

NAGPUR HIGH COURT

Basant Kumar Mishra

Vs

Roshanlal Shrivastava

Second Appeal No. 641 of 1944

(Hidayatullah and R. Kaushalendra Rao, JJ.)

28.09.1953

JUDGMENT

R. Kaushalendra Rao, JJ.

1. (1-10-1952) :- This second appeal involves the question of agent's right to sue the principal for accounts. The learned counsel for the appellants contends that even in those exceptional cases wherein it was held that the principal was liable to render accounts to the agent, the position of the former was that of an agent of the latter. He says this is an important question of law and he would request for permission to file a Letters Patent Appeal in case the decision goes against his clients because of the importance of the question. Shri Adhikari agrees with Shri Bobde that it is an important question of law and that he would also request for permission to file a Letters Patent Appeal in case the decision goes against his client. In view of the importance of the question of law involved in this appeal and in order to save time, I refer this appeal to my Lord the Chief Justice with a recommendation that it be placed before a Bench of two Judges under Sub-Rule (1) of Rule 9, Chapter I, Part I of the Rules of the High Court of Judicature at Nagpur.

JUDGMENT:-

This second appeal is referred to the Division Bench by Mangalmurti, J. on the ground that it involves an important question of law, namely, whether an agent can institute a suit against the principal for accounts.

2. The facts giving rise to the question may now be briefly stated. The suit was instituted by the respondent-plaintiff against the appellant-defendants on the following allegations. The defendants are the proprietors of Mishra Bandhu Karyalaya, a publishing concern of Jabalpur. In October 1934, the defendants appointed the plaintiff as their sole agent for the sale of their books and articles in the Narsimhapur sub-division. The plaintiff was to get commission on all books

and articles sold in the said area from the above Karyalaya through any agency and in whatsoever manner. The rates of the commission were as detailed in para. 2(c) of the plaint.

Later in 1935, according to the plaintiff, it was agreed between the parties that the plaintiff should get the cost of a signboard, the rent of the book depot where the books were exhibited for sale and the price of wooden shelves to the extent of Rs. 15, Rs. 8 per month and Rs. 10 respectively. The plaintiff worked as the sole agent of the defendants from October 1934 to August 1937 and spent Rs. 178 on the book depot. The plaintiff alleged that the defendants had with them the accounts of the sales in the Narsimhapur area in their possession and they were accordingly liable to render account. The plaintiff asked the defendants several times to settle the accounts but the defendants failed to do so. The suit out of which this appeal arises was accordingly instituted.

3. The defendants admitted that the accounts of sales in the area were in their possession. They, however, denied that they appointed the plaintiff as their sole agent. They denied that the book depot opened at Kandeli had any concern with their Karayalaya. They asserted that it was the exclusive shop of the plaintiff opened by him with their help as he was then out of employment. They further pleaded that the plaintiff closed the shop after 8-8-1935 and asked the defendants to supply books to one Gajrajsingh. Books were supplied to the said Gajrajsingh from 8-8-1935 to 4-7-1936 on the plaintiff's standing surety for the regular payment of the price of books supplied to him. The plaintiff transferred the stock of books with him to the said Gajrajsingh and promised to realize the price from Gajrajsingh and pay it to the defendants. Gajrajsingh however did not pay the price of books supplied to him and therefore the defendants demanded the same from the plaintiff. In answer to that demand, the plaintiff took UP the position that he was an agent entitled to commission. The defendants denied that there was any agreement to pay the plaintiff the price of signboard, the rent of the book depot and the price of an almirah. Finally, they pleaded that the plaintiff's claim if any, was barred by limitation.

4. The plaintiff succeeded in both the Courts. The decree is that the defendants should render account to the plaintiff for the period 15-10-1934 to 15-7-1937 and it orders the appointment of a commissioner to take account of the same. The plaintiff's claim for Rs. 178 on account of rent of shop, signboard, etc., is also decreed. The lower appellate Court has awarded interest to the plaintiff on the amount found due at the rate of 6 per cent, per annum from 17-5-1937 to the date of the final decree.

