

1957      *Present* : H. N. G. Fernando, J., and T. S. Fernando, J.

B. P. MEDONZA, Appellant, and B. K. KIEL, Respondent

*S. C. 185—D. C. Colombo, 21690*

*Principal and agent—Agent appointed to conduct a business—Action for accounting—  
Conditions precedent for instituting it—Must agent maintain a separate bank  
account ?*

In an action for accounting instituted by a principal against his agent who had been appointed by him to manage and conduct a transport business—

*Held*, (i) that the obligation of an agent to render accounts to his principal does not terminate merely by the submission of account papers ; he is bound to explain those papers, and if, on accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum.

An action for accounts does not lie unless the principal has first called upon the agent to explain the accounts and the agent refuses or fails to explain them satisfactorily.

(ii) that, in the absence of supporting evidence, the mere failure on the part of the agent to maintain a separate bank account in connection with the business which he had been appointed to manage was insufficient to establish a charge of fraud.

**A** PPEAL from a judgment of the District Court, Colombo.

*H. V. Perera, Q.C., with H. W. Jayewardene, Q.C., M. L. de Silva and H. D. Perera, for the defendant-appellant.*

*H. W. Tambiah, with C. Ranganathan and S. C. Crossette-Thambiah, for the plaintiff-respondent.*

*Cur. adv. vult.*

April 9, 1957. H. N. G. FERNANDO, J.—

The defendant in this case has appealed against a judgment and decree of the District Court ordering him to render to the plaintiff a true and correct account of his management during the period 7th January, 1943, to 10th May, 1948, of a Transport business known as the Haliela Forwarding and Clearing Agency.

The business in question had been owned and carried on by a person called D. A. Abeysekera, who died in January 1942; his widow found herself unable to manage the business successfully and entered into negotiations relating to the management first with one Pakir Saibo and afterwards with the present defendant. The widow herself died in January 1943 having by last will appointed her brother, the plaintiff, as her executor.

The half share of the forwarding business to which the widow had succeeded upon the death of her husband was disposed of in the last will between the minor children of the testatrix and her brothers and sisters respectively. In the result, after her death, the minors became entitled to a  $\frac{2}{4}$ th interest in the business, and the brothers and sisters of Mrs. Abeysekera to the remaining  $\frac{1}{4}$ th.

On 7th January, 1943, the plaintiff as executor named in the will of the widow concluded an agreement with the defendant whereby the latter agreed to manage the business for a period of one year with an option to buy it at any time during that period for the sum of Rs. 40,000. In consideration of the option the defendant undertook to pay to the plaintiff on behalf of the deceased's estate, one half of the nett profits of the business. This agreement is contained in the letter P 16 written by the defendant to the plaintiff and was confirmed by the letter P 17 from the plaintiff of the same date. It is of some importance to note that the defendant's letter P16 refers to the fact that the agreement mentioned in the letter is "tentative and subject to ratification after my Mr. Edwin, who is going with you to Hali Ela today, returns and reports satisfactory on the concern." It is common ground that from 7th January, 1943, Edwin Silva (the Mr. Edwin referred to in P16) did in fact manage the

