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a minor when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. If this were the law no minor would be safe, and we do not see how Koilash, when he attained majority, was debarred from claiming, and that in the suit originally instituted by his guardian, such property as that guardian had omitted in the schedule of the plaint."

Section 7 of Act VIII of 1859 corresponds with the first part of section 43 of the present Code, and is as much a statutory bar as is section 103; so if negligence gets rid of the statutory bar under section 43, it equally gets rid of the one imposed by section 103.

In our opinion, the view of the Court below is right. We dismiss this appeal with costs.

J. V. W.

*Appeal dismissed.*

*Before Mr. Justice Ghose and Mr. Justice Gordon.*

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 Aug. 17.

NARAYAN COOMARI DEBI (DEFENDANT, PETITIONER) v. SHAJANI  
 KANTA CHATTERJEE (PLAINTIFF, OPPOSITE-PARTY).<sup>9</sup>

*Executor—Contract—Consideration—Gratuitous contract—Contract to pay remuneration to executor for performance of his duties—Remuneration not coming out of assets of estate—Administrator General's Act (II of 1874), section 56—Illegal contract as being opposed to public policy—Contract Act (IX of 1872), section 23—Executors, Position and rights of.*

The defendant's brother appointed as executrix and executors of his will his wife K., together with the plaintiff and another, and the plaintiff being unwilling to undertake the duties of executor without remuneration, K. offered him, and he accepted, a sum of Rs. 125 a month for acting as executor; but before any formal agreement was entered into the defendant's *dewan* on her behalf proposed to the plaintiff that he should accept a *perwana* for Rs. 125 a month from the defendant instead of from K., to which the plaintiff agreed, and he accordingly received from the defendant a *perwana* in which she agreed to pay him from her own pocket the above sum monthly as long as he continued to perform the duties of executor of the estate of her brother, in which she was interested. In pursuance of this agreement the plaintiff, in conjunction with the other executor, took out probate of the will, and the stipulated remuneration was paid for some time and then ceased. In a suit for his salary for the portion of the time during

<sup>9</sup> Civil Rule No. 895 of 1894.

which he had acted as executor and had not been paid : *Held*, there was good consideration for the agreement. Such an agreement, moreover, was not unlawful by reason of section 56 of the Administrator-General's Act (II of 1874), the words "receive and retain" in that section referring to the receipt or retention by an executor or administrator of commission or agency charges from the assets of the estate and not to remuneration paid to him by a third person. *Held* also, that the agreement was not void under section 23 of the Contract Act as being illegal or contrary to public policy, and a suit upon it was under the circumstances maintainable.

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THE facts of this case which was tried by the Subordinate Judge, in the exercise of his powers as Small Cause Court Judge, are stated in his judgment which was as follows :—

"This is a suit for recovery of Rs. 375, being the amount due to the plaintiff as allowance for the months of Aghran, Pous and Magh of the current year (1300) (November, December, 1893 and January 1894), which it is alleged the defendant agreed to pay the plaintiff at the rate of Rs. 125 per mensem, according to a *perwana*, which was addressed to the plaintiff by her with her seal, dated in Magh 1299 (January 1893).

"The facts of the case are that Lalla Bangsha Gopal Nanda, who was the brother of the defendant, died in Pous 1299 (December 1892), after having made a will of his property on the 15th Kartick 1298 (31st October 1891), in which among other persons the plaintiff was named as an executor. The plaintiff, who is a pleader of the District Court here, having given out that he would not act as executor unless he received some remuneration for his services as executor, Kanchan Dai, who was the widow of Lalla Bangsha Gopal and one of the executors under the will, offered to pay the plaintiff a remuneration of Rs. 125 a month out of her own pocket if the plaintiff would accept the office of executor. The plaintiff agreed to this sum, but before any formal document was executed by Kanchan Dai binding herself to pay this sum in favour of the plaintiff, the plaintiff was asked if he would accept a *perwana* for this sum of Rs. 125 from the defendant instead of from Kanchan Dai. The plaintiff consented, and the *perwana* alluded to above was received by the plaintiff on the 15th Magh 1299 (27th January 1893) from the defendant, by which she undertook to remunerate the plaintiff at the rate of Rs. 125 for his acting as executor from her own pocket in the interest of the estate of her deceased brother. That this *perwana* was granted by the defendant cannot admit of a doubt, regard being had to all the circumstances and probabilities of the case. A notice was given to the defendant with the summons according to section 128 of the Civil Procedure Code, in which she was asked if she would admit or deny the document. But this notice was not responded to, and then in the written statement which was filed by her in this case in answer to the plaintiff's case all that was pleaded on her behalf was, that there was no

