APPELLATE CIVIL.

Before Mitter and Akram JJ.

1939

Aug. 22, 23, 28.

BENOY KRISHNA GHOSH CHAUDHURI

v.

AMARENDRA KRISHNA GHOSH CHAUDHURI.*

Hindu Law—*Position of the* kartâ *of joint family*—Kartâ's *accountability and period thereof*—*Limitation*—*Indian Limitation Act (IX of 1908), Sch. I, Art. 120.*

A co-sharer of a joint Hindu family under the Dâyabhâga school of Hindu law demanded accounts from the *kartâ* or did not accept the accounts submitted by the *kartâ* since April 20, 1924, *i.e.*, from 1331 B.S. The co-sharer on March 8, 1935, instituted a suit for partition of the joint family property with a claim for accounts against the *kartâ*. This suit was instituted within six years from the refusal of the *kartâ* to submit accounts.

Held that the *kartâ* is liable to account for the entire period from April 20, 1924, *i.e.*, from 1331 B.S. to the date of the institution of the suit on March 8, 1935.

It is incorrect to say that under Art. 120, Sch. I of the Limitation Act, 1908, the period of accountability of the *kartâ* is only six years anterior to the institution of the suit.

Saroda Pershad Chattopadhya v. *Brojo Nath Bhuttacharjee* (1); *Hemangini Dasi* v. *Nabin Chand Ghose* (2); *Advocate-General of Bombay* v. *Bái Punjábái* (3); *Barada Proshad Banerjee* v. *Gajendra Nath Banerjee* (4); *Sophia Orde* v. *Alexander Skinner* (5); *Ahidannessa Bibi* v. *Isuf Ali Khan* (6) and *Midnapur Zemindary Co., Ld.* v. *Naresh Narayan Roy* (7) referred to.

Biswambar Haldar v. *Giribala Dasi* (8) distinguished and dissented from.

The position of the *kartâ* in a joint Hindu family of the Dâyabhâga school cannot be defined in terms of English law.

*Appeal from Original Decree, No. 111 of 1936, against the decree of Sitesh Chandra Sen, First Subordinate Judge of 24-*Parganâs*, dated Jan. 31, 1936.

(1) (1880) I. L. R. 5 Cal. 910.
(2) (1882) I. L. R. 8 Cal. 788.
(3) (1894) I. L. R. 18 Bom. 551.
(4) (1909) 13 C. W. N. 557.
(5) (1880) I. L. R. 3 All. 91; L. R. 7 I. A. 196.
(6) (1923) I. L. R. 50 Cal. 610.
(7) (1924) 29 C. W. N. 270.
(8) (1920) 25 C. W. N. 356.

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A normal joint Hindu family of the Dâyabhâga school consists of members with varying rights. The *kartâ* is to take care of all of them, satisfy their legitimate needs and has to maintain them. He preserves the family properties and the name, prestige and welfare of the family. The *kartâ* is not merely a collecting agent and custodian of family property or funds. In spending family funds the *kartâ* has a wide discretion, which is only limited by family necessity. He can spend more for one branch of the family than another branch of it, although the shares in the family property of both the branches are equal. The *kartâ's* position is not akin to that of an agent, trustee, executor, administrator or co-owner. The *kartâ* is liable to account for the existing property and not for what the *kartâ* would have got by better skill and diligence. But this does not mean that the *kartâ's* statement or his account of family assets is final. Parties to the suit have a right to have his statement and his account verified in the usual way.

Narendra Nath Roy v. *Abani Kumar Roy* (1) followed.

In a Dâyabhâga joint Hindu family, a junior co-sharer has a right to demand accounts from the *kartâ*, even during the continuance of the joint family and if the *kartâ* refuses, the junior member can enforce it by a suit against the *kartâ*.

Abhaychandra Roy Chowdhry v. *Pyarimohun Guho* (2) followed.

Soorjeemoney Dossee v. *Denobundoo Mullick* (3) referred to.