transport business on behalf of the defendant. Some time prior to June 1943 the plaintiff, who was already the executor of the will of his sister Mrs. Abeysekera, was also appointed administrator *de bonis non* of the estate of Mr. Abeysekera. It is apparent that the original informal agreement under which the defendant commenced to carry on the transport business in January 1943 had been made pending the vesting in the plaintiff of the powers necessary to enable him to enter into a more formal and binding transaction. On June 22nd, 1943, the plaintiff in his dual capacity as executor of his sister's will and as administrator *de bonis non* of the estate of Mr. Abeysekera, together with his brothers and sisters (who owned a  $\frac{1}{4}$ th share interest), entered into a notarial agreement P15, the other party to which was the defendant. This instrument provided that the defendant should manage and conduct the business for such period as he should think fit but not exceeding a period of two years from 7th January, 1943. The defendant undertook to pay a  $\frac{1}{2}$  share of the nett profits to the plaintiff, but the amount payable was for the commencement restricted to Rs. 200 per mensem for reasons which immediately appear. The agreement acknowledged that the defendant had already advanced a sum of Rs. 4,000 which had been "received by the plaintiff for the payment of pressing debts due by the estate" of the deceased Abeysekera and his widow, and also provided for a further advance of Rs. 12,500 "agreed on as essential for original repairs". The monthly rate of profit payable to the plaintiff was to be restricted to Rs. 200 per month until such time as the defendant could reimburse himself for the total amount of these two advances. It was further agreed that the defendant would have the option of purchasing the business outright at any time during the period of two years ending on 7th January, 1945, for the sum of Rs. 40,000 less the amount of the two advances. In regard to accounts, the agreement provided that the defendant should keep proper books of accounts which would be available for inspection at premises called "Andabel" (where the office of the business was maintained), and should transmit a statement of accounts to the plaintiff every six months.

Relations between the parties appear to have been perfectly amicable until about the end of the year 1944. In May 1944 the defendant gave notice of his intention to exercise his option to purchase the business for Rs. 40,000 less the amount of the advances, and in conformity with the clause in that behalf which was contained in the agreement P15, the plaintiff in December 1944 filed a petition in his deceased sister's testamentary case for the sanction of the District Court "to proceed with and complete the sale of the said business" to the defendant. Notice of the plaintiff's application for the sanction of Court was issued on one of his brothers as *guardian ad litem* of the minor children of Abeysekera as well as on the same brother, another brother and a sister of the plaintiff as donees of the  $\frac{1}{4}$ th share of the business; and those two brothers and the sister filed objection against the sale of the property. Ultimately it was agreed of consent in August 1945 that the business be valued by one of two firms of Chartered Accountants and floated into a private Company on that valuation. The present defendant was to be allotted shares in

the Company up to the amount of his investment in the business and the remaining shares were to be divided among the heirs of Abeysekera in proportion to their interests. This settlement was approved by the Court. As neither of the firms named in that order was willing to undertake the valuation, order was made on 30th October, 1945, that the valuation be done by Mr. A. P. Rowlands assisted by Sambamurti and Co., who are a firm of accountants. At this stage however it was noted that the consent of the minors and of the two brothers and sister of the plaintiff was subject to their rights "to have the settlement cancelled on account of the mismanagement of the would be purchaser". In September 1946 the accountants filed in Court a financial statement relating to the business and a valuation report.

On the 30th October, 1946, plaintiff's Proctor moved that the Commissioner's report be taken up for consideration and date for consideration was fixed accordingly. Thereafter objections were filed by the plaintiff and by and on behalf of the heirs. So far as the plaintiff was concerned he did not in his objections refer to any omissions or inaccuracies in the accounts of the Agency for the period ending on December 31st, 1945, which had been filed by Messrs. Sambamurti and Company, but only complained that the goodwill of the business as well as the value of the route licences should be added to the assets of the business for the purposes of valuation. While consideration of these objections was pending, a settlement was arrived at between the parties and was accepted by the District Judge on 14th October, 1947. This settlement replaced the earlier one of August 1945 which had provided for the floatation of a private Company. Under the new settlement it was agreed that the plaintiff should pay a sum of Rs. 67,500 to the defendant on or before 30th November, 1947. Upon this payment being duly made the defendant was to deliver over possession of the business and all its assets to the plaintiff. In default of due payment the Court was empowered to issue a commission to Colonel Vandersmaght to sell the business and its assets as a going concern by public auction, and the proceeds of sale were to be utilised first in repaying the sum of Rs. 67,500 to the defendant. The defendant was by this settlement empowered to purchase the business himself at the auction and in that event was to be allowed credit up to a sum of Rs. 67,500; if the price realised at the auction was less than Rs. 67,500 the defendant was to be paid the full proceeds and to enter satisfaction for the sum due to him under the agreement. The terms of the settlement also included the following provisions:—

