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not think that this view taken by the Subordinate Judge, against which the present appeal has been preferred, can be supported. The present suit was brought by the plaintiffs not to have the order of the Collector dated the 9th August 1893, set aside, but to obtain possession of certain plots of lands and for a declaration of their title thereto. The order of the Collector staying and striking off the partition proceedings, until the parties to the dispute had had the matter in dispute between them decided by a Court of competent jurisdiction, cannot be regarded as in any way standing in the way of the plaintiffs obtaining the reliefs, which they claimed in the present suit; and it was therefore unnecessary for the plaintiffs in this suit to have that order set aside. The limitation under Article 14 of the second schedule of the Indian Limitation Act, does not in our opinion, apply to this case, as the case is not one brought to set aside the order of any public officer.

We therefore set aside the judgment and decree of the learned Subordinate Judge and direct that the case be sent back to him for trial on the merits. The appeal is decreed with costs.

The institution fee in this appeal will be returned under section 13 of the Court Fees Act.

Appeal allowed.

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[719] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

SHIB CHANDRA ROY *v.* CHANDRA NARAYAN MUKERJEE.*

[8th March, 1905.]

Principal and agent—Suit for account—Limitation Act (XV of 1877), Arts. 89 and 120, Sch. II.

A suit by a principal against his agent for an account and also for recovery of money from him that may be found due, is a suit for moveable property received by the agent on behalf of the principal and not accounted for, and is governed by Art. 89, Sch. II of the Limitation Act (XV of 1877).

***Jogendra Nath Roy v. Deb Nath Chatterjee* (1) followed.**

[Fol. 3 I. C. 684=9 C. L. J. 107; 13 C. W. N. 43; Ref. 35 Cal. 298=12 C. W. N. 820 =7 C. L. J. 279; 5 I. C. 58=14 C. W. N. 121; 4 C. L. J. 198; 3 I. C. 101; Ref. 10 I. C. 325=13 C. L. J. 418=15 C. W N. 752; 16 C. L. J. 282=17 C. W. N. 5=16 I. C. 742; 4 C. L. J. 198; 9 C. L. J. 107=3 I. C. 684; 16 C. W. N. 1042=16 C. L. J. 288=16 I. C. 414; 13 C. W. N. 48n.; 25 I. C. 286=21 C. L. J. 46; 19 M. L. T. 257=24 M. L. J. 313; 26 I. C. 740=28 M. L. J. 140=39 Mad. 376; 21 C. L. J. 462=29 I. C. 848=20 C. W. N. 356; 52 I. C. 373=17 A. L. J. 805; 30 C. L. J. 90=53 I. C. 675; Rel. 48 Cal. 248.]

SECOND APPEAL by the plaintiff, Shib Chandra Roy Chowdry.

This appeal arose out of a suit for accounts.

The allegation of the plaintiff was that the defendants executed an *izara kabuliat* dated 28th Sraban 1299 and obtained *izara* of the plaintiff's share of estate No. 284 for six years from 1299 to 1304 B.S. at an annual rental of Rs. 498-3 annas; that the defendants became *tehsildars* of the plaintiff in certain mauzas and served him as such from 1299 to 1305 B.S.,

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* Appeal from Appellate Decree, No. 1596 of 1902, against the decree of Shyam Chand Roy, Subordinate Judge of Birbhum, dated April 21, 1902, reversing the decree of Ganendra Nath Mukherjee, Munsif of Bhagalpur, dated September 3, 1901.

(1) (1903) 8 C. W. N. 113.

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and they also agreed to collect arrears of rents of another estate on receipt of commission; that the defendants did not render any accounts, and hence the suit was brought for accounts from 1299 to 1305 B.S., to recover from the defendants the amount that might be found due on adjustment of accounts and also to recover certain vouchers and rent-receipts. The defence was mainly that the suit was barred by three years' rule of limitation under Article 89, Schedule II of the Limitation Act. The suit was brought on the [720] 17th April 1900 (5th Baisak 1307 B. S.) The Court of first instance overruled the plea of limitation and decreed the plaintiff's suit. On appeal the learned Subordinate Judge having found that, inasmuch as the suit was brought at least five years after the termination of the defendant's agency, which was in 1301 B.S., held that it was barred by limitation under Article 89, Schedule II of the Limitation Act.

Against this decision the plaintiff appealed to the High Court.