5. The defendants have come up in appeal and urge :

- (i) that the Courts erred in holding that the plaintiff was an agent and in rejecting the defense put forward by them;
- (ii) that the suit by the plaintiff being one by an agent against the principal was not maintainable;
- (iii) that the suit was barred by limitation under Article 115, Limitation Act; and (iv) that the lower appellate Court erred in awarding interest to the plaintiff from the date of the

demand.

6. The first contention of the appellants really raises a question of fact. Both the Courts substantially disbelieved the defence set up by the appellants, and accepted the version of the respondent. According to both the Courts, the respondent was the sole agent for the sale of the appellants' books in the Narsimhapur sub-division, and the Courts also found that it was mainly due to his efforts that the books of the appellants got introduced in the schools in the Narsimhapur area. The two Courts also found that the shop at Narsimhapur, though it might have been called Krishna Book Depot and later Pustak Bhandar, was in fact a branch of the Mishra Bandhu Karayalaya opened for advertising the books of the appellants. The lower appellate Court definitely rejected the plea of the appellants that the respondent was the book-seller and the exclusive owner of the shop. It was found that the respondent was an agent who under the agreement was to canvass for commission for the sale of the books of the appellants and worked in that capacity till 15-7-1937. These are essentially findings of fact. There is no adequate reason for interfering with them in second appeal. So the appeal must be considered on the footing that the respondent was an agent entitled to a commission from the appellants on the sales effected in the Narsimhapur area.

7. The next question is whether the suit was not maintainable because it was instituted by an agent against his principal. On this point there is a divergence of opinion. In - '*Gopikisan v. Padmrāj*¹', Mitra, A.J. c. observed that an agent cannot bring a suit for accounts against his principal but only for the balance due upon an account. According to the learned Additional Judicial Commissioner, the agent alone is liable to render accounts and the principal is not. To the same effect are the decisions or dicta in - '*Jowahar Singh v. Haria Mal*²', - '*Gulam Qutab-uddin Khan v. Faiz Bakhsh*³', - '*Hanuman Baksh v. Balmukand*⁴', - '*Narmada Chandra v. Maharaja Bahadur Singh Dugar*⁵', - '*Mahadevi v. Sankara Menon*⁶', and - '*Mirza Najm Effendi v. Kohinoor Footwear Co*⁷.'.

8. On the other hand, in - '*Ram Lal Kapur and Sons v. Asian Commercial Assurance Co., Ltd*⁸.' the plaintiffs who were insurance agents were to be remunerated by commission calculated on the premia paid on all policies effected or introduced through them. It was held that they were entitled to call on the defendants for rendition of accounts as that was the only relief which would enable the plaintiff satisfactorily to assert their rights. The ground of the decision was that while no doubt the plaintiffs were aware of all policies effected or introduced through them, they could not certainly know which of those policies had lapsed, matured or had been forfeited. As it was not possible for them to calculate what commission would be payable to them on policies effected through or introduced by them as agents of the Insurance Co., the suit was held maintainable.

9. According to the decision in - '*Gulabrai Dayaram v. India Equitable Insurance Co., Ltd*⁹', though an agent has no statutory right to have an account from his principal, nevertheless there

may be circumstances rendering it equitable that the principal should account to the agent. Such a case may arise where all the accounts are in the possession of the principal and the agent does not possess accounts to enable him to determine his claim for commission against his principal. The observation in - '*Ramchandra Madhavados Co. v. Moidunkutti Biranbutti and Bros*¹¹', seem to imply that a suit for account does lie at the instance of an agent where the extent of dealings are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into.