"The 9th respondent is to conduct the business from 14th October, 1947, up to 30th November, 1947, in association with B. K. Kiel or a person nominated by him in writing in consultation with the proctors in the case. During that period all monies of the business in hand or now in deposit in any bank or that may come in during the said period are to be deposited in a bank to the credit of the account of the business. the said bank account of the business to be operated on for the purpose of the business by cheques drawn and signed jointly by Edwin Silva on behalf of the 9th respondent and Mr. Kiel or his nominee already referred to."

As a transitional measure the following provision was included with respect to the carrying on of the business until 30th November, 1947, which was the last date before which the plaintiff could pay off the defendant in terms of the settlement :—

“ The 9th respondent gives an undertaking to Court that he has not drawn any monies out of profits or out of the capital of the said business and agrees to duly account for all monies and assets of the said from 1st January, 1946 to 13th October, 1947 on or before 15th December, 1947.

If it is found that he has drawn any monies out of the capital or profits of the business as aforesaid or if any money is found to be due by the 9th respondent after such due accounting he is to be debited with the said monies if any drawn by him as aforesaid or found due as against the said sum of Rs. 17,500 to be deposited in Court as aforesaid the 9th respondent being liable to pay to the Executor of the Estate of Mrs. Abeysekera and Administrator of the Estate of Mr. Abeysekera any sum found to be due in excess of the said sum of Rs. 17,500. If the 9th respondent duly accounts as aforesaid before the 30th November, 1947, as aforesaid the said sum of Rs. 17,500 or such other sum as may be agreed upon or found as being due to the 9th respondent therefrom it is to be paid to him direct and not into Court.”

The plaintiff failed to pay to the defendant the stipulated sum of Rs. 67,500 before the end of November 1947, and, upon the application of the defendant, on 11th December, 1947, the District Court issued a commission for sale. Early in January 1948 an application was made by the plaintiff to stay the sale. Several issues were raised upon that application and the Court thereafter made order on 30th January, 1948, refusing to stay the sale and also remedying the omission of the Court to enter a formal decree in terms of the settlement of October 1947, and entering decree *nunc pro tunc* in terms of that settlement. In the meantime an application had unsuccessfully been made in the Supreme Court for *restitutio in integrum* in order to set aside the settlement of 14th October, 1947. Subsequently in 1950 the Supreme Court dismissed an appeal which had been filed against the District Judge's refusal to stay the sale. The sale actually took place in March 1948 and the business was purchased by the defendant for Rs. 50,000. The sale was confirmed without objection on 27th April, 1948, and the Fiscal's conveyance executed in favour of the defendant in May 1948.

The present action for an accounting was filed on 26th August, 1949. In the plaint no reference whatever was made to the various applications and proceedings which had earlier been taken in the District Court or to the settlements which had been arrived at in that Court. The cause of action relied on was that the defendant had by the agreement of June 1943 undertaken to manage and conduct the business, that he had done so until 10th May, 1948, and that he had failed to render true and correct accounts for the period of management to wit 7th January, 1943 to 10th May, 1948. To this plaint the defendant answered by referring to the

option to purchase and to the plaintiff's application to Court for sanction to sell the business to the defendant in terms of that option and by setting out the purport of the settlement of October 1947 to which I have already referred. Thereafter an amended plaint was filed in August 1950 again reciting only the original agreement of June 1943 but including a new allegation that "the defendant has wilfully and fraudulently failed and neglected to render a true and correct account of the business" for the whole period. In support of this allegation the amended plaint referred to seventeen different items in respect of which there had been an alleged failure to account.

