1937

Present : **Hearne J. and Fernando A.J.**

CHITHRAPOOPALAPILLAI *v.* CHINNIAH *et al.*

45—D. C. Trincomalee, 1,868.

Action for account—Claim for general account—Particulars as to items—Practice—Principal and agent—When agent is trustee—Claim against agent—When it may be barred—Fiduciary relation—Recovery of interest—Trusts Ordinance, No. 9 of 1917, s. 111, Ordinance No. 22 of 1871, s. 8.

Where property is entrusted to an agent for investment, sale, or custody the agent is trustee for the property, and a claim to recover such property would not be barred by the provisions of the Prescription Ordinance, No. 22 of 1871.

In such a case interest would be recoverable on the claim.

Where an agent merely collects rents or debts he is not a trustee unless the agency is of an exceptionally fiduciary character.

In the latter case, the provisions of the Prescription Ordinance would apply except when the proviso operates.

In this case no interest would be chargeable in the absence of an agreement.

APPEAL from a judgment of the District Judge of Trincomalee.

F. A. Hayley, K.C. (with him *N. E. Weerasooria* and *N. K. Choksy*), for defendant, appellant.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *A. Muthucumaru*), for plaintiffs, respondents.

Cur. adv. vult.

July 29, 1937. HEARNE J.—

When the plaintiff filed his suit in the District Court of Trincomalee he asked for an order directing the defendants to pay him Rs. 15,475.31 made up as follows:—

		Rs.	c.
Schedule A.	Monies alleged to have been received by the defendant and not accounted for ..	10,446	67
Schedule B.	Monies alleged to have been received by the defendant from third parties on account of the plaintiff and not accounted for ..	2,510	31
Schedule C.	Which were for small amounts	1,451	15
Schedule D.	Do. do.	942	27½
Schedule E.	Do. do.	124	90½
		15,475	31

This was his first cause of action.

As a second cause of action he asked for a further accounting from the defendant and estimated that the amount that would be found due on such accounting would be in the region of Rs. 14,000 (paragraph 15 of plaint) and in (c) of his prayer he also asked for an order on the defendant "to pay such other sums of money as may be found due from him at a true and full accounting, and in default of such accounting, to pay a sum of Rs. 14,000".

A plaintiff can, of course, file a suit for money which will be found to be due on taking accounts. It is ordinarily done when a defendant is under a legal obligation to render accounts which a plaintiff is not in a position to ascertain. It is usual in such a case for a Court, where liability to account is established, to direct that an account be taken of the transactions between the parties. But in the present case, in regard to the second cause of action, the defendant was most seriously prejudiced by the fact that, as the result of what transpired, the plaintiff did not merely set out to establish that the defendant was liable to account. He set out to establish that the defendant owed him Rs. 15,475.31 in accordance with Schedules A to E as well as a further sum of money in regard to which he would not condescend to particulars. (Page 27 of typed record.) It is a rule of practice for which no authority is necessary that where a claim is for a general account, that is where the accounts are unsettled and it is sought to have them settled, particulars as to items, initially at any rate, need not be given. But when a definite sum made up of several items is claimed for which judgment is asked, particulars of the items will be necessary.

What occurred in the case was this. The Judge made an order that both parties should file accounts. In his accounts the defendant set out "the bonds in favour of second plaintiff which he had despatched to her" (D 1 A), "the account left in his charge by the first plaintiff before he left for the F. M. S." (D 1 B), "the re-investment account" (D 1 C), "receipts on the plaintiffs account" (D 1 D) and finally "the expenses he had incurred" (D 1 E). He did not set out the sums of money he had received from the plaintiffs. But the first plaintiff in his accounts detailed (*a*) the monies he claims to have remitted to the defendant, and

(*b*) the monies he claims that the defendant received on account of the plaintiffs from third parties. These documents are P 1, the sum in (*a*) is shown as Rs. 47,122.11 and the sum in (*b*) as Rs. 11,569.

The Judge at this stage proceeded to frame issues—at page 25 of the typed record. In particular he framed issues 8 to 11.

Issue 8.—Did the plaintiffs entrust to the defendant the sums of money mentioned in the statement filed by them on March 21, 1935 ? (P 1).

Issue 9.—Has the defendant failed to render the plaintiffs a true and full account. . . . ?

Issue 10.—Is the defendant liable to render the plaintiffs a true and full account ?