Babu *Nilmadhub Bose* (Babu *Shib Chunder Palit* with him) for the appellant. The suit is not barred by limitation. The Article of the Limitation Act applicable to such a case is Article 120, being a suit for accounts and also for recovery of money, if found due, on taking accounts. See *Saroda Pershad Chattopadhya* v. *Brojo Nath Bhuttacharjee* (1) and *Hurri Nath Rai* v. *Krishna Kumar Bakshi* (2). The present case does not fall either under Article 88, 89 or 90, and is not provided for by any Article of the Limitation Act. Therefore Article 120 is applicable. See *Mahomed Riassat Ali* v. *Hasin Banu* (3).

Babu *Krishna Prosad Sarvadhicary* (for Babu *Jyoti Persad Sarvadhicary*), for the respondent. The case of *Jogendra Nath Roy* v. *Deb Nath Chatterjee* (4) is in point. Article 89 applies, being a suit by a principal against his agent for accounts and for any money that may be found due on taking accounts. *Kalee Kisen Paul Chowdhry* v. *Mussamat Juggut Tara* (5) also supports my contention.

Babu *Nil Madhub Bose* in reply. The case of *Kalee Kishen Paul Chowdhry* v. *Mussamut Juggut Tara* (5) is more in my favour than against me. An account taken involves adjustment of accounts. My cause of action did not accrue before I knew the defendant was liable. As soon as I came to know that I am a creditor, then my cause of action arose. Taking accounts means not only rendering accounts, but also, paying over money, [721] if found due, and then the cause of action arises. That being so, the plaintiff's suit could not have been barred by limitation.

HARINGTON J. This is an appeal on behalf of the plaintiff against the decision of the Subordinate Judge dismissing his suit on the ground that it was barred by Article 89, Schedule II of Act XV of 1877.

The plaint alleged that the defendants were appointed to collect rents on behalf of the plaintiff on being paid a commission for so doing, and the plaintiff asked that an account might be rendered by the defendants of the monies, which they had received, and that a decree might be passed for the amount found payable to the plaintiff from the defendants. The plaintiff also asked that the defendants should be directed to give him rent-receipts and other documents, and asked for 50 rupees as damages in default of a delivery of those documents claimed.

The suit was brought on the 17th April 1900, corresponding to the 5th Bysack 1307 B.S. The learned Subordinate Judge has found, as a

(1) (1880) I. L. R. 5 Cal. 910.
(2) (1886) I. L. R. 14 Cal. 147, 152; L. R. 13 I. A. 123.
(3) (1893) I. L. R. 21 Cal. 157 L. R. 20 I. A. 155.
(4) (1903) 8 C. W. N. 113.
(5) (1868) 11 W. R. 76.

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matter of fact, that the defendants acted as agents for the plaintiff up to the year 1901 B.S., and that they had not collected any rent or money on his behalf in 1300. That being so, the suit was instituted at least five years after the termination of the defendant's agency, and is therefore barred, if the Judge is right in holding that Article 89 applies.

On behalf of the appellant two points have been argued: *first*, it has been contended that the letter written by the plaintiff to the defendants and produced by them at the trial shows that the defendants were in the plaintiff's service within three years of the time that the action was brought, but the liability or non-liablity of the defendants does not depend on the construction of this letter. At its highest it is only a piece of evidence which has to be considered in arriving at the conclusion of fact whether the defendants were or were not in the plaintiff's service at the time that it was written. It is conceded by the learned vakil for the appellant that it is not conclusive evidence. It would have to be considered along with all other evidence material to this point, and therefore is a matter which we cannot deal with in second appeal. If the liability of the defendants depended on the construction **[722]** of the letter, we might have considered the construction put upon it as a matter of law. But as it is only a piece of evidence to be taken into consideration to arrive at a conclusion of fact, it is a matter of itself out side our consideration in second appeal.

The second point argued is that to this form of action Article 89 is not applicable, but that the case must fall under Article 120, which provides the period of limitation at six years.