The term (January 1943 to May 1948), for which an accounting is demanded, can be divided into four periods. There was firstly the period from January 7th, 1943 to June 30th, 1944. In respect of this period there was an audit report dated 8th September, 1944, by Messrs. Weeramantri and Co. to which was attached the accounts for the year ending 31st December, 1943, and the half year ending 30th June, 1944. Thereafter the plaintiff made his application to the District Court in December 1944 for sanction to sell the business to the defendant in terms of the agreement of June 1943 (P15). The affidavit D2 attached to that application and signed by the plaintiff contains a paragraph 13 stating that the half share of the profits of the business to which the plaintiff was entitled as executor until 30th June, 1944, amounted to Rs. 6,826/50 and that a sum of Rs. 3,350/79 had been withdrawn by the plaintiff out of these profits for the maintenance of the minor children. The figures quoted in this paragraph are obviously based on the balance sheets furnished by Messrs. Weeramantri and Co. which show that 50% of the profits of the year 1943 amounted to Rs. 3,622/92 and that 50% of the profits for the first half year of 1944 amounted to Rs. 3,203/68. The amount of drawings specified in paragraph 13 of D2 was arrived at by the addition of Rs. 970/96 (shown in the accounts as the 1943 drawings) and Rs. 2,379/83 (shown as the drawings for the first half year of 1944). The affidavit D2 also recites that the total value of the interest which the plaintiff had, as executor, held in the business up to the end of June 1944 (made up of the value of lorries and equipment as at 7th January, 1943, and of the balance of undrawn profits) was Rs. 27,975/81. This figure also was taken directly from the balance sheet prepared by Messrs. Weeramantri and Co. Considering that the plaintiff's application to the Court in December 1944 was made in a fiduciary character with the object of seeking the approval of Court for the sale of assets held by him as executor, it should fairly be assumed that the plaintiff was perfectly satisfied in December 1944 with the accounts, figures from which were utilised by him in his application to which the defendant was named a respondent. I cannot see therefore how the plaintiff can now contend, as he has sought to do, that those accounts were neither accepted by him nor regarded as settled. The only ground therefore upon which those accounts can properly be canvassed at this stage would be the ground of fraud, to which I shall refer later.

In respect of the second period, which is July 1944 until December, 1945, Messrs. Sanbamurthi and Co. furnished in September, 1946, (P35) to the District Court working and profit and loss accounts for the whole of the

years 1944 and 1945 and also furnished valuation reports as directed by the Court. It was after these accounts were furnished that the settlement of October 1947 was arrived at of consent by which the parties agreed that a total sum of Rs. 67,500 was due to the present defendant and would be paid to him by the plaintiff in terms of the settlement D5. This settlement was only approved of by the Court after recording the evidence of Mr. Sambamurthi and after an examination of the figures in Mr. Sambamurthi's statement of accounts. It should be noted that a period of thirteen months elapsed after Messrs. Sambamurthi and Co.'s accounts were filed in Court and that during that period no request was made at any time by the plaintiff to the defendant for any books or vouchers connected with the accounts or any explanations as to the accounts. On the contrary the plaintiff, who was represented by Counsel, voluntarily agreed to the figure of Rs. 67,500 as being the sum which should be paid to the defendant in order to "buy out" his interest in the business. It should be noted also that the defendant by this settlement surrendered the right, which he had under the original agreement of June 1943, to acquire the whole business for himself for the sum of Rs. 40,000 less amounts advanced by him and profits due to him. Here again the circumstances lead to the obvious conclusion that on the basis of the accounts furnished by Messrs. Sambamurthi negotiations took place between the parties which resulted in the settlement of October 1947 and that the accounts upon which the settlement must have been based, had been mutually accepted by the parties.

