

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

1908
Jan. 17.

HAFEZUDDIN MANDAL

v.

JADU NATH SAHA.*

Principal and Agent—Account, suit for—Limitation—Charge upon immoveable property—Contract under registered document—Limitation Act (XV of 1877), Sch. II, Arts. 89, 116, 132.

Where the suit is not merely one for account, but one to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts, the case falls within Art. 132 of the Second Schedule of the Limitation Act.

To ascertain which Article of the Second Schedule of the Limitation Act applies, it is important to see what is the relief which the plaintiff claims.

Asghar Ali Khan v. Khurshed Ali Khan(1), *Jogendra Nath Roy v. Deb Nath Chatterjee*(2), *Madhub Chunder Chuckerbutti v. Debendra Nath Dey*(3), *Shib Chandra Roy v. Chandra Narain Makerjee*(4), *Mati Lal Bose v. Amin Chand Chattopadhyay*(5), distinguished.

SECOND APPEAL by the defendants, Hafezuddin Mandal and another.

The plaintiffs, Gopi Mohan Saha and others, as executors to the estate of one Kalikrishna Chaudhuri, deceased, sued the *gomasta*, defendant No. 1 Hafezuddin Mandal, with his surety the defendant No. 2, Mahabul Sheikh Mandal, for document and account papers which were not delivered and also for accounts that were not rendered. The plaintiffs also claimed recovery of the money which would be found due on accounts being taken from them.

* Appeal from order, No. 478 of 1906, against the order of A. W. Watson, District Judge of Murshidabad, dated Aug. 27, 1906, modifying the decree of Bipin Behari Chatterjee, Subordinate Judge of Berhampore, dated Jan. 26, 1906.

(1) (1901) I. L. R. 24 All. 27 ;

L. R. 28 I. A. 227.

(2) (1903) 8 C. W. N. 113.

(3) (1901) 1 C. L. J. 147.

(4) (1905) I. L. R. 32 Calc. 719.

(5) (1902) 1 C. L. J. 211.

Both the defendants hypothecated certain properties to secure the moneys due from the *gomasta*, by two registered documents, a security *kabuliat* from defendant No. 1 and a *zaminnama* from defendant No. 2, and the defendants charged those properties with the payment of what might be found due on taking accounts.

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The Subordinate Judge regarded the suit as one for accounts merely, and dismissed the suit, holding that the suit was barred under Article 88 or 89 of Schedule II of the Limitation Act. The District Judge on appeal reversed the decision of the Munsif and decreed the suit in part, holding that, as the contract was by registered deeds, the case fell under Article 116 of the Limitation Act, and remanded the case for trial of all the issues in the case.

The defendants appealed to the High Court against this order of remand.

Babu Ram Chandra Majumdar, for the appellants. Only the case of *Mati Lal Bose v. Amin Chand Chattopadhyay*(1) is against me. *Shib Chandra Roy v. Chandra Narain Mukerjee*(2) comments on the former case and decides in my favour. The former case did not consider whether the *kabuliat* was registered or not, and is thus distinguishable.

There is a prayer for compensation here. We do not know if that question was raised in *Mati Lal Bose v. Amin Chand*(1).

Babu Tarak Chandra Chakravarti, for the respondent. By a long series of cases, the general Article would apply and that is the equitable view. Art. 116 would apply. In *Harender Kishore Singh v. Administrator-General of Bengal*(3), the deed was a registered one. That case has not been overruled: see also *Din Doyal Singh v. Gopal Sarun Narain Singh*(4), *Moti Singh v. Ramohari Singh*(5) and *Mati Lal Bose v. Amin Chand*(1). So long as I proceed against the mortgaged properties, limitation would be 12 years. Defective pleading cannot prejudice a party. A suit for money has been held to be a suit for moveable property by the Allahabad High Court.

(1) (1902) 1 C.L. J. 211.

(3) (1885) I. L. R. 12 Calc. 257.

(2) (1905) I. L. R. 32 Calc. 719.

(4) (1891) I. L. R. 18 Calc. 536.

(5) (1897) I. L. R. 24 Calc. 699.

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[MACLEAN, C.J. I see it is not merely a suit for account. There is a charge. Would Article 132 apply?]