To that contention I am unable to agree. The action is brought by a principal against his agent claiming an account and payment of the money found due on that account. It appears to me that that falls within the particular species of action provided for by Article 89. It has been argued that the relief claimed in clause (*a*), paragraph 5 of the plaint is separate and that the plaintiff can ask for an account, notwithstanding the fact that his right to recover his property in the hands of the defendants is barred by Article 89. I do not assent to this proposition; and, even if it were sound, the plaintiff would be barred by the provisions of Article 90, because to enforce his claim for an account he would have to allege first that it was the duty of the agent to render him accounts from time to time, and secondly that the agent had neglected to render such accounts. That would be an action against an agent founded on his neglect and would be barred after the expiration of three years by the provisions of Article 90, Schedule II of Act XV of 1877. Three cases were cited to us in the course of the argument—two decisions by the Privy Council, which are not relevant to the point at issue in the present case; the third case, [*Jogendra Nath Roy* v. *Deb Nath Chatterjee* (1)] decided by a Bench of this Court is relevant. In that case it was held that a suit by a principal against his agent for an account and for payment of money found due upon an account being taken is governed by Article 89, Schedule II of the Limitation Act. That case is in point. I agree with it, and I am of opinion that the present suit is barred.

The appeal, therefore, fails and must be dismissed with costs.

MOOKERJEE J. I agree with my learned brother that this appeal cannot succeed. It is an appeal on behalf of the plaintiff **[723]** in an action against his agents, for the taking of accounts, for the realization of the sum

(1) (1903) 8 C. W. N. 113.

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which may be ascertained to be payable by them, and also for the recovery of certain vouchers and rent-receipts deliverable by the defendants. The plaintiff alleged that the defendants had acted as agents up to June 1899, and that they were liable to render accounts from 1892, from which year they had not accounted for the receipts and disbursements. The defendants resisted the claim upon various grounds upon the merits and relied upon the Statute of Limitation as a bar. The Court of first instance made a preliminary decree holding that the defendants were liable to render accounts for the years 1892 to 1898. A Commissioner was appointed to take the accounts, and on the basis of his report a final decree was made against the defendants for Rs. 950. On appeal to the learned Subordinate Judge, he dismissed the suit on the ground that it was barred by limitation under Article 89 of Schedule II of the Limitation Act, inasmuch as the agency had ceased in April 1895 and the suit was not instituted till the 17th April 1900. The plaintiff has appealed to this Court, and on his behalf the decision of the Court below has been challenged on two grounds, namely, *first*, that the finding as to the time of the termination of the agency is based upon an erroneous view of the inference to be drawn from a letter written by the plaintiff to the defendants, and *secondly*, that the period of limitation applicable to the suit is six years, as provided by Article 120. I am of opinion that neither of these two contentions is well founded.

As regards the first contention, I am clearly of opinion that the appellant cannot, in second appeal, successfully challenge the finding of the learned Subordinate Judge upon the question of the time of the determination of the Agency. Assuming that the Subordinate Judge has not drawn the right inference from the letter referred to, it does not follow that his decision is erroneous in law; the inference to be drawn was an inference of fact, and the case therefore does not fall within the rule laid down by the Judicial Committee in *Ram Gopal* v. *Shams Khaton* (1). As pointed out by Sir Richard Couch C.J. in *Nowbut Singh* v. *Chutter Dharee Singh* (2) [724] the misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title, is allowed to be a ground for special appeal, but a special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. The first contention of the appellant therefore fails.

As regards the second contention advanced by the learned vakil for the appellant, I am of opinion that it is not supported either by principle or by any of the authorities relied upon. Article 89 provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for must be instituted within three years from the time when the account is, during the continuance of the agency, demanded and refused, or when no such demand is made, from the time when the agency terminates. It is not suggested in the case before me that the account was demanded and refused during the continuance of the agency. If, therefore, this article is applicable, the suit is clearly barred as it has been brought more than three years after the date of the termination of the agency. In order to determine therefore whether Article 89 applies, I have to consider whether this is a suit for moveable property received by the agent and not accounted for. The learned vakil for the appellant has argued that the suit does not properly fall within this description, as the primary object of

(1) (1892) I. L. R. 20 Cal. 93; L. R. 19 I. A. 228. (2) (1873) 19 W. R. 222.

