

due to the plaintiff. This being so, we are unable to entertain the plea that the mortgage has become extinguished *qua* a two-thirds share out of half of mahal Madan Gopal. A reference is made in the third ground of appeal to the fact that after the plaintiff had purchased this property it was pre-empted and that the fact of its having been pre-empted did not make any difference. We agree with this proposition, but we have said enough to show that the appellant is not in a position to maintain the plea that any portion of this mortgage in suit has merged in the purchase made by the plaintiff. We think therefore that the decree of the lower court is right. The appeal fails and is dismissed with costs.

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 JAMNA DEVI  
 v.  
 LALA RAM.

*Appeal dismissed.*

*Before Mr. Justice Walsh and Mr. Justice Sundar Lal.*

SUSHIL CHANDAR DAS (DEFENDANT) v. GAURI SHANKAR (PLAINTIFF)\*  
*Act No. IX of 1908 (Indian Limitation Act), schedule I, article 115—Limitation*  
*—Principal and agent—Broker—Suit to recover commission.*

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The relation between a broker and the persons for whom he acts is that of agent and principal. Unlike the factor, he is not entrusted with the custody and apparent ownership of the goods, but he is a mere negotiator to effect business and is paid for his services a commission on the sales resulting from his efforts. Where the contract is not in writing, its terms are to be inferred from the course of dealings between the parties.

Hence, where a broker, between whom and his employer the contract was that he would be paid his commission at certain rates upon the date of the delivery of goods, sued to recover commission due to him, it was *held*, that the suit was one for compensation under a contract for services rendered, which for purposes of limitation was governed by article 115 of schedule I to the Indian Limitation Act, and was not one for wages within the meaning of article 102 of the said Act. *Ganesh Krishna v. Madhavrao Ranji* (1), *Parbutty Nath Roy Chowdhry v. Mudho Paros* (2), *Nobocomar Mookhopadhyaya v. Siru Mullik* (3) and *Nistarini Debi v. Chandī Dasi Debi* (4) referred to.

THE fact of this case were as follows :—

The plaintiff sued for an account of commission due to him as broker for the defendant. The original contract, which was

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\* Second Appeal No. 299 of 1915 from a decree of Banke Bihari Lal, Additional Judge, of Cawnpore, dated the 5th of December, 1914, modifying a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 6th of August, 1914.

(1) (1881) I. L. R., 6 Bom., 75.      (3) (1880) I. L. R., 6 Calo., 94.  
 (2) (1878) I. L. R., 3 Calo., 276.      (4) (1910) 12 C. L. J., 423.

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not substantially in dispute, appeared by the pleadings to have been made about the year 1901. It was agreed between the plaintiff and the defendant that in respect of goods actually delivered by the defendant to his customers the plaintiff should get six annas per cent. on cotton goods and twelve annas per cent. on woollen goods whether the order for the goods was secured by the defendant through the plaintiff or otherwise. In the course of business commission was paid as from the date of the delivery of the goods.

In the year 1905 there was a general settlement up to the 13th of November, 1905. About the month of July, 1905, with the consent of the defendant, the plaintiff introduced a new man named Jiwan Ram or, as he is sometimes called, Jiwan Singh, who acted for the plaintiff in looking after the agency of the defendant. The defendant apparently became dissatisfied with the lack of attention given to the business, and on the 2nd of March, 1908, gave the plaintiff the following notice;—

“As you do not take any interest to have our goods sold we are compelled to have same done through our brokers. So please note that we will not be able to give the brokerage for those goods which will be sold by other brokers from this date onward ”

This was a variation of the original contract, and meant that whereas the plaintiff was formerly the sole broker for the sale of the defendant's goods and entitled to commission on all goods, in future he was not to have brokerage on goods sold by other brokers.

