

# THE INDIAN LAW REPORTS

## PUNJAB SERIES

### LETTERS PATENT APPEAL.

*Before Bhandari, C. J. and Mehar Singh, J.*

S. RIPUDAMAN SINGH,—*Plaintiff-Appellant.*

*versus*

SURINDER KUMAR, ETC.,—*Defendant Respondents.*

Letters Patent Appeal 10-D/1955

Code of Civil Procedure (V of 1908)—Section 9—Remedy  
by way of account—Nature and extent of—Suit for accounts  
—When and between whom competent—Matters to be  
established to maintain a suit for accounts—Indian Trusts Act  
(II of 1882)—Section 3—Trust—When and how created—  
Trust and contract—Distinction between—Indian Contract  
Act (IX of 1872)—Section 182—Agency—Definition of.

1957  
Nov., 22nd

*Held*, that remedy by way of account is remedy for the recovery of money, received by one, belonging to another, who has no evidence of such receipt, or of the amount so received. It is designed to compel one who, by virtue of some privity or trust relation, has received or been entrusted with money or property belonging to another, or to be applied or disposed of in a particular manner, to render an account thereof, and to recover the balance found to be due. It is a very exceptional remedy and can be availed of only where a fiduciary relation exists between the parties and a duty rests upon the defendant to render an account. A suit for rendition of accounts can be brought by one cotenant against another for the recovery by the plaintiff of his just share, or of a portion, of the rents and profits received by the defendant from the common property, by a beneficiary against a trustee in respect of property subject to the trust, by one member of a partnership against another who

receives and refuses to account for proceeds of the partnership property, by the principal against an agent who has been entrusted with money to be expended for the principal, to compel an accounting thereof and to recover the unexpended balance, and by a ward against his guardian in respect of the property entrusted to the latter.

*Held*, that the plaintiff in a suit for accounts can succeed only if he establishes the existence of facts entitling him to an accounting, namely that the person upon whom such an obligation is sought to be imposed (the obligor) has received some property not his own, that the person seeking to impose the obligation (the obligee) is the owner of the property in respect of which the obligation is sought to be imposed, that the obligor did not receive the property as mere bailee, that the obligor received it into his possession and control, and that there is privity of contract between the obligee and obligor. The whole basis of a decree for account is a liability on the part of the defendant to account, and the first issue to be determined in every such suit is whether or not the plaintiff is entitled to an account. The mere fact that it would be convenient to have the accounts examined in the presence of the defendant will not render the defendant liable to account.

*Held*, that a trust is a relationship of a fiduciary character with respect to property, not one involving merely personal duties. It subjects the person by whom property is held to equitable duties to deal with the property for the benefit of another person and, in the case of an express trust arises from the intention of a person to create a trust directly or indirectly. An express trust may be established even though the parties did not intend to create a trust, even though they did not call it trust and even though they did not understand precisely what a trust is. It is the manifestation of intention and not the actual intention which determines whether a trust has been created.

*Held*, that a number of features distinguish a trust from a contract. Trust always involves an equitable ownership whereas a contract is a legal obligation based on an undertaking supported by a consideration which obligation may or may not be fiduciary in character. The beneficiary of a trust has the beneficial interest in the trust property the beneficiary of a contract has only a personal

claim against the promisor. There is a fiduciary relationship between the trustee and the beneficiary but not between the promisor and promisee or between the debtor and creditor. To constitute a trust there must be distinct fund which the trustee is required to preserve in tact and for which he must eventually account. To constitute a contract there is no such fund and the person receiving money has unrestricted use thereof being liable to pay similar amount, whether with or without interest, to the payer or to a third person. There is only a personal obligation to pay the money. If, therefore, a question arises whether the parties to a transaction intended to create a debt or trust, the court should enquire whether they intended that the person receiving the money should have the beneficial as well as the legal interest in it. If he was intended to have the use of the money as his own and to be under a merely personal obligation to pay the money to the payer or to a third person, a debt is created. If on the other hand, it was intended that the beneficial interest in the money should remain in the payer or should pass on to a third person, a trust is created. Where the language of the parties does not clearly show their intention, all the circumstances must be considered in order to determine whether a debt or a trust was intended. If it was intended that the persons receiving the money should hold it for the benefit of another, a trust is created. If on the other hand, it was intended that he might use it as his own being under a merely personal liability to pay a similar amount of money, a debt is created.

*Held*, that an agency may be defined as a contract by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which that other assumes to do the business and render an account of it.

*will* Letters Patent Appeal from the decree of the Court of Hon'ble Mr. Justice J. L. Kapur dated the 13th January, 1955, accepting the 2nd appeal of the defendants appellants and dismissing the plaintiff's suit leaving the parties to bear their own costs throughout, thus reversing the decree of the Court of Shri. Sultan Singh Jain, Additional District Judge, Delhi, dated the 16th November, 1953, modifying that of Shri. Madan Mohan Singh, Sub-Judge Ist Class, Delhi dated the 31st March, 1953, to the extent that the plaintiff is granted a preliminary decree for the rendition of accounts

subject to the direction that it shall primarily be the duty of the plaintiff to prove each item in the account, i.e., the plaintiff would be required to prove as to what amount was actually received by R. S. Nathu Ram towards the sub-contract in dispute from the Government. It would also be his duty in the first instance to prove as to what amount was actually spent for carrying out of the contract. The net amount proved to have been spent by the plaintiff in carrying out of the sub-contract would be deducted from the net amount proved to have been received by R. S. Nathuram from the Government and the balance if any would be the net profits in the business. Out of the net profits so determined  $6\frac{1}{2}$  per cent would be paid to the defendant and 93 per cent would be paid to the plaintiff. The plaintiff has already received 90 per cent from R. S. Nathuram on his monthly bills. If the net amount proved to have been received by R. S. Narula from the Government does not exceed the sum already received by the plaintiff from R. S. Nathuram no amount shall be paid by the defendants to the plaintiff. But if the net amount received by R. S. Nathuram from the Government exceeds of the amount already paid by R. S. Nathuram to the plaintiff then alone the surplus, if any, will be paid by the defendants to the plaintiff. Out of the surplus if any, of course,  $6\frac{1}{2}$  per cent of the net profits as referred to above would be paid to the defendants. The plaintiff shall be responsible to prove all the figures involved in the accounts in the first instance. The defendants of course shall have a right to produce evidence in rebuttal. In the light of the decree as passed by this Court the account shall be gone into and taken by the local commissioner Shri Amar Chand Narula, Advocate who has been appointed as Commissioner by the trial Court.

The parties shall bear their own costs for the time being in both the courts but if after the taking of account any amount is found due from the defendants to the plaintiffs the defendants shall pay proportionate costs to the plaintiff on that amount but if no amount is found due to the plaintiff from the defendant the parties shall bear their own costs throughout.

GURCHARAN SINGH, for Appellant.

GURBACHAN SINGH, for Respondent.

## JUDGMENT.

BHANDARI, C.J.—This appeal under Clause 10 of Bhandari, C. J. the Letters Patent raises the question whether the plaintiff was at liberty to bring a suit for rendition of accounts against the defendant or the legal heirs or representatives of the defendant.

The plaintