*² but if that agreement is made and part of the consideration for it on the side of the aggrieved party is an agreement not to prosecute criminally, then the agreement is void. If the agreement as to the civil liability changes the nature or the extent of the original civil liability, for example if the guarantee of a surety is introduced, of, *Flower v. Sadler* (1883) 10 Q.B.D. 572(Supra) or if the liability is changed from a personal one to a mortgage security, this will be a strong indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. The additional advantage so conferred by the agreement cannot be enforced in law, though it would be open to a party to fall back upon the original civil liability and enforce it. This distinction is a fundamental one and in our judgment forms the basis of the decisions pronounced in *Gopal Chandra v. Lakshmi Kanta* , *Deb Kumar v. Anath Bandhu* and *Sudhindra Kumar v. Ganesh Chandra* . This distinction would with greater reason apply, where the foundation of the original civil liability is wholly unconnected with the act which is made the foundation of the

criminal offence.

10. In another part of our judgment we will deal with the nature of the rights and obligations of the plaintiffs and of defendant 1. For the purpose of the point now under consideration, it is sufficient to state that before the agreement, Ex. Q, the claim of the one against the other was in a fluid Btate. The account was unsettled and for finding the exact dues not only complicated accounts spreading over a large number of years had to be taken but the charges of mismanagement, negligencoe and wilful default levelled against the late Maharaja had to be investigated. The agreement Ex. Q substituted for what was then unascertained liability for a fixed sum of money. For his right of indemnity against the trust estate as the legal representative of the deceased trustee a debt was substituted in favour of defendant 1 and he was given the right to additional securities in the shape of instalment mortgage bonds. If therefore the consideration of Ex. Q was wholly or in part the withdrawal of the non-com, poundable cases then pending, defendant 1 cannot claim the sums of money specified in Ex. Q or plead that the suit as framed is not maintainable on the ground that accounts had already been settled. The parties would in law be relegated to the position they occupied before Ex. Q was executed, and whatever rights they then had would remain intact and could be enforced subjectto the law of limitation. In fact the plaintiffs seek to enforce in the suit those pre-existing rights.

11. In deciding the question as to whether the consideration of Ex. Q was the settlement of the pending criminal cases we cannot be confined to the terms of Ex. Q. The whole evidence must be examined. We cannot therefore accept Dr. Basak's contention that the consideration for the withdrawal of the criminal proceedings is what has been expressly stated in para. 4 of Ex. Q, that is the settlement of the title to the lands of Sribati and other lands and nothing else. That contention is inconsistent with the following observations of the Bt. Hon'ble Sir Benod Mitter in *Kamini Kumar v. Birendra Nath* :

In a case of this description it is unlikely that it would be expressly stated in the ekrarnama that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful.

12. In the case before U9 that evidence is furnished mostly by documentary evidence. The first document is Ex. 11 (C 235). It is a notice issued by the Sub-Divisional Officer on the Ghandras informing them that the District Magistrate will come to Katwa on 3rd May 1931 for settlement of their litigations with Maharaja Srish Chandra. Harendra Kristo Roy, the Chief Secretary of defendant 1, has admitted in his evidence that there were no civil litigations then pending between the parties. The object, accordingly, of the District Magistrate's visit was to settle the criminal cases. On 3rd May 1931, the arranged meeting was held at Katwa and the agreement

Ex. Q was brought into existence. There cannot be any doubt from Ex. J (C 226), Ex. C 9 (C 268) and Ex. 1 (0 270) that the withdrawal of the pending criminal cases was the main consideration for Ex. Q. The parties as well as the Magistrate understood the matter in that way. Three orders re-recorded by the learned District Magistrate in Ex. J dated respectively 16th June, 13th July and 4th August 1931 are significant. The learned Magistrate expressly ordered the criminal cases to be kept pending till the first instalment payable by the Chandras in terms of Ex. Q had been paid. We accordingly hold that Ex. Q is a void agreement and must be totally ignored.