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valid contract by the defendant under the *perwana* mentioned above, without either formally admitting or expressly denying this document. That the defendant knew what she was about in agreeing to grant the plaintiff a monthly remuneration of Rs. 125 for his acceptance of the office of executor would appear from the personal communication which the plaintiff had with the defendant subsequent to this *perwana*. Then she has not given her evidence in this case. It is also a fact that up to Kartick last allowance at the rate agreed upon was received by the plaintiff from the defendant as evidenced by the receipt book produced by the defendant in this case at the instance of the plaintiff.

"The main contention on the part of the defendant in this case is, that the plaintiff is not entitled to the relief asked for on the basis of the document propounded by him, in that it does not disclose any consideration, as she is not supposed to derive any personal benefit as a consequence of the agreement. For my part I am unable to accept this argument as valid. It is clear, both from the document alluded to above as well as from the evidence of the plaintiffs which stands wholly un rebutted, that the inducement which led the plaintiff to take upon himself the responsibility of the office of executor was the promise on the part of the defendant by that *perwana* to grant him a monthly sum of Rs. 125 if he accepted the executorship to the estate of her deceased brother, in the good management of which she was interested. The plaintiff states that he would have refused to act as executor if this allowance had not been assured him. After having had this assurance from the defendant under the *perwana* alluded to, the plaintiff applied with the other executors on the 28th January 1893 for probate of the will. I think there was a lawful consideration for the agreement, and it is therefore binding on the defendant (*vide* the definition of "consideration" as set forth in the Contract Act and in Addison on Contracts, p. 2, 9th edition). I am not prepared to say that the contract was gratuitous and a *nudum pactum*.

"The question whether this contract is binding on the defendant for ever, and whether it can be lawfully rescinded by her, does not arise in this case. It is not correct to say that the negotiation which the plaintiff had had at first with Kanchan Dai about his remuneration, before the defendant came in and offered to pay him the said allowance on her own behalf, had ripened into a binding contract, as nothing tangible in the shape of a document was offered by her to the plaintiff.

"I would decree this suit to the plaintiff with costs in all for Rs. 341-6 annas."

The defendant thereupon petitioned the High Court to send for the record in the case, and submitted that the decision of the Court below should be set aside mainly on the following grounds :—

That the Court below ought to have held that the alleged contract was gratuitous and without consideration; that upon the plaintiff's own case, and upon the evidence adduced in the case, he having looked upon Kanchan Dai as the real person liable for the remuneration, and having actually received an instalment of the remuneration from Kanchan Dai, the Court below ought to have held that the defendant was not liable to the plaintiff, and that the plaintiff's remedy, if any, was against Kanchan Dai; that the Court below ought to have held that the defendant was not legally liable to pay the sum claimed, and that the claim of the plaintiff was illegal and prohibited under section 56, Act II of 1874; that the Court below ought to have held that there was no valid contract under the *sunud* relied upon by the plaintiff, and the defendant was not personally liable to the plaintiff under the *sunud*; and that upon the facts admitted or proved in the case, the Court below ought to have dismissed the suit as against the defendant.

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The High Court granted a rule to show cause why the judgment should not be set aside.

The *Advocat-General* (Sir Charles Paul) and Babu Karuna Sindhu Mookerjee in support of the rule.

Mr. W. C. Bonnerjee and Babu Hara Persaud Chatterjee showed cause.