The period of limitation for such suits is governed by Art. 120 of Sch. I of the Indian Limitation Act, 1908. In accordance with the third column of Art. 120, limitation would run from the time when the right to sue the *kartâ* accrues.

The right to sue the *kartâ* arises or accrues only after the demand for accounts has been refused by the *kartâ*.

Bolo v. *Koklan* (4) referred to.

APPEAL FROM ORIGINAL DECREE preferred by the defendant arising out of a suit for partition and accounts.

The facts of the case and the arguments in the appeal are sufficiently set out in the judgment.

Jatindra Mohan Choudhuri and *Rabindra Nath Chaudhury* for the appellant.

Harideb Chatterji for the respondent No. 1.

Bankim Chandra Roy for respondents Nos. 2 to 4.

Cur. adv. vult.

(1) (1937) 42 C. W. N. 77.
(2) (1870) 5 B. L. R. 347.
(3) (1857) 6 M. I. A. 526.
(4) (1930) I. L. R. 11 Lah. 657; L. R. 57 I. A. 325.

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The judgment of the Court was as follows:—

This appeal is by the defendant in a suit for partition and accounts. The suit was instituted on March 8, 1935, by four plaintiffs, three being brothers of the defendant and the fourth his brother's widow. The properties in respect of which the claim was made consists of five items, a dwelling house described in sch. *ka*, and four items of property described in sch. *kha*. The finding of the learned Subordinate Judge is that items Nos. 2 to 4 of sch. *kha* had been sold long before the suit with the concurrence of the parties to the suit or their predecessors-in-interest, and in item No. 1 of sch. *kha*, there are other co-sharers not parties to the suit. He has, accordingly, excluded from partition the four items of sch. *kha* and has only directed partition of the house described in sch. *ka* on a declaration that the plaintiffs have four-fifths share (each of them a fifth share) and the defendant the remaining fifth share. He has also declared that the parties have shares in the same proportion in item No. 1 of sch. *kha*.

Defendant No. 1 denied the right of the plaintiff No. 4 (his brother's widow) to the properties in suit. That contention was overruled by the learned Subordinate Judge and it has not been repeated before us. The defendant-appellant does not challenge the above findings of the learned Subordinate Judge.

The learned Subordinate Judge has, however, made the defendant liable to render accounts from January 29, 1901, till the date of the suit. This part of the decree only is challenged by the appellant.

In the plaint it is recited that the properties in suit with other properties belonged to Radha Krishna Sen. Radha Krishna died in 1887 without male issue. He left three daughters Nistarini, Aghoremani and Sarada Sundari. He left a will, by which he appointed his two sons-in-law executors. They were Prasanna Kumar and Bhuban Mohan, the husbands of Aghoremani and Sarada

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Sundari respectively. After probate, Sarada Sundari's husband died and Prasanna Kumar continued to act as the sole surviving executor. In the beginning of 1901 he made the distribution. He made over the estate in equal shares to Aghoremani and her sons and to Sarada Sundari and her sons, and directed these two branches to pay, by way of maintenance, Rs. 40 per month to Nistarini, who was a childless widow then living at Benares. All the persons interested in the estate of Radha Krishna accepted this arrangement and distribution. Shortly after this distribution, Sarada Sundari and her four sons, plaintiffs Nos. 1 to 3 and the husband of plaintiff No. 4, executed on January 29, 1901, a power-of-attorney in favour of the defendant, the second son of Sarada Sundari, authorising him to manage the joint estate, make collections and conduct suits and proceedings. It is, however, admitted by the plaintiffs that the defendant was also the *kartâ* of the joint family and has acted as such all along.

In the plaint, the defendant is sought to be made liable for accounts "as agent and *kartâ*". The learned Subordinate Judge, in passing the decree for accounts, has not stated whether the accounts are to be rendered by him on the footing that he was the *kartâ* or on the footing of a mere agent. Before us the parties admit that the accounts must be taken on the footing that he was the *kartâ*. We, accordingly, direct that the accounts which are to be taken from the defendant are to be taken on the principles formulated in the case of *Narendra Nath Roy* v. *Abani Kumar Roy* (1).