13. We cannot further accede to Dr. Basak's argument that the parties by re-affirming Ex. Q after the criminal cases had been dropped must be taken to have agreed afresh on the same terms as are embodied in Ex. Q and as there were no non-compoundable criminal cases then pending the fresh agreement cannot be hit by Section 23, Contract Act. For the purpose of substantiating his contention he has referred us to the large number of petitions made to the District Magistrate after 4th August 1931, when the criminal cases were dropped. These petitions are printed at page 272 and the following pages of Vol. C. In all these petitions the compromise of 3rd May 1931, that is the memorandum of agreement Ex. Q is expressly referred to and the parties proceed to make their excuses or prayers on the basis thereof. They only wanted to carry out or to have carried out, the terms of the agreement Ex. Q which was, for the reasons which we have given void in law. I The agreement Ex. Q being out of the way I the parties are relegated to their rights and j duties which they have by reason of the fact that the late Maharaja was the trustee and the plaintiffs and the pro forma defendants the cestui que trusts.

14. learned Subordinate Judge has given cogent reasons for his finding that the plaintiffs have produced all the account papers which had been delivered to them and their co-sharers and the remaining papers are with defendant 1. Dr. Basak has frankly admitted before us that on the materials on the record he cannot say that the finding of the learned Subordinate Judge is a wrong one, but he submits that it should be left to the commissioner to decide on such evidence that may be produced before him by his client whether more account papers than have been produced by the plaintiffs had been delivered to them. We cannot accede to this contention. Defendant 1 raised a distinct plea on the point with the object of defeating the plaintiffs' suit in limine. An express issue, issue 3, was raised. The parties led evidence on the point and the matter was fully gone into. In the circumstances we cannot allow the same question to be re-agitated before the commissioner. Defendant 1 had set up a case which has been found to be false on cogent grounds which we accept.

15. Dr. Basak has also attacked that part of the decree which directs the commissioner to ascertain the loss caused by the late Maharaja by his negligence or wilful default. His contention

is that the trust deed by its terms had exonerated the late Maharaja from such liability. Some of the fundamental duties of a trustee are to get in the trust property and to manage the trust as a prudent man of business. He must exercise his powers also like a prudent man of business. Where he has a discretion he must exercise it in a bona fide and intelligent manner. It is doubtful whether those duties can be abrogated or minimised by an agreement between the creator of the trust and the trustee. Those duties are the duties which a trustee owes to the cestui qua trust, and the unwarranted exercise of his powers and discretions would affect them, who may be, and ordinarily are, persons other than the creator of the trust. But assuming that a covenant in the trust deed can in law abrogate or minimise the aforesaid obligations imposed by law, we do not think that the clause at B 116, lines 43 to 45 in the trust deed Ex. B (B 115) has the effect contended for by the appellant. It does not, in our judgment, absolve the trustee from the effects of acts negligently done or negligent omissions or wilful defaults. The directions given by the Subordinate Judge must be upheld. The loss occasioned by such acts and omissions of the late Maharaja must be made good from his assets in the hands of defendant 1. The cause of action survived, as the loss would be the result not of a mere tort committed by the late Maharaja but of the breach of a fiduciary relation, of a failure to *perform a duty* : *Concha v. Murrieta de Mora*³

16. We are however of opinion that the directions given to the commissioner to ascertain the value of the moveables are wrong. Section 75, Civil P.C., does not authorize the Court to issue a commission of this nature. As the late Maharaja held the ornaments and other moveables as trustee, the plaintiffs are entitled to recover them back in specie under the provisions of Section 11, Specific Relief Act. The decree ought to be a decree for delivery of the moveables enforceable under Order 21, Rule 31, Civil P.C., but in accordance with Order 20, Rule 10 of that Code the decree has to state the amount of money to be paid by the defendant as an alternative if delivery cannot be had.