There is distinctly a charge. Legislature never contemplates a multiplicity of suits, and this suit should definitely decide the entire matter. We have the analogy of the possession of immovable properties with the ancillary reliefs.

Babu Ram Charan Majumdar, in reply. In the case of a charge, there must be a fixed amount. *Harender Kishore v. Administrator-General* (1) was a suit for definite items misappropriated, and not applicable. *Moti Singh v. Ramohari*(2) is also inapplicable. The suit was never regarded as one for payment.

MACLEAN C.J. This is a suit for accounts by the executors of the estate of a deceased principal against his *gomasta*, who was defendant No. 1, and his surety, defendant No. 2. The Subordinate Judge dismissed the suit on the ground that it was barred by limitation holding that Article 89 of the Second Schedule to the Limitation Act applied. The officiating District Judge reversed that decision, holding that the case fell within Article 116. There seems to be some difference of judicial opinion upon the question as to which Article does apply. In the Privy Council case of *Asghar Ali Khan v. Khurshed Ali Khan*(3), the Judicial Committee held that in a case of this nature Article 89 applied and that the expression "moveable property" in that Article included money. The same view was followed by this Court in the case of *Jogendra Nath Roy v. Deb Nath Chatterjee*(4). The same view was also adopted in the case of *Madhub Chunder Chuckerbutti v. Debendra Nath Dey*(5) and in the case of *Shib Chandra Roy v. Chandra Narain Mukerjee*(6). In this case, however, it appears that the contract under which the *gomasta* was appointed *gomasta*, is a registered document. The argument is that as it is a registered document, the case falls within.

(1) (1885) I. L. R. 12 Calc. 357.

(4) (1908) 8 C. W. N. 113.

(2) (1887) I. L. R. 24 Calc. 699.

(5) (1901) 1 C. L. J. 147.

(3) (1901) I. L. R. 24 All. 27;

(6) (1905) I. L. R. 32 Calc. 719.

L. R. 28 I. A. 227.

Article 116 of the Second Schedule to the Limitation Act : and, the respondent relies upon a decision of a Division Bench of this Court, *Mati Lal Bose v. Amin Chand Chattopadhyay*(1) which laid down that where the contract between the parties is under a registered document, the case is governed by Article 116 and not by Article 89. Had the matter rested there, my own view would have been that Article 89 applied, and not Article 116. Article 89 expressly applies to the case of a principal suing his agent for on account, whilst Article 116 applies to a suit "for compensation for the breach of a contract in writing registered." To ascertain which Article of the Schedule applies, it is important to see what is the relief which the plaintiff claimed. Now, he is not seeking here for compensation or damages for the breach of the contract entered into by the *gomasta* to furnish accounts as he contracted to do, but he is asking for an account simply upon the footing of principal and agent. And, as I have said if the matter had rested there, I should have been disposed to say that Article 89 and not Article 116 applied. But the matter does not rest there: and, there is to my mind a very important point which has not been noticed by either Court. Both defendants Nos. 1 and 2 hypothecated certain properties, to secure the moneys due from the agent, by two documents, a security *kabuliat* and a *zaminnama*, and charged those properties with the payment of what might be found due on taking such accounts: and by the third prayer of his plaint, the plaintiff asked that if "in the event of defendants Nos. 1 and 2 failing to pay within the time fixed by Court, the money which might be found due to the plaintiff at the time of *nikas* (i.e., the accounts) an order might be passed directing recovery thereof from the property pledged by them and on its proving insufficient from the person and other properties of defendants Nos. 1 and 2."

The result is, that this suit is not merely a suit for account, but is a suit to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts. That seems to me to be a case which falls within Article 132 of the Second Schedule to the Limitation Act, which enacts that in a suit to enforce payment of money

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charged upon immoveable property, the period of limitation is twelve years from the time when the money sued for becomes due. The agent was dismissed at the commencement of Agrahayan 1308: the suit was instituted on the 16th December 1904. Looking, therefore, at what is actually claimed by the plaintiff in the suit, I think we cannot properly say that the case falls within Article 89 to which I have referred. The appeal, therefore, must be dismissed with costs.

The respondent has not filed any cross-objection, but is satisfied with the accounts which have been directed by the decree of the lower Appellate Court, which apparently are for the years 1306, 1307 and 1308 only.

COXE J. I agree.

Appeal dismissed.

S. M.