The arguments and cases cited are sufficiently stated in the judgment of the Court (GHOSH and GORDON, JJ.), which was as follows :—

The petitioner, who obtained this rule, is the Maharani of Burdwan, and the opposite party, Shajani Kanta Chatterjee, is a pleader practising in the District Court at that Station. The facts are shortly as follows: Lala Bangsha Gopal Nanda, the Maharani's brother, died in Pous 1299, leaving a will in which he appointed as his executors his wife Kanchan Dai, Jugat Bandhu Mitter and Shajani Kanta Chatterjee. Shajani Kanta being unwilling to act as executor unless he received some remuneration for his services, Kanchan Dai offered him, and he accepted, a sum of Rs. 125 a month as remuneration for undertaking the duties of executor. Before, however, any formal agreement could be entered into, the Maharani's *dewan* proposed

1894 to Shajani Kanta that he should accept a *perwana* for Rs. 125 a month from the lady instead of from Kanchan Dai. Shajani Kanta agreed to this, and accordingly on the 15th Magh 1299 (27th January 1893) he received a *perwana* from the Maharani, in which she undertook to pay him monthly Rs. 125 so long as he continued to perform the duties of executor to the estate of her late brother. In pursuance of this agreement, Shajani Kanta on the 16th Magh applied jointly with his co-executor for and obtained probate of the will of Lalla Bangsha Gopal Nanda, and he continued to receive from the Maharani the stipulated remuneration up to Kartick 1300, but from that month the payment ceased. Shajani Kanta accordingly sued the Maharani in the Small Cause Court of Burdwan to recover Rs. 375 on account of his salary for the months of Aghran, Pous and Magh of 1300, and the learned Judge of that Court decreed his claim. The Maharani then moved this Court, and a rule was issued on the plaintiff to show cause why, for reasons stated in the petition, the judgment should not be set aside.

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The rule has been argued before us by the learned Advocate General for the Maharani and by Mr. Bonnerjee for the opposite party.

The first point urged by the learned Advocate General was, that the alleged contract was gratuitous and without consideration. We are however unable to accept this view. Reading the *perwana* and the plaintiff's evidence together, it seems to us clear that there was consideration for the alleged contract. The Maharani was desirous that the estate of her late brother should be administered, and accordingly with this object she promised, in the *perwana* referred to, to pay the plaintiff a monthly sum of Rs. 125 as remuneration so long as he continued to perform the duties of executor. The plaintiff, who was not legally bound to accept the office of executor, in accordance with the desire of the Maharani as conveyed in her *perwana*, applied for probate as executor, and having obtained probate, he performed the duties of executor, and for some months received the stipulated remuneration from the Maharani. There was thus, we think, a clear consideration for the alleged contract [see Indian Contract Act, section 2 (d), Addison on Contracts,

p. 2, 9th Edition, and Pollock on Contracts, 5th Edition, p. 176].

The second ground taken before us is, that under section 23 of the Contract Act, the consideration of the alleged agreement is unlawful, because such an agreement is positively forbidden by law, or is of such a nature that if permitted it would defeat the provisions of the law. The law relied upon is section 56 of Act II of 1874, the Administrator-General's Act, which provides as follows: "No person other than the Administrator-General acting officially shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration or letters *ad colligenda bona*, which have been or shall be granted by any Court of competent jurisdiction within the meaning of sections one hundred and eighty-seven and one hundred and ninety of the Indian Succession Act, 1865."

The learned Advocate General contends that the word "receive" in this section means receive from any body and not merely from the assets of the estate, and that therefore in the present case the plaintiff is prohibited by law from receiving from the Maharani any remuneration whatsoever for the performance of the duties of executor. We are however not prepared to ascribe to the word "receive" in this section this wide and general meaning. Having regard to the scope and object of the Act, as well as to the terms of the section, it seems to us that the words "receive and retain" bear a more restricted meaning, and that they refer rather to the receipt or retention by an executor or administrator of commission or agency charges from the assets of the estate than from any third person; and in this view we think section 56 does not apply to the present case.