17. There is no evidence on the record to determine the value in the plaintiffs' one-third share. We would have been constrained to remand the case for the purpose of ascertaining the value thereof, but we are relieved of that necessity by the admission made by Dr. Basak. The plaintiffs have valued their share in the plaint at Rs. 2000 for the purpose of court-fees. They cannot have a sum exceeding the same fixed in terms of Order 20, Rule 10, for, for a relief for possession of moveables the Court-fees Act does not allow tentative valuation. Dr. Basak says that his client admits the value in the plaintiffs' share to be Rs. 2000, the highest amount which they can claim on their pleadings. This part of the decree is accordingly set aside and in lieu thereof the decree would be for delivery to the original plaintiffs of their one-third share of the moveables and ornaments specified in schedule ha to gha of the plaint. If defendant 1 does not or is unable to deliver the same the said plaintiffs would be entitled to realize Rs. 2000 in the manner provided for in Order 21, Rule 31, Civil P.C. But in case the said defendant delivers to the said plaintiffs

only some of the ornaments and moveables and fails to deliver the rest which would go to make up the plaintiffs' one-third share in the ornaments and moveables specified in the said schedules of the plaint, then the executing Court will fix the amount of compensation for what may not be delivered in terms of Order 21, Rule 31 (2), Civil P.C.

18. The last contention of Dr. Basak is that the Court ought to have reserved in the preliminary decree itself the right of defendant 1 to get a decree in the suit, if on taking accounts the balance turned in his favour. His contention proceeds upon the footing that the suit is essentially a suit for accounts, and that being the character of the suit a decree in that form ought to follow. In the course of his argument he admitted that the liability of his client is in some respect lighter than that of his father, in that he has not, like his father, to explain the accounts, and that the onus is on the plaintiffs to prove what is due. Subject to these limitations, says he, the suit is in form and substance a suit for accounts. To support his argument he asks us to take by way of analogy suits instituted by a principal against a dead agent's representative. The cases cited by him are all cases in which the question of limitation was raised, the question being whether Article 89, Limitation Act, was applicable. On this point divergent views have been expressed in this Court; some of the cases holding that that Article is applicable, others holding that either Article 115 or Article 120 is the proper Article. We do not think it necessary to express any opinion on this conflict. Most of those cases have a remote bearing on the question we have to decide. The only case of that series which enunciates a principle which has some bearing on the controversy before us is the case in *Kumeda Charan Bala v. Ashutosh*⁴ That case lays down that to sustain a suit for account there must be a liability to account, which must be discharged by the accountable party, that a suit for recovery of money is not a suit for account, simply because accounts may have to be taken to ascertain the sum and that a dead agent's heir is not an accountable party. He has no duty to explain accounts and the onus is on the principal to establish with regard to each specific sum, that he is entitled to recover it.

19. A trustee is bound to account to his cestui que trust. The burden of rendering account is entirely upon him. He must explain questioned items and must be ready, to support each and every item with proper-vouchers. If he had spent money out of his own pocket he is entitled to be indemnified, if he can prove that it had been spent in the administration of the trust. Ordinarily, he has a charge on the trust property for the money so spent, but in special cases where he had spent at the express or implied request of the cestui que trust he can also recover it from the latter personally. A suit for account can be brought by the cestui que trust against the trustee. But where his case is that money is due to him, the trustee can as plaintiff ask the Court to take accounts, and to have a decree for such balance as may be found due to him, for otherwise he would be without remedy if the cestui que trust does not choose to file a suit for accounts (Langdell; Brief Study of Equity Jurisdiction p. 90, Edn. 2). If a suit for account is, however,

brought by the cestui que trust against the trustee, the latter can get a decree for payment in that very suit if he is in surplusage. In the Courts of Equity in England the decree is given in favour of the defendant trustee on the principle that by bringing such a suit the cestui que trust submits by implication to have a decree for payment made against him and in favour of the trustee, if the balance turns in favour of the latter (Langdell, p. 46, Edn. 2). In some decisions in India the principle of avoidance of multiplicity of suits has been invoked. It is said* that it would be inequitable to drive the trustee to a separate suit, simply for the purpose of having the same accounting done over again. In our judgment both these principles must be kept in view in deciding, the point.