The third period of the entire term is the period January 1, 1946 to 14th October, 1947. In regard to this period the provision in the settlement D5 was that the defendant would duly account for all monies and assets of the business on or before 15th December, 1947. On the specified date the defendant filed in Court a statement of account (P34) for that period prepared by Messrs. Sachithananda, Schokman and de Silva. By this time the defendant was no longer entitled in terms of the settlement D5 to "buy out" the plaintiff for the agreed sum of Rs. 67,500. Between December 1947 and the time of the filing of the plaint in 1949 the plaintiff took no steps whatever to challenge the defendant's statement of accounts nor to ask for any explanation or assistance with regard to any particular items in the accounts. Instead as I have already stated he instituted various proceedings both in the District Court and in this Court the only object of which was to abrogate the settlement of October 1947, and the present action was filed only after repeated efforts at abrogation had failed. I should refer in this connection to one letter (P46) of 18th February, 1948, which appears to have been regarded by the learned trial Judge as a request by the plaintiff for assistance to verify the defendant's accounts. The relevant paragraph is as follows:—

"Please let me know whether you can make available to me these books to enable me to take extracts from these books. I want the books for 1944, '45, '46 and '47."

It is evident that the only reason why the plaintiff here asked for the books was because he himself had to submit accounts in the testamentary

case and desired to include in those accounts *extracts from the books*. There was no word here of any dissatisfaction with the accounts submitted to Court in December 1947 nor indeed with the earlier accounts prepared by Messrs. Weeramantri and Messrs. Sambamurthi. The defendant replied by P47 of 23rd February, 1948, to the effect that the books were available at the office of the Accountants and were at the time of writing available at Hali Ela where the office of the business was maintained. He stated that the plaintiff would be at liberty to inspect those books and obtain extracts. Having regard to the terms in which the plaintiff made the request for those books, it is unreasonable to expect that the defendant should have interpreted that request as one for any explanation or assistance in connection with the accounts.

While the original agreement of June 1943 only provided for the management of the business by the defendant until a date not later than 7th January, 1945, the defendant actually conducted the business after that date and until October 14th, 1947, acknowledging all the time the right of the plaintiff to a half share of the profits to which he was entitled during the pendency of the original agreement. It has been contended on behalf of the defendant that since the agreement had ceased to be in force in January 1945 the relationship between the parties as from the beginning of the year 1945 had become altered and was different from the relationship established by the agreement. I see no force in this contention. The only reason why the defendant continued to be responsible for management after January 1945 was that proceedings were pending in the District Court for sanction to sell the business to the defendant in terms of the original agreement. At the lowest it must therefore be assumed that there was an implied agreement between the parties that the relationship established by the original agreement would continue until the termination of the Court proceedings.

This implied agreement was acknowledged and confirmed in the settlement D5 of October 1947 in which the defendant undertook to account for the management of the business until October 14, 1947.

The defendant was clearly the agent of the plaintiff under the original agreement of 1943 and continued to be his agent until October 14, 1947, being entitled to a half share of the profits in consideration of his undertaking the duties of management. It is clear that the duty of an agent to render accounts to his principal is not to be regarded as having been duly performed merely by his furnishing accounts to the principal. "It is well settled that his obligation towards his principal does not terminate merely by the submission of account papers; he is bound to explain those papers, and if, on accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum." (*Madhusudan Sen v. Rakhai Chandra Das*)<sup>1</sup>. And as the learned trial Judge has rightly observed in the present case, the requirement of leave to surcharge and falsify accounts which have been furnished is necessary only in a case where accounts have been settled, and not where the agent has failed to carry out his obligation in terms of the principle laid down by the Privy Council in the judgment just cited. At the same time,

<sup>1</sup> *A.I.R. 1916 Calcutta at 684.*



however, if statements of account have in fact been submitted the agent has *prima facie* performed his duty to account and the action for an accounting does not lie unless the principal has first called upon the agent to explain the accounts and the agent refuses or fails to explain them satisfactorily. “ At the same time we think that the decree has been too readily passed and the order for examination of the accounts has been made without proper findings or materials. If a decree were justified in the present case it will be open to any principal who has got all the accounts of his agent in his possession, to employ the machinery of the Courts for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him. Such indiscriminate issue of commissions by Courts for examining accounts has been condemned by this Court on more occasions than one . . . . ” ( *Chakrabarty v. Rai* ).<sup>1</sup>

In the present case there is nothing in the evidence to show that the defendant was ever called upon by the plaintiff to explain the accounts audited respectively by Messrs. Weeramantri, Sambamurthi and Satchithananda. Indeed neither the original plaint nor the amended plaint contains averment that the defendant failed or neglected to explain any of those accounts or to furnish any books or documents called for by the defendant in connection with an examination of the accounts. None of the issues framed was directed at establishing any such failure or neglect.