10. The statement of law in Halsbury is that an agent has a right to have an account taken, and where the accounts are of a simple nature they can be taken in an ordinary action in the Queen's Bench Division (See Vol. 1, para 454). According to Bowstead, where the accounts between the principal and agent are of so complicated a nature that they cannot be satisfactorily dealt with in an action of law, the agent has a right to have an account taken in equity. See Article 79, Bowstead's Digest of the Law of Agency, 11th Edn. The learned author of the 14th Edn. of Story's Equity Jurisprudence after saying that an agent is not generally entitled to accounting by his principal makes himself responsible for the following statement :

"There are usually exceptions to all rules, and where the principal has kept the accounts between him and his agent and the matters and things transacted in the course of the agency are within his own peculiar knowledge, the agent may ask for accounting." (Vol. II, p. 31, section 611).

11. In 1852 it was held that it by no means followed that because a principal was entitled to have an account taken in equity as against his agent, the agent had a similar right against his principal. See - '*Padwick v. Stanley*¹¹', Notwithstanding this pronouncement, 11 years later a suit by an agent against his principal for accounts was entertained by the Vice-Chancellor in - '*Shepard v. Brown*¹²',

12. In the last ruling the plaintiff's case was that he was employed by the defendants to obtain orders for goods manufactured by them and that he was to be allowed remuneration in the shape of commission upon the amount of all goods sold under orders which were obtained through his exertions. The plaintiff sought an account of all orders received and executed by the defendants through his exertions and to have it ascertained how much was coming to him for commission in respect of the goods so sold. Overruling the demurrer that the plaintiff might recover in an action the whole amount of that commission which he was seeking to recover by account in the Equity Court, the Vice-Chancellor observed :

"Where the case of the plaintiff is one in which he seeks an account of transactions and dealings with the defendants, the evidence of which transactions must remain principally, if not entirely, in the hands of the defendants, it is extremely difficult to say that, upon a bill seeking an account of that kind upon a case so stated, this Court has no jurisdiction to

entertain it."

Reference was made to the decision in - '*Mackenzie v. Johnston*¹³', In that case a bill was filed by the principal against an agent who was employed to sell goods for him. It was held that the plaintiff could only learn from the discovery of the defendants how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence. The same principle was made applicable to a suit by an agent against the principal.

13. The very next year the Appeal Court in Chancery ruled that a bill for an account inequity by an agent against his principal for his commission on orders obtained by the agent was demurrable. It was held that the fact that the-agent may be ignorant of the orders did not entitle him to file a bill for an account of what was due to him for commission, but that his remedy was at law. According to Lord Justice Turner, in the absence of an allegation as to complication of accounts, the bill could not be entertained in equity. See - '*Smith v. Leveaux*¹⁴', The remedy at law was not however doubted, though that remedy as is well known was not as efficacious as the equitable' remedy in matters of account. See what was stated by Lord Redesdale in - '*Attorney-General, v. Mayor of Dublin*¹⁵', about the old action of account and by Lord Chancellor Erskine in - '*Corporation of Carlisle v. Wilson*¹⁶', about how the Court of equity assumed a concurrent jurisdiction in cases of account.

14. Finally, reference is necessary to a decision in 1872 : - '*Blyth v. Whiffin*¹⁷', There the Vice-Chancellor observed :

"With regard to that question, whether an agent, can maintain a bill against his principal for an account, it is not necessary to go further than to say I entertain no doubt on the subject. x xx x if there are complicated accounts it is just as much open to the suit of the agent against the principal as on the part of the principal against the agent; but in neither case is it to be permitted unless there be a complicated account." (p. 334).

15. It is not to the purpose of the present appeal to consider whether there was any limitation in the Court of Equity on the right of a principal to have an account against his agent or whether the fiduciary character between the-two was not itself sufficient for the maintenance of such a claim. See - '*Makepeace v. Rogers*¹⁸', But it may not be out of place to mention that the right of a principal to file in equity a bill for account against his agent was itself sustained on varying grounds at different times - '- '*Phillips v. Phillips*¹⁹', - '*Barry v. Stevens*²⁰', and - '*Hemings v. Pugh*²¹', (1863) 66 ER 785. In - '*Barry v. Stevens* ' (supra) the bare relationship of principal and agent was not regarded as entitling the principal to come into equity for an account.