20. The position of the heir or legal representative of the trustee will now have to be considered. He is under no liability to account to the cestui que trust because of want of privity. It is therefore necessary to examine precisely the principle on which the cestui que trust is entitled to relief limited to the personal assets of the trustee in the hands of his legal representative, for it is well established that those assets can be got at. The first principle is that a trustee is liable to make good the loss caused by his breach of trust. The cause of action to obtain compensation survives and his legal representative is bound to make good the loss out of assets which he receives. The second principle is that a cestui que trust is entitled to follow the trust property, whatever shape or form it takes, in the hands of a volunteer. The same principle applies even when the trust property is money, provided it can be traced. If the trustee mixed his own money with trust money and either keeps the mixed funds himself or hands it over to a volunteer the cestui que trust will have a charge over the entire fund for so much as represents the trust money. The taking of account in such cases is only necessary for ascertaining the exact amount of the trust money which was mixed up with the personal funds of the trustee.

21. In our judgment the matter for consideration before us can be solved on these principles keeping in view the fact that the heir or legal representative of the deceased trustee stands in the position of a volunteer so far as the trust fund is concerned. A suit to have an account against the legal representative of a dead trustee is in essence a suit for recovery of the trust fund, the accounting being necessary to ascertain the amount representing the said fund, so that it may be charged on the assets received by the legal representative, such assets being in substance what we have called the mixed fund. Such being the character of the cestui que trust's remedy, the theory of an implied undertaking by him as in a suit for account against the trustee, which is the main foundation on which a decree is given in the latter's favour if he is in surplusage, can have no application. We have already pointed out that not only the cestui que trust but also the trustee can file a bill for account. Whether the trustee is the plaintiff or the defendant, in such a suit the burden is always on him to establish the items of account. The net balance either in favour or against the trustee, as the case may be would be the same in both the suits. But, when a suit is

brought by the cestui que trust against the legal representative of a trustee, the burden is on the plaintiff. He will have to establish what was the surplus which was in the hands of his trustee. The defendant is under no obligation to explain or establish any item of account. All items of receipts and expenditure appearing in the trust accounts must prima facie be taken as correct unless proved by the cestui que trust to be otherwise. In a suit however instituted by the legal representative of the trustee against the cestui que trust to enforce the right of indemnity of the deceased trustee, the former must show that the amount spent from the private funds of the trustee was spent for the trust. Where the ascertainment of the amount would depend upon taking accounts he must prove that the trust fund was in deficit and the said deficit was made up from the personal funds of the trustee. He must therefore satisfactorily explain the questioned items of receipts and expenditure. The difference in the burden in the two cases may produce different results. Multiplicity of suits cannot accordingly be avoided. We cannot import the theory of implied undertaking by the cestui que trust, as in a suit for account against the trustee, to pay the balance, if any, found due to the trustee, for, this might imply an undertaking to pay more to the legal representative of the trustee than the latter himself could recover in a separate suit against the cestui que trust. If the defendant had pleaded equitable set off he may have been entitled to get a decree, but in that case he would have had to shoulder the burden, which he has expressly declined to shoulder in this case by specifically stating in his written statement that he would prefer his claim in a separate suit. We accordingly overrule this point, which is not even taken specifically in the memorandum of appeal. The result is that subject to the modification of the decree of the learned Subordinate Judge, relating to the enquiry by the commissioner of the value of the ornaments and other moveables, this appeal fails. As the appeal has failed on all the substantial points defendant 1 appellant must pay full costs of this appeal to the plaintiffs respondents.

Cases Referred.

1(1926) 13 A.I.R. Cal. 59

2(1883) 10 Q.B.D. 572

3(1889) 40 Ch D 543

4(1913) 17 C.W.N. 5