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it is to compel the agent to render the accounts which he is bound to submit under the law, and that the principal has no cause of action to recover a decree for money until, upon the accounts being taken, it has been ascertained that the defendant has misappropriated any money belonging to the plaintiff. In my opinion this argument is erroneous and ought not to prevail. It is perfectly true that under section 213 of the Indian Contract Act, an agent is bound to render proper accounts to his principal on demand, or, as was said by Sir Thomas Plumer, M. R., in *Pearse* v. *Green* (1), it is the first duty of an agent to be constantly ready with his accounts ; it may also be conceded that, as was said in the cases of *Annoda Persad Roy* v. *Dwarka Nath Gangopadhya* (2) and *Lawless* v. *Calcutta Landing* **[725]** *and Shipping Coy.* (3), he must further be always ready to explain them and produce vouchers. But it does not follow that the liability to recoup the principal any sums that might have been misappropriated does not arise till the accounts have been taken and the fraud discovered. Indeed in the present action, the plaintiff prays that the accounts may be taken and the sum found due may be decreed to him. Now it has been held by the Judicial Committee in the case of *Ashghar Ali Khan* v. *Khurshed Ali Khan* (4) that the words " moveable property " in Article 89 include money. It is clear therefore that the present suit in so far as it seeks to recover money received by the defendant and not accounted for falls within the terms of Article 89. It is then taken out of the operation of that article because the plaintiff prays that an account may be first taken and the sum due ascertained ? I have no doubt that the answer to this question ought to be in the negative. As pointed out by Sir Barnes Peacock in *Kalee Kishen Paul Chowdhury* v. *Mussamut Juggut Tara* (5) when it is said that the law imposes an obligation on the agent to render an account of his agency and to account for the monies of his principal, the word 'account' is used in its legal sense and is not confined merely to rendering an account by the agent of what he has done with the monies, but also includes the payment of any balance, which might be found due from him upon taking the accounts. This is substantially in accordance with the observations of Lord Esher in *Harsant* v. *Blaine* (6) that the duty of the accounting party is not merely to be constantly ready with his accounts, but also, if the accounts show that he has money to pay over, to be constantly ready to pay. In this view of the matter Article 89 would cover a case of the present description, the object of which is to obtain an account of the monies in the hands of the agent as also to recover the sum due. That any other interpretation would lead to an obvious inconsistency, is amply illustrated by the position which the learned Vakil for the appellants found himself obliged to take up in the course of the argument. He first contended that the principal would have under Article 120 **[726]** six years within which to bring an action against the agent to compel him to render accounts, the time running from the date of the termination of the agency. He next argued that the principal would have another six years under Article 120 to bring a suit for the recovery of the money found due, the time running from the date of the final decree in the previous suit. He was obliged however to abandon this second position as before Article 120 could be applied, it must be shown that no other article applies. And upon the authority of the case of *Ashghar Ali Khan* v.

(1) (1819) 1 Jac. & W. 135; R. R. 258.
(2) (1881) I. L. R. 6 Cal. 754.
(3) (1881) I. L. R. 7 Cal. 627.
(4) (1901) I. L. R. 24 All. 27 ; L. R. 28 I. A. 227.
(5) (1868) 11 W. R. 76.
(6) (1887) 56 L. J. Q. B. 511 ; 3 T. L. R. 689.

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Khurshed Ali Khan. (1) Article 89 would apply to the second suit; in other words, if the contention of the appellant prevailed the result would be that, although the principal might compel the agent to render the accounts, he could not successfully realize any sum which might be found due. It was then suggested that Article 90 might perhaps apply to the second suit, but the obvious answer is that, if, a suit were instituted against the agent on the ground of misconduct, it would not necessarily follow that the misconduct relied upon became known to the plaintiff, when the decree was made in the previous suit. I must hold accordingly that Article 89 applies to this suit, not only in so far as it is one for the recovery of money from the agent, but also in so far as it asks for an account as a preliminary step to enable the plaintiff to recover from the defendant money received by him and not accounted for. This view is in accordance with that taken by this Court in the cases of *Madhub Chunder Chuckerbutti* v. *Debendra Nath Dey* (2) and *Jogendra Nath Roy* v. *Deb Nath Chatterjee* (3). As was pointed out by Mr. Justice Banerjee in the second of the two cases just referred to, Article 89 by its very language shows that the suit contemplated by it must involve the taking of an account, for if the moveable property claimed is accounted for by the agent, the suit necessarily fails. This view is in no way inconsistent with the decision of the Judicial Committee in *Hurri Nath Rai* v. *Krishna Kumar Bakshi* (4) where the question of the limitation applicable to a suit for an account was raised, but not decided, although their Lordships intimated that, whether the time-limit was three years [727] or six years, it must be counted from the date of the cessation of the agency. Reference was also made in the course of the argument to the case of *Saroda Pershad Chattopadhya* v. *Broja Nath Bhattacharjee* (5) as an authority for the proposition that a suit to have an account of the defendant's stewardship, was in substance a suit for an account of the money received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due on taking the account, and that such a suit was governed by article 120 of the Limitation Act. I am unable to hold that this decision is a binding authority upon the question now raised as to the applicability of Article 89. It appears from the report of the case that the Court of first instance held that Article 120 was applicable, but that the suit was barred, because it had been brought beyond the period prescribed by that article. Upon appeal the District Judge held that the claim was not barred as the case fell within section 10 of the Limitation Act. Upon appeal of this Court by the defendant, the only question, which was argued, was whether section 10 applied to the suit or whether it was barred by the operation of Article 120. The defendant did not contend as he might have done (though the suggestion appears to have been made in the written statement) that the suit was barred by the operation of Article 89. I am of opinion therefore that although the case of *Saroda Pershad Chattopadhya* v. *Broja Nath Bhattacharjee* (5) may be treated as an authority as to the true effect of section 10 of the Limitation Act, it ought not to be regarded as an authority binding upon this Court upon the question of the applicability of Article 89 to a suit by a principal against an agent for the recovery of money received by the latter and not accounted for. The present case is also distinguishable from that of *Harender Kishore Singh* v. *Administrator-General of Bengal* (6)