With regard to the period of accounting the learned advocate for the appellant raises two points.

He says that—

(*i*) accounts are to be directed only up to a period of six years before suit, and

(1) (1937) 42 C. W. N. 77.

(*ii*) if that contention be not accepted, accounts cannot be directed for a period anterior to 1333 B.S. (1926-27) or in any event for a period anterior to 1330 B.S. (1923-24) as the defendant had in fact rendered accounts up to that period.

We will deal with the second question first as it depends entirely on facts. There is documentary evidence on the record that the defendant used to make *furds* showing the income and expenditure and used to give those *furds* to his co-sharers. Two such *furds*, one containing the accounts of the year 1330 and the other of the year 1333, are on the record with the covering letters (II. 35 and II. 41). The accounts of 1333 was sent to plaintiff No. 1, who usually resided at Cawnpore with the covering letter [Ex. 1(*c*), dated May 25, 1927 (II. 40)]. The reply of plaintiff No. 1 to that letter has not been produced by the defendant. There are, however, two other letters of the defendant to plaintiff No. 1, dated August 5, 1927, and November 20, 1927 [Ex. 13(*c*), II. 44 and Ex. 3, II. 4] which throw light upon the question. In the first of the two, which was written after the *furd* of 1333 had been sent to plaintiff No. 1 the defendant recites the terms of a letter which he had received for plaintiff No. 1. There he mentions that the plaintiff No. 1 had made a demand for five years' account. In the second letter Ex. 3 he pleads for time for preparing the accounts. These two letters lead us to conclude that no objection had been taken by any body to the accounts submitted by the defendant for a period up to 1330, but that accounts for later years including that of 1333 submitted by the defendant to the plaintiff No. 1 with the letter Ex. 1(*c*) had not been accepted as final. We, accordingly, hold that the defendant is bound to render accounts of his management from the year 1331 B.S. only and not for an earlier period unless he can make out his first ground.

In considering the first point raised we must proceed on the footing that the defendant was the *kartâ*

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of a joint Hindu family governed by the Dâyabhâga law, and as such *kartâ* is accountable for the management of the joint estate. The learned advocate for the appellant urges, and we think rightly, that s. 10 of the Limitation Act is not applicable. He further urges that his client is only liable to render account for a period of six years anterior to the suit, as the claim for accounts for the period before that is barred by Art. 120 of the Limitation Act. In support of his argument he relies upon the decision of a Division Bench of this Court which has applied Art. 120 to a case of accounts from the *kartâ* of such a family; *Biswambar Haldar* v. *Giribala Dasi* (1). In that case the *kartâ* was held liable to account, in a suit for partition and accounts, for only a period of six years anterior to the suit. We will have to consider this case in some detail.

A claim for accounts in a suit for partition of joint family property is in a sense incidental to the right to require a partition. Its object in part is to ascertain the moveable assets to be divided between the parties to the suit along with the immoveable family poperties. In a sense its scope is wider, to find out misappropriations or misapplications of joint family funds. A claim for account when joined in a suit to a claim for partition stands on a different footing from a claim for accounts against the *kartâ*, when the family is still joint, and a right to enforce it by suit, when no partition is claimed therein, must, in our judgment, rest upon entirely different considerations.