16. The old practice of bandying a suitor from Court to Court was brought to an end by the

Judicature Acts. So the question whether in a particular case the suitor can claim account by a bill in equity or by an action at law has lost its old importance. The position now is that an action for an account can be maintained in any case in which equity or common law had jurisdiction formerly to order an account. As observed by Lord Justice James :

"A man may now bring in the Chancery Division almost any variety of action which might have been brought in the Common Law Courts." (See - '*Warner v. Murdoch*²²').

It is no doubt provided for convenience that actions for the taking of partnership and other accounts shall be commenced in the Chancery Division : (vide section 56, 15 and 16 Geo. V, c. 49). But the King's Bench Division has power to order an account to be taken and exercises such power where the account is one of a simple character : See sections 18, 36, 43 and 59, 15 and 16 Geo. V., c. 49; Order 40, Rule 1, Rules of the Supreme Court (England) and - '*Leslie v. Clifford*²³', That the right of an agent to claim an account against his principal for the commission due to him on orders received by his principal from the customers introduced by the agent, of which the plaintiff is not aware, is recognized, is evident from Bullen and Leake's Precedents of Pleadings in Actions in the King's Bench Division, 10th Edn., pp. 59-61.

17. It is true that in India the right of a principal to have an account from his agent is founded on the statute-S. 213 of the Contract Act. Such a suit would always lie. But that does not warrant the unqualified proposition that a suit by an agent for an account against his principal can never lie. The Indian decisions to the contrary, which are referred to above, cannot, if we may say with due respect, be regarded as laying down a complete or an accurate statement of the law on the point.

18. In present case, it is not disputed that the plaintiff canvassed throughout the Narsimhapur area. The agent's function was not to sell the books directly himself but to canvass for effecting the sales of the principal's books. The agent does not know how many orders were placed with the principal and how many books were actually sold as a result of the agent's efforts. In such circumstances, the agent could not have with him any account of the transactions entitling him to the commission. Those accounts have admittedly been maintained by the principal. That in this type of a case the agent can maintain against his principal an action for an account is clear from the authorities already referred to. See also Pleadings by Sir Gilbert Stone, pp. 352-353 and 376-377. So there is no justification for insistence in this class of cases on a suit for a definite sum arrived at by recourse to the circuitous and comparatively dilatory procedure of interrogatories and discovery as suggested by Mathur, J. in - '*Mirza Najm Effindi v. Kohinoor Footwear Co.*' (supra) instead of a straightforward action for an account.

19. Coming to the question of limitation, we are of the view that Article 115 has no application to the case because the present suit cannot be regarded as one for compensation for the breach of a contract as provided for in that article. As observed by Mookerjee, J. in - '*Md. Mozaharal Ahmad*

v. *Md. Azimaddin Bhuinya*²⁴;

"The term 'compensation' etymologically suggests the image of balancing one thing against another, its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent."

20. What the plaintiff is claiming in this suit is the commission to which he would be entitled on an account being taken not compensation in lieu of what he was entitled to under the contract. As observed by Reilly, J. in - '*Annu Avathanigal v. Somasundara Avathanigal*²⁵', a suit for an account is not a suit for compensation for breach of contract. So Article 115 has no application to this case.