(1) (1901) I. L. R. 24. All. 27; L. R. 28 I. A. 227.
(2) (1901) 1 C. L. J. 147.
(3) (1903) 8 C. W. N. 113.
(4) (1886) I. L. R. 14 Cal. 147; L. R. 13 I. A. 123
(5) (1880) I. L. R. 5 Cal. 910.
(6) (1885) I. L. R. 12 Cal. 357.

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where Article 116 was applied to a suit brought against the representatives of a deceased agent for the recovery of certain sums alleged to have been received and misappropriated by the agent; the suit was not for an account strictly so called, but rather for the recovery of specific sums of money and was treated as one for compensation for breach of a contract [728] in writing and registered. A similar view was taken in the case of *Mati Lal Bose* v. *Amin Chand Chattopadhya*, (1) although the learned Judges, who decided it, made some observations as to the applicability of Article 89, which were not necessary for the purposes of the decision, and which are, perhaps, not quite in harmony with the cases I have already mentioned.

The result therefore is that the view taken by the learned Subordinate Judge is correct, and this appeal must be dismissed with costs.

Appeal dismissed.

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32 C. 729 (=9 C. W. N. 697.)

[729] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

PRAN NATH SARKAR *v.* JADU NATH SAHA.*

[12th April, 1905.]

Mortgage—Attestation, absence of—Charge—Transfer of Property Act (IV of 1882), ss. 58, 59, 100.

Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of the Act:

Held, that it did not operate as a charge under s. 100 of the Act.

Rani Kumari Bibi v. *Sri Nath Roy* (2) and the observations of Banerjee in *Tofaluddi Peada* v. *Mahar Ali Shaha* (3) approved.

[Fol. 33 Cal. 985=4 C. L. J. 219; Ref. 35 Cal. 837=12 C. W. N. 849=7 C. L. J. 492; 14 Bom. L. R. 115; 15 I. C. 665=16 C. W. N. 1075.]

SECOND APPEAL by the plaintiff Pran Nath Sarkar.

Plaintiff brought this suit to enforce a registered mortgage bond executed in his favour by the father of the defendant, Jadu Nath Saha. The defendant alleged that there was no consideration for the mortgage bond, and that it was executed by his father as a *benami* transaction. The date of payment stated in the bond was in the month of Baisakh 1299 (April-May, 1892); the suit was instituted in the year 1901.

The Munsif, who tried the suit, framed two issues for trial:

(i) Whether the mortgage bond set up by the plaintiff is a *benami* transaction.

(ii) Whether the requirements of s. 59 of the Transfer of Property Act, were complied with.

He decided the first issue in favour of the plaintiff, but, deciding the second issue against him, dismissed the suit. On appeal [730] by the plaintiff, the Subordinate Judge held that the mortgage bond

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* Appeal from Appellate Decree No. 1273 of 1903, against the decree of Kali Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 16th March 1903, affirming the decree of Kali Pada Mukherjee, Munsiff of Sealdah, dated the 28th of February 1902.

(1) (1901) 1 C. L. J. 211.

(2) (1892) 1 C. W. N. 81.

(3) (1898) I. L. R. 26 Cal. 78.