At a time a view was expressed that the junior members of a Dâyabhâga family having shares in the family properties had no right to demand accounts of the *kartâ* or enforce it by suit without at the same time suing for partition. The observations of the Supreme Court made in 1855 in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (2) are specific and indicate

(1) (1920) 25 C. W. N. 356. (2) (1857) 6 M. I. A. 526.

a view in support of that proposition. The force of the observations made in that case that "the liability "to account can *only* be enforced upon a partition" have, in our judgment, been affected by the decision of the Full Bench of this Court pronounced in 1870 in *Abhaychandra Roy Chowdhry* v. *Pyarimohun Guho* (1). In that case the defendant as *kartâ* had managed the undivided share of plaintiff for some time. Later on, the management of that share was taken out of his hand and committed to another person. The plaintiff sued the defendant for accounts for the period he had managed his share. Partition was not claimed in the suit. In the referring order, Mitter J. observed that under the Hindu law, which had been correctly summarised in Juggernath's Digest, Vol. 3, p. 97, a *kartâ* is liable to give an account of his managership to the other members of the joint family, and can be sued if demand of the latter for accounts is refused. The Full Bench held the suit to be a good one. That authority is binding on us and we hold that in a Dâyabhâga family a junior co-sharer has the right to demand accounts of the *kartâ* while the properties are still joint and on refusal can enforce it by a suit without praying therein for partition of the joint estate. This is the first point which we decide.

The next question is what is the period of limitation to such a suit—a suit for accounts without partition. In our judgment the residuary Article, Art. 120, must apply. Limitation would run in accordance with the third column from the time when the "right to sue accrues".

Whether a person has a right of a particular nature against another depends upon the jural relation. The jural relation between a junior member and the family head gives the former the right to have accounts from the latter. That is what we have

(1) (1870) 5 B. L. R. 347.

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already held. The right to sue for accounts would arise only when the said right had been infringed or when infringement is threatened. In *Bolo* v. *Koklan* (1) the Right Hon'ble Sir Benod Mitter commenting upon the third column of Art. 120 said as follows:—

> There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

In that case, the right in question, namely, right to moveable property accrued to the plaintiff in 1918 and the suit was instituted in 1927. It was held to be within time, on the basis that Art. 120 was applicable, as the invasion of the plaintiff's right was in 1922.

A right must of necessity accrue before its infringement. What facts constitute the infringement would depend upon the nature and extent of the right. The right of a junior member to demand accounts from the *kartâ* of a joint Hindu family accrues or comes into being as soon as the former acquires a right to the family property but it would not necessarily follow that his right to sue the latter would accrue from that moment of time. Some other facts must intervene. What those facts are to be would, as we have already observed above, depend upon the nature and extent of the right of the co-sharer. This makes it necessary for us to examine the constitution of a joint Hindu family governed by the Dâyabhâga law and the powers, obligations and responsibilities of the *kartâ* of such a family.

A normal Hindu joint family in Bengal consists of members with varying degrees of rights. Some have defined shares in the family properties, some the legal right to be maintained and rest are dependant members, wives and children of the co-sharers and persons connected by blood or marriage who, though not strictly members of the family, actually live in the family. The *kartâ* has to take care of all of them and to supply their maintenance and legitimate needs.

(1) (1930) I. L. R. 11 Lah. 657; L. R. 57 I. A. 325.

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He is not merely the manager of the joint properties and his position is not akin to an agent or even trustee in the sense in which these terms are used. His powers are greater and in one sense he has greater responsibilities. He must be solicitous to preserve not only the family properties but also the family name and prestige, and must be careful in preserving and promoting the family welfare. He holds the strings of peace and harmony and enjoys the respect and confidence of the members of the family. The amount of confidence which is invariably reposed in him by the other members of the family, so long as there is peace and harmony in it, is well known to those who have practical knowledge of such families. In the normal state of a joint Hindu family implicit reliance is placed on him, on his impartiality, ability and wisdom by the other members. It is only when dissensions arise in the family or when the *kartâ* by his unfair or biased acts shakes the confidence of the members of the family that occasion arises for demanding account of his stewardship.

The powers of a *kartâ* of a joint family are very wide. He is not merely the collecting agent and custodian of the family property and funds. He is no doubt under a liability to account, but the measure of that liability is different from that of an agent, trustee, executor, administrator, partner or mere co-owner. He is liable to account for what he gets in and not for what he ought to have got in with greater skill and diligence. He has a wide discretion in spending family funds and that discretion is limited only by considerations of family necessity. He can spend more on one branch than on another, although the shares of both the branches in the family properties be equal. In short, the position of a *kartâ* cannot be defined in terms of any jural relationship known to the western jurists.