The first court held that as the result of this variation, from the 2nd of March, 1908, onwards the plaintiff was only entitled to commission on goods sold through him or his man and that the *onus* lay on him to show which goods these were. The lower appellate court took the contrary view and held that the plaintiff was to get commission on all goods sold except those sold through other brokers.

The defendant appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailash Nath Katju*, for the respondents.

WALSH, and SUNDAR LAL, JJ. :—In this case the plaintiff sued for an account of commission due to him as broker for the

defendant. The original contract, which was not substantially in dispute, appears by the pleadings to have been made about the year 1901. It was agreed between the plaintiff and the defendant that in respect of goods actually delivered by the defendant to his customers the plaintiff should get six annas per cent. on cotton goods and twelve annas per cent. on woollen goods, whether the order for the goods was secured by the defendant through the plaintiff or otherwise. In the course of business commission was paid as from the date of the delivery of the goods. This fact is recorded in the judgement of both the lower courts.

In the year 1905, there was a general settlement up to the 18th of November, 1905. About the month of July, 1905, with the consent of the defendant, the plaintiff introduced a new man named Jiwan Ram or, as he is sometimes called, Jiwan Singh, who acted for the plaintiff in looking after the agency of the defendant. The defendant apparently became dissatisfied with the lack of attention given to the business and on the 2nd of March, 1908, gave the plaintiff the following notice :—

“ As you do not take any interest to have our goods sold we are compelled to have same done through our brokers. So please note that we will not be able to give the brokerage for those goods which shall be sold by other brokers from this date onward. ”

This was a variation of the original contract, and meant that, whereas the plaintiff was formerly the sole broker for the sale of the defendant's goods and entitled to commission on all goods, in future he was not to have brokerage on goods sold by other brokers.

The first court held that, as the result of this variation, from the 2nd of March, 1908, onwards, the plaintiff was only entitled to commission on goods sold through him or his man and that the *onus* lay on him to show which goods these were. The lower appellate court took the contrary view and held that the plaintiff was to get commission on all goods sold, except those sold through other brokers.

We agree with the lower appellate court on the ground that the continued employment of the plaintiff and Jiwan Ram showed that there was no determination intended of the existing general

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employment of the plaintiff, but only a modification entitling the defendant to employ other brokers as well and protecting him against the payment of double commission in such event.

The lower appellate court also held, founding itself upon the course of business, that, the defendant having kept account books, and having the facts peculiarly within his knowledge, the *onus* lay upon him to show how much, if any, of the goods were sold through other brokers and that he had failed to give any evidence upon this point.

We think these findings establish the correct principles on which the account claimed by the plaintiff should have been taken. The first court appointed a commissioner to examine the books on the principles laid down by the first court. The plaintiff was held to be entitled to only Rs. 183-13-6. On the principles laid down by the lower appellate court the plaintiff has been found to be entitled to Rs. 602-4-9.

A further question was raised before us by the plaintiff respondent as to the proper period of limitation. It is quite true that the general principle governing commission cases is that the agent is entitled to receive his pay as and when he has found the business for his employer irrespective of what his employer may do with the business thereafter, that is to say, his claim arises when he has done his work. But each case must be governed by its own circumstances, and we are bound in this case by the finding of the lower appellate court upon a question of fact that the plaintiff was by his contract entitled to payment from the date of the delivery of the goods. We think the case is governed by article 115 of the Limitation Act for the following reasons. The relation between a broker and the person for whom he acts is that of agent and principal. Unlike the factor, he is not entrusted with the custody and apparent ownership of the goods, but he is a mere negotiator to effect business and is paid for his service a commission on the sales resulting from his efforts. Where the contract is not in writing, as appears to be the case in this instance, its terms are to be inferred from the course of dealings between the parties. According to Bullen and Leake on Pleadings, page 103, the claim for the broker's commission is a claim for money payable by the defendant to the plaintiff.

for work done by the plaintiff as broker and agent for defendant at his request and for commission or reward due from the defendant to the plaintiff in respect thereof. Ordinarily, it is an agent who has to render an account to his principal, but at page 47 of Bullen and Leake's Pleadings is to be found an illustration of a case for account by a commission agent who obtained orders for goods for the defendant. The prayer for relief in such a case is formulated in the following terms:—(1) that an account be taken of the orders obtained by the defendant from the customers introduced by the plaintiff and of the amount of commission due to the plaintiff in respect thereof. (2) Payment of the amount found due on taking of the said account.