Issue 11.—If issue 10 is answered in favour of the plaintiffs, what amount would plaintiffs be entitled to in the event of the defendant failing to render a true and full account ?

Now P 1, as I have already said, indicated that the defendant had received Rs. 47,122.11 from the plaintiffs and Rs. 11,569 from third parties on account of the plaintiffs, and the defendant did not know when the issues were framed for what proportion of these sums it was claimed he had not accounted, for which judgment was being asked ; what items in those two statements supported the plaintiffs claim for judgment in addition to the Rs. 15,475.31 mentioned in Schedules A to E. In fact the further sum of money for which the plaintiff was claiming judgment was, as it transpired, one of approximately Rs. 19,000 which is about Rs. 5,000 more than the estimate he made of Rs. 14,000, in paragraph 16 of the plaint. This sum was based on P 50 (Rs. 1,000), P 51 (Rs. 500), P 55 (Rs. 500), P 59 (Rs. 250), P 74 (Rs. 400), P 75 (Rs. 200), P 76 (Rs. 350), P 77 (Rs. 300), P 78 (Rs. 25), P 79 (Rs. 45), P 80 (Rs. 25), P 81 (Rs. 300), P 82 (Rs. 200), P 64 (Rs. 2,000), P 41 (Rs. 506), P 40 (Rs. 600), and P 42-49 for Rs. 12,000 on unendorsed seconds of exchange of drafts, the originals of two of which the plaintiff had admittedly paid to third parties (D 19 and D 20). But the defendant had no notice of these items till the plaintiff had entered on his case and in the case of P 42-49 not till he was himself cross-examined after the plaintiff had closed his case.

It was eventually conceded that the procedure in regard to the second cause of action was irregular and we were asked to deal with the appeals on two lines. In the first place to send the case back for re-trial on the second cause of action with a direction to the Judge that he should now order an account to be taken. In the second place to hold that the plaintiff is entitled to judgment in accordance with the Judge's findings on Schedules A to E.

I find it impossible to direct the Judge in the lower Court to order an account to be taken on the second cause of action, as that would involve the implication that in my opinion the plaintiff had made out a case for the defendant's liability to account ; and I cannot say that any result could be held to flow from the trial on the second cause of action in view of the irregularities which prejudiced the defendant. It is not in every case where a plaintiff establishes that a defendant was his agent that the Judge automatically orders an account to be taken. The Judge does not do so if the liability to account is not established or if the necessity for

accounts is not made out. To this aspect of the matter the trial Judge did not appear at the outset of the case to direct his attention. In his pleadings the defendant stated that up till 1928 he had accounted to the plaintiff for monies received by sending him the bonds obtained in his favour, while in his evidence he says that when he was given a power of attorney by the plaintiff he had satisfied him regarding previous transactions. The matter was not put in issue by reason of the course the trial took, but had it been put in issue it appears that there is ground for supposing that when the plaintiff executed the power of attorney in defendant's favour he was satisfied that the monies remitted to the defendant prior to 1928 had been duly invested by him. Apart from these considerations, some of the items of the claim, for instance, those based on the drafts, are palpably dishonest.

I find it equally impossible to hold that a case like this can be tried piecemeal and that judgment should be entered in plaintiffs favour in accordance with the Judge's findings on Schedules A to E, especially as some of the findings do not appear to me to be justified by the evidence. In view of the conclusion at which I have arrived that there should be a new trial—it is the only satisfactory solution that I can envisage—it would be inappropriate to refer specifically to many of the items of account. I select three items of the plaintiffs claim where the amounts involved are small to indicate the mistaken view taken by the Judge in regard to the burden of proof.

In Schedule E there is a claim for Rs. 20, which according to the plaintiff "was supposed to have been returned to Subramaniam on November 3, 1928". The plaintiff himself could give no relevant evidence; Subramaniam said he had paid the full interest payable by him and that Rs. 20 as interest had not been deducted, but the defendant in support of his contention that he had made a deduction of Rs. 20 produced a letter from the plaintiff in which he had authorized the defendant not to charge Subramaniam one month's interest (D 2). Of course it was open to the Judge to take the view that notwithstanding the plaintiff's authority to the defendant the latter did not deduct Rs. 20. But in his finding at page 167 he makes no reference to D 2 and appears to have given it no weight at all.