A *kartâ* has the liability to render accounts. But what is the nature and extent of that liability? He is

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under no obligation to render accounts to the co-sharers at the end of each succeeding year, or even for any period, unasked. His liability amounts to this, and no more, namely, that when asked to furnish accounts he must comply. Such being his obligation the corresponding right on the part of his co-sharers is the right to make a *demand* for accounts from him. The right is not to have accounts without a previous demand. Such being the right, the right is infringed only when the demand for accounts is refused. The right to sue him for accounts, accordingly, arises or accrues only when there is a refusal to the demand. Having regard to the nature of a joint Hindu family placed under a *kartâship* it would be intolerable, and would be against the institution of a joint Hindu family, if it be held that a suit for accounts, while the family is still joint, is maintainable against the *kartâ* at the instance of a junior member, who had made no previous demand for accounts and whose demand had not been refused by the *kartâ*. In that case, a whimsical co-sharer would be placed in a position, without suing for partition, to bring successive suits for account against the *kartâ*, year after year without giving him an opportunity to render the accounts amicably. In our view, the right to sue the *kartâ* for accounts—apart from accounts that may be claimed in a suit for partition—arises only when a demand for accounts has been refused. We cannot, accordingly, subscribe to the view that the right to get accounts is automatically extinguished year after year as years roll on, while the family continues to be joint and the members thereof have no occasion to lead them to suspect that the *kartâ* is not doing what he is expected to do. In our judgment, there is no principle behind the *dictum* that a *kartâ* is bound to render accounts only for a period of six years before the suit, whatever the circumstances be. In the view we have taken of the position of a *kartâ* and of the nature of the right of the junior members in this

respect we do not feel bound to follow in the case of a *kartâ* the observations made to the effect that a trustee or executor is bound to render accounts for a period of six years only anterior to the suit for accounts. The cases, *Saroda Pershad Chattopadhya* v. *Brojo Nath Bhuttacharjee* (1); *Hemangini Dasi* v. *Nabin Chand Ghose* (2) and *Advocate-General of Bombay* v. *Bái Punjábái* (3) were suits for accounts against trustees. The case of *Barada Proshad Banerjee* v. *Gajendra Nath Banerjee* (4) was a case against an executor. In those cases demand for accounts was not the essence of the right or of the cause of action. In *Sophia Orde* v. *Alexander Skinner* (5) the suit was a suit for accounts by a co-sharer against another co-sharer who, by the will of the common ancestor, had been made the manager. There was no joint family and the parties were not Hindus but Christians. The Judicial Committee of the Privy Council simply recited as a fact at p. 300 of the report that the Subordinate Judge had decreed accounts only for a period of six years before the suit. The question for decision before the Privy Council did not relate to the period of accountability but as to whether the Court, in which the suit had been instituted, had jurisdiction to entertain it. From the recital of facts it, moreover, appears that the suit was based on the term in the will that the managing co-owner would have to render accounts yearly at the end of each year. Failure by itself to render a year's account at the end of that year constituted the breach or infringement and gave the other side right to sue at once for that year. The claim to each year in succession accordingly became barred at the end of six years from the expiry of that particular year.

In *Ahidannessa Bibi* v. *Isuf Ali Khan* (6) some of the heirs of a Mahomedan sued the remaining heir

(1) (1880) I. L. R. 5 Cal. 910.
(2) (1882) I. L. R. 8 Cal. 788.
(3) (1894) I. L. R. 18 Bom. 551.
(4) 1909) 13 C. W. N. 557.
(5) (1880) I. L. R. 3 All. 91; L. R. 7 I. A. 196.
(6) (1923) I. L. R. 50 Cal. 610, 614.