Such claims are at the present day in England of almost every day occurrence. The suit is really for money due on a contract for services rendered. The account is merely ancillary to the main prayer of relief and mere machinery for arriving at the correct amount. The nature of the action is for money due under a contract. The first point for consideration is whether article 102 of the Limitation Act applies. That article applies to a suit for wages not otherwise especially provided for. The term "wages," though it may be said to include payment for any kind of service, is in general confined to the earnings of menial workers, salary being the word used for payment for services to the higher class. U. N. Mittra (see his notes to article 102) in his work on the Law of Limitation says:—"In ordinary language the term wages is usually restricted to the remuneration for mechanical or muscular labour, specially to that which is ordinarily paid at short intervals."

This is not a suit for wages at all, and we think the article does not apply. Article 88 applies to a suit by a principal against a factor and for an account and articles 89 and 90 also apply to other kinds of suits by a principal. Article 62 is not applicable, for no money need necessarily be received by a principal to entitle the agent to payment of the commission which he has earned. Article 85 is not applicable, because there is no mutual, open and current account where there have been reciprocal demands between the parties. There is no article which adopts the precise language of claims which agents have to make in such

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suits as this, but we think the suit is one for compensation for breach of a contract express or implied not in writing registered or elsewhere provided for in the Act. The term 'compensation' used in articles 115 and 116 has been held to include money due on a bond and payable under a contract. It is used in the same sense in which the term is used in section 73 of the Contract Act. A suit to recover a specific sum of money due on a registered bond or other writing or contract has been held to have been a suit for compensation within the meaning of this article. See *Ganesh Krishn v. Madhavrav Ravji* (1); *Parbutty Nath Roy Chowdhry v. Mudho Paroe* (2); *Nobocoomar Mookhopadhyaya v. Siru Mullick* (3) and *Nistarini Debi v. Chandī Dasi Debi* (4).

It appeared to us at one time that it might be necessary to refer certain issues to the lower court, but on re-consideration of the findings we think that the lower appellate court has covered all the ground in the findings of fact at which it has arrived and that it has rightly directed itself on the question of law which arose. It is not suggested that, the period of limitation being three years from the delivery of the goods, the lower appellate court has not worked out correctly the sum to which the plaintiff is entitled. The result is that the judgement of the lower appellate court is right and must be affirmed. The appeal and the cross objections are dismissed with costs.

*Appeal dismissed.*

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July, 12.

*Before Mr. Justice Walsh and Mr. Justice Sundar Lal.*

GANGA PRASAD (PLAINTIFF) v. HIRA LAL AND ANOTHER (DEFENDANTS).  
*Act No. XXVI of 1881 (Negotiable Instruments Act), section 22—Hundi payable after sixty-one days—Date of maturity—Liability of endorser.*

*Held* (1) that a bill of exchange which is not expressed to be payable on demand, at sight or on presentment, is at maturity on the third day after the day on which it is expressed to be payable, and (2) that a hundi drawn in the customary form, that is, expressed to be payable after so many days, does not

\* Second Appeal No. 1391 of 1915, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 2nd of August, 1915, confirming a decree of Piari Lal Chaturvedi, Munsif of Koil, dated the 4th of March, 1915.

(1) (1861) I. L. R., 6 Bom, 75. (3) (1880) I. L. R., 6 Cal., 94.

(2) (1878) I. L. R., 3 Cal., 276. (4) (1910) 12 C. L. J., 423.