The third and last point which has been pressed upon us is that the consideration or object of the alleged contract is unlawful, because such a contract is opposed to public policy, in other words, that it is opposed to public policy, not only to permit an executor to receive any allowance or remuneration for his services from the estate in respect of which he is acting as executor, but also to permit him to receive under any circumstances remuneration for such service from any person whatsoever. No doubt the autho-

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rities cited before us [see Williams on Executors, Book II, Part IV, p. 1860, Edition 1879 ; the case of *Robinson v. Pett* (1), of *Scattergood v. Harrison* (2), and the case of *Joygopal Bysack v. Roma Nath Bysack* (3)], go to show that an executor's office should be voluntary and gratuitous, and that as a general rule, an executor or administrator is entitled to no allowance at law or in equity for personal trouble and loss of time in the execution of his duties. In one English case, however, to which our attention has been drawn, *viz.*, the case of *Chetham v. Audley* (4) the Lord Chancellor allowed an executor in India passing his accounts in England commission upon receipts or payments according to the practice then prevailing in India. The leading English cases bearing on the subject are that of *Robinson v. Pett* (cited above), and the cases referred to therein, and the principle which appears to underlie these decisions is that bargains which secure remuneration to the executor out of the estate itself ought to be discouraged as tending to dissipate the property. This principle has, however, no application to the present case.

It has however been strongly contended before us that the present contract is against public policy, because it creates an interest at variance with a duty [see case of *Egerton v. Earl Brownlow* (5)], that is to say, if the plaintiff be remunerated for his services there will be an inducement for him to neglect his duties and to prolong the administration instead of acting with care and diligence. We think that there is much force in this contention, but at the same time, although an agreement of this character may appear to some extent for the above reason to be opposed to public policy, we are not prepared to hold that such an agreement is necessarily unlawful. We think it should be borne in mind that, if a sole executor, or where there is more than one, all the executors, renounced, the estate of the testator might go unadministered unless the executor or executors undertook to accept office on receipt of remuneration from a third person, and it is quite possible that more public mischief and inconvenience might

(1) 3 P. Wms., 249.

(2) Mosely, 130.

(3) Fulton, 113.

(4) 4 Vesey, 72.

(5) 4 H. L. C 1—250.

be occasioned by the estate remaining unadministered than by rewarding an executor for administering it. In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that, under the circumstances, the agreement entered into between him and the Maharani was unlawful. On the whole, we think that the decree of the Judge of the Small Cause Court ought not to be interfered with, and accordingly the rule will be discharged with costs.

J. V. W.

*Rule discharged.*

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*Before Mr. Justice Ghose and Mr. Justice Gordon.*

NIM CHAND BABOO AND OTHERS (PLAINTIFFS) v. JAGABUNDHU  
GHOSE (DEFENDANT). \*

1894  
July 20.

*Limitation Act, 1877, Arts. 57, 120—Suit on pledge of moveable property—  
Prayers in plaint both for personal decree, and for right to enforce  
charge against property pledged.*

A suit on a pledge of certain moveable property, made in respect of a loan of money on the 10th February 1887, was instituted on the 14th December 1891. The plaint prayed for a decree for the money lent against the defendant personally, and also that the charge might be enforced against the article pledged. Held that, so far as the prayer for a personal decree was concerned, the suit was governed by article 57 of schedule II of the Limitation Act, and was barred; but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell, not within that article but within article 120 of the same schedule and was therefore not barred.

In this case the defendant on 29th Magh 1293 (10th February 1887), borrowed from the plaintiffs the sum of Rs. 825, at the same time pledging to them certain ornaments, a list of which was written out, and at the foot a memorandum was made, "I take a loan of Rs. 825 on the pledge of these articles; I will pay interest on this at the rate of one rupee per cent. per mensem," and signed by the defendant. The plaintiffs alleged that at the time

\* Appeal from Appellate Decree No. 352 of 1893 against the decree of J. Kelleher, Esq., District Judge of Burdwan, dated the 25th of February 1893, reversing the decree of Babu Rajendra Kumar Bose, Subordinate Judge of that District, dated the 1st of March 1892.