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for an account of the money which the latter had collected on the basis of a succession certificate issued to him alone. This Court held that Art. 62 was applicable and the suit was barred by time as it had not been filed within three years of the receipt of the money by the defendant. In answer to the plaintiffs' contention that Art. 120 was applicable and the suit was in time, as it was instituted within six years of the plaintiffs' demand and the defendant's refusal, Ghose and Panton JJ. stated by way of *obiter* that :—

"If in a suit for accounts" (which falls within Art. 120) "time is made to run from the date when the defendant refuses to comply with the plaintiff's demand for a suit for accounts, for the plaintiff, in such a case, may choose to wait as long as he likes and all that he would have to do to save limitation even under Art. 120 is to send the letter of demand to the defendant and to institute a suit within six years of the refusal."

Speaking generally, the principle so laid down is appealing, but where the essence of the right is the demand, or to put it in another way, where the right consists of the demand for accounts, the right to sue would only begin when the demand is refused. The *obiter* made in that case accordingly cannot apply to the case before us.

We are also of opinion that the case of the *Midnapore Zemindary Co., Ld.* v. *Naresh Narayan Roy* (1) is not applicable to the case before us. Naresh Narayan was a co-sharer of the Midnapur Zemindary Co., Ld. He had been ousted from the joint property by Messrs. Robert Watson & Co., the predecessors-in-interest of the Midnapur Zemindary Co., Ld. He sued for joint possession and got a decree. In execution of that decree he was put in symbolical possession in 1903. In 1912 he sued for partition and for mesne profits. The High Court of Calcutta decreed partition overruling the plea of adverse possession and other pleas. That part of the judgment was upheld by the Judicial Committee (2). The High Court

(1) (1924) 29 C. W. N. 270.

(2) (1924) I. L. R. 51 Cal. 631; L. R. 51 I. A. 293.

also granted mesne profits for a period beginning from three years before suit. The Judicial Committee pointed out that the correct thing to do was to give the plaintiff compensation for use and occupation, on the principle that the defendant, his co-sharer, was in exclusive possession of joint property. The Judicial Committee accordingly, without further consideration, gave the plaintiff compensation for nine years before suit, *i.e.*, from 1903 to 1912. On review this period was reduced to six years. The Board applied the six years' limitation provided for in Art. 120. The right of the plaintiff was to get compensation for use and occupation from his co-sharers, the defendant, for every year he was kept out of possession. Non-payment, therefore, by the defendant constituted the infringement. No demand was required and a refusal accordingly was immaterial. Each year's unsatisfied claim was, accordingly, barred at the end of the following six years. We do not see how this case helps the appellant before us.

We will now consider the case of *Biswambar Haldar* v. *Giribala Dasi* (*supra*). The reporter has not reported the facts, and they do not fully appear from the judgment. That was a case of partition of joint family properties and for accounts from the *kartâ*. The family was a joint Hindu Dâyabhâga family. If the demand for accounts for a period of six years anterior to the suit had been made and refused by the *kartâ*, the decision is correct. It may be that those were the facts. If, however, there was no such demand and refusal beyond six years we respectfully dissent from the same, as apparently the third column of Art. 120 was not properly considered.

In the case before us, the right of the plaintiffs to claim accounts was there. The plaintiff had made demands, but there is no evidence that such demands had been refused before March 8, 1929. The last letter on the record bearing upon the question of accounts is Ex. 3 (II. 46), dated November 20, 1927.

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In that letter, the defendant did not refuse compliance with the demand for accounts but expressly promised to submit them later on. The earlier letter written by the defendant dated August 5, 1927 [Ex. 13(*c*), II. 44] is of the same effect. There is no evidence on the record that the defendant later on took up a different attitude. We, accordingly, hold that the claim of the plaintiffs for accounts for any period after 1330 is not barred by time.

We, accordingly, allow this appeal in part and direct the defendant to render account of his management from 1331 B.S. till the date of the institution of the suit on the footing that he was the *kartâ*.

As the success is divided we direct each party to bear its respective costs of this appeal.

Appeal allowed in part.

N. C. C.