21. While there is a specific article for a suit by a principal against his agent, there is no such article for the converse case. But it has been ruled that a suit for accounts not covered by any specific article falls under Article 120 : - '*Cursetjee Pestonjee v. Dadabhai Eduliee*²⁶', and - '*Sri Raman Lalji Maharaj v. Gopal Lalji Maharaj*²⁷', If the case is governed by Article 120, as we hold it is, the suit cannot be said to have been barred by time. The learned appellate Judge considered the claim for Rs. 178 as distinct and separate claim. Even on that footing we agree with the learned appellate Judge that the claim was not barred by time because of an acknowledgment of liability by the defendants within the period of limitation. The acknowledgment is to be found in the letter dated 9-10-1937 (Exhibit P-7). This letter is in answer to the requests made by the plaintiff for the payment of what was due to him (Exhibits P-3 and P-6). The defendant replied as under :

"You should kindly send your claim to the Karyalaya immediately, so that it may be examined and the amount may be sent." The reply in our view means that the defendants admitted their liability to the plaintiff and were willing to pay the amount on examining the claim. Reference may be made to the decision in - '*Skeet v. Lindsay*²⁸', There the debtor said :

"If you send me the particulars of your account, I shall have it examined and cheque sent to you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim."

It was held that there was a clear and absolute acknowledgment sufficient to take the case out of the statute of limitation. We are therefore of the view that the suit was not barred by time.

22. The question of interest remains. There is no warrant for the proposition contended for by the appellants that in a suit for accounts interest prior to the ascertainment of the account cannot be given. See - '*Ek Nath v. Godhaji*²⁹', Two instances may be cited where in a suit for accounts interest prior to the suit was allowed - '*Miller v. Barlow*³⁰', and - '*Mutia Chetti v. Sobramaniam Chetti*³¹',

23. It has been held that an agent is liable to pay interest on failure to pay the money over at the request of the principal See - '*Barclay v. Harris and Cross*³²', In a similar case by a manager who sued for arrears of wages due to him, the amount of which was to be ascertained by taking a percentage of the profits appearing from the books which were to be kept by the defendant, the Court of Equity made the defendant liable to interest from the date of the demand See - '*Rishton v. Grissell*³³', There was no excuse for the appellants, being in possession of the accounts, not to have struck the

account when the demand was made. We are accordingly of the view that the award of interest from the date of demand till the institution of the suit is proper and is maintained. But the award of interest thereafter, 'pendente lite' and subsequent to the decree till realization, is a matter 'of discretion for the Court under section 34, Civil Procedure Code. In our view, the proper stage in this case for the exercise of that discretion is while passing the final decree. The direction regarding interest in the decree of the Court below shall be suitably modified in conformity with this judgment.

24. But for this modification, the appeal fails and the decree of the Court below is affirmed. The appellants shall bear the costs of the respondent.

Order accordingly.

¹ AIR 1916 Nag 70 at p. 71

²60 Pun Re 1899

³ AIR 1925 Lah 100

⁴ AIR 1927 Lah 701

⁵ AIR 1937 Cal 359

⁶ AIR 1940 Mad 504

⁷ AIR 1946 All 489

⁸ AIR 1933 Lah 483

⁹ AIR 1937 Sind 51

¹⁰ AIR 1938 Mad 707

¹¹(1852) 68 ER 664

¹²(1862) 66 ER 681

¹³(1819) 56 ER 742

¹⁴(1863) 46 ER 274

¹⁵(1827) 4 ER 888 at p. 898

¹⁶(1807) 33 ER 297 at p. 298

¹⁷(1872) 27 LT 330

¹⁸(1865) 34 LJ Ch 396

¹⁹(1819) 56 ER 742

²⁰(1852) 68 ER 596

²¹ (1862) 54 ER 1137

²²(1877) 4 Ch D 750 at pp. 752-753

²³(1884) 50 LT 590

²⁴ AIR 1923 Cal 507 at pp. 511, 512

²⁵ AIR 1931 Mad 185

²⁶(1877) 36 LT 98

²⁷19 All 244

²⁸14 Moo Ind App. 209 (PC)

²⁹F.A. No. 10 of 1950. D/d. 18.9.1953.(Nag) 19 Mad 425

³⁰18 Cal 616 (PC)

³¹(1915) 85 LJKB 115

³²(1870) 10 Eq 393