The only ground therefore upon which the plaintiff's action can succeed in respect of accounts for the period ending October 14, 1947, is that the defendant has been guilty of fraud. In his attempt to establish fraud the plaintiff referred in his amended plaint to some twenty seven items in respect of which he challenged the accounts. The learned District Judge did not arrive at any finding adverse to the defendant in regard to any one of the matters itemised in the amended plaint. Some at least of them were not even referred to in the evidence. With regard to those items which were referred to in the evidence, the accounts and explanations offered on behalf of the defendant make it impossible to hold that there was fraud in connection with any one of those accounts. There was however one matter upon which the learned Judge did reach a finding of fraud. This was in regard to a bill rendered on 19th August, 1946, for transport work done by the Agency for one Mrs. Pestonjee. It is clear from the evidence that this work was undertaken by the Agency at the express request of the plaintiff. The evidence on behalf of the defence was that the bill was sent to the plaintiff for collection from Mrs. Pestonjee. The truth of this evidence is supported by a letter P52 of 8th October, 1946, written by Edwin Silva to the plaintiff which contains the following statement :—“ With regard to Mrs. Pestonjee's bill let her pay anything she likes. There is nothing left in that bill for me to prune once again. I am returning herewith her bill ”. The fact that the bill was sent to the plaintiff and not to Mrs. Pestonjee is borne out by Edwin Silva's statement in P52 that he is *returning* the bill to the plaintiff. The plaintiff himself admitted that he was asked to collect money from Mrs. Pestonjee. His explanation was that the amount was collected by the driver of one of the Agency's lorries and a clerk who accompanied the driver. If in fact the money had been paid by Mrs. Pestonjee to the driver

<sup>1</sup> *A.I.R. 1925 Calcutta at 1072.*

it is strange that the plaintiff did not call her to prove the payment or to produce a receipt. It is stranger still that the plaintiff was able to produce the original bill at the trial; he could only have done so if the bill remained all the time in his custody, or else if Mrs. Pestonjee had for some inexplicable reason retained the bill but not the receipt. In these circumstances it was unreasonable to reject the evidence given on behalf of the defendant that the auditors advised Edwin Silva to debit the plaintiff's personal account with the sum due from Mrs. Pestonjee.

The learned trial Judge was also not satisfied with the manner in which the accounts of the Agency had been maintained. It is undoubtedly correct that no proper accountant was employed by the defendant and that the accounts shown on vouchers and other documents were not contemporaneously entered in the books of account. But the plaintiff admitted in his evidence at the trial, as well as in his statements to Court in connection with his own application to sell the business to the defendant, that the business had been conducted in a most unsatisfactory and unprofitable manner before the business passed into the hands of the defendant. This at least was one reason why the defendant was unable either to incur special expenditure in connection with the accounts or to make quick improvements with regard to the management of the business.

Much was made of the fact that the defendant failed to produce certain records which the Motor Car Ordinance required a Transport Agency to maintain. He did however produce books in which had been entered sums received for transport services from various estates and from the Kachcheri for work performed for the Government. In regard to the Kachcheri payments in particular, strenuous effort was made by the plaintiff, but without success, to prove that the defendant's accounts did not tally with those produced from the Kachcheri. With regard to other casual transport work the defendant explained his failure to produce the appropriate books by the suggestion that those books were with the plaintiff and had not been returned. This suggestion does receive some support from the circumstance that nearly all of the items which were scheduled to the amended plaint are items which refer to work done not for estates but for other casual customers, and as I said earlier, the plaintiff was unable to substantiate his allegation that there was fraud in connection with any one of those items.