In Schedule C there is a claim for Rs. 50 which according to the first plaintiff was alleged to have been paid to the second plaintiff. The first plaintiff's evidence was clearly hearsay. All he could say, and this could only be implied from his evidence, was that the second plaintiff had told him she had not received the alleged payment. The defendant said he had received the Rs. 50 and had paid it over to the second plaintiff. The Judge found against him in regard to this item on which he had given evidence merely on the hearsay evidence of the first plaintiff.

In Schedule B an item of Rs. 108 appears. This was said to be the interest paid to defendant on July 7, 1932. The receipt of the money was admitted by the defendant who showed that he had brought it to credit on page 297. The Judge accepts this at page 162 but says that the defendant is liable to pay an amount of Rs. 108 alleged to have been paid to the defendant on April 15, 1933. Apart from the fact that the defendant was said to be liable according to the pleadings not for money received

on April 15, 1933, but on July 7, 1932, the money paid on April 15, 1933, was paid according to the receipt, to the plaintiffs themselves after they had returned from the F. M. S.

In my opinion the appeal should be allowed with costs and the cross-appeal dismissed, the decree of the trial Court rescinded and a new trial ordered with the following directions concerning prescription, interest, and the claim in reconvention based upon the injunction. The costs in the lower Court should remain in the discretion of the Judge of such Court.

Before the enactment of the Trusts Ordinance an action for conversion was barred after two years from its cause, while an action to recover what is in effect a trust fund fell within section 8 of the Prescription Ordinance or else within section 11 which allows a three year period in cases not expressly provided for. (*Dodwell & Co., Ltd. v. John*[1].)

The Trusts Ordinance enacted that in the case of any claim to recover trust property, or the proceeds thereof still retained by a trustee, or previously received by the trustee and converted to his use, the claim shall not be held to be barred or prejudiced by any provision of Ordinance No. 22 of 1871 (section 111). Sub-section (5) of section 111 provides that this section shall not apply to constructive trusts in so far as such trusts are treated as express trusts by the law of England.

It is no easy matter to decide when an agent is in fact a trustee of his principal.

The leading cases on the subject are *Burdick v. Garrick*[2]; *Soar v. Ashwell*[3]; *Friend v. Young*[4]; and *North American Land & Timber Co. v. Watkins*[5].

Soar v. Ashwell was a case in which a stranger to a trust received part of a trust property which he knew had been handed to him in breach of the trust. It does not help in the present case.

In *Burdick v. Garrick* much was made to depend upon the special nature of the deed under which monies were to be received or invested. See Hall V.C. in *Watson v. Woodman*[6].

In *Friend v. Young* it was held that the existence of a fiduciary relationship between the parties did not prevent the defence of the Statute of Limitations being set up. This case was explained and distinguished in *North American Land & Timber Co. v. Watkins* which followed *Burdick v. Garrick*. The result appears to be that *(a)* where property is handed to an agent for investment, sale, custody, &c., he is a trustee of that property; but *(b)* where he merely collects rents or debts he is not a trustee unless his agency is of an exceptionally fiduciary character—*Underhill on Trusts (7th ed.), p. 183.*

In the former case, therefore, the claim to recover would not be barred by any provisions of Ordinance No. 22 of 1871 and interest would be chargeable in accordance with the Trusts Ordinance; in the second case unless the proviso operates (in which event the position would be the same as in the former case) the provisions of Ordinance No. 22 of 1871, would have application and in the absence of an agreement no interest would be chargeable.

[1] *(1918) 20 N. L. R. 206 at p. 212.*
[2] *(1870) L. R. 5 Ch. 233.*
[3] *(1893) 2 Q. B. D. 390.*
[4] *(1897) 2 Ch. 421.*
[5] *(1904) 1 Ch 242.*
[6] *L. R. 20 Eq. 721. 731.*

It would appear that the application made by the plaintiff to prohibit the defendant from disposing of *any* movable or immovable property belonging to him until the decision of the case was misconceived. At the most an order for sequestration adequate to the plaintiff's claim could have been asked for by the plaintiff. The Judge, like the plaintiff, was wrong in regard to the particular remedy open to the plaintiff assuming that the conditions requisite for either remedy existed. But in regard to the claim in reconvention, the Judge at the retrial (and of course there must be a new Judge) may award assessed damages, not on the basis of the fact that the plaintiff had misconceived his remedy (if any) but if he is satisfied that the material on which the injunction was issued were wrong and false to the knowledge of the plaintiff.

FERNANDO A.J.—I agree.

Sent back.