The learned District Judge has also commented on the failure of the defendant to maintain a separate bank account in connection with the business. Even if the explanation offered for this failure was unsatisfactory, the evidence and the correspondence which has been produced make it clear that the plaintiff continually visited the office of the Agency and must necessarily have been aware that no separate bank account existed. The bank account was in fact one maintained in the name of Edwin Silva personally, and payments were made at various times to the plaintiff by Edwin Silva, but the plaintiff never once complained of the failure to maintain a separate account. In the absence of supporting evidence, the mere failure to maintain a separate account is in my opinion quite insufficient to establish a charge of fraud.

For these reasons I am of opinion that the plaintiff has now no cause of action to sue the defendant for an accounting in respect of the period January 7, 1943 to October 14, 1947. Although the plaintiff had, as an alternative to his claim for an accounting, asked in his plaint for payment of a lump sum alleged to be due to him, the evidence does not establish what sums the plaintiff was entitled to receive on the basis of the accounts actually furnished by the defendant. Nor is it clear that the settlement D5 did not, in fixing the sum of Rs. 67,500 as being due to the defendant, operate to liquidate all outstanding liabilities of the defendant. At the second hearing in appeal which was held in connection with these two matters, Counsel for the plaintiff was unable to satisfy us that the material on the record entitled him to a decree for the payment of any unpaid profits of the period prior to October 14th, 1947.

The remaining period of the whole term is October 15th, 1947 to May 10th, 1948, on which latter date the ownership of the business passed to the defendant under a Fiscal's conveyance. No accounts have in fact been submitted to the plaintiff in respect of this period, and the defendant has in his answer denied any liability to submit them. The transitional arrangement made in the settlement D5 of October 14, 1947, was that from October 15th until November 30th, the business was to be managed jointly by Edwin Silva (on behalf of the defendant) and the plaintiff or his nominee; no provision was included for the management of the business after November 1947.

The plaintiff had asked for an accounting *for the entire term* on the basis that the defendant was managing as agent under the original agreement of 1943; hence it was contended for the defendant that since the management after October 14, 1947, was in pursuance of the settlement D5 and not of the original agreement, no cause of action had been averred in the plaint to claim an accounting for the period subsequent to October 14th, 1947; it was also contended that since the settlement provided for joint management, the defendant would either not be liable to account to his co-manager, or would else have been entitled to set up defences which had not been taken at the trial because the claim of the plaintiff had been on the basis of an agency and not of a co-managership. In my opinion neither of these contentions is entitled to succeed in the circumstances.

Although the claim for an accounting did not refer to the settlement of October 1947 and to the arrangement for co-managership thereafter, all the necessary material concerning the circumstances and the manner of management after October 14, 1947, is in the record of evidence. If that evidence established that there had in fact been co-managership, the contentions of the defence would have much force. But in fact the plaintiff does not appear to have made serious efforts to appoint a nominee on his side, and the provision for joint management was virtually a dead letter. The defendant impliedly admitted in his answer that he had been responsible for management until his purchase of the business, and it is clear that for a great part, if not the whole, of this last period, the plaintiff did not actually participate in the management. In these

circumstances, the mere fact that the plaintiff had a right to participate in management is no answer to the claim that the defendant should account for the monies which actually came into his hands during the period. As regards the right to profits during the last period, the term in the settlement D5 that the defendant would have no share in the profits has to be given effect.

The decree under appeal, which directed an accounting for the entire term, must be set aside. Decree will instead be entered ordering the defendant to render a true and correct account of his management of the business from October 15th, 1947, till May 10th, 1948, and declaring the plaintiff entitled to payment of the entire nett profits of this last period. The defendant having been only partly successful, will be entitled to be paid one half of the costs of this action and of this appeal.

T. S. FERNANDO.—I agree.

*Appeal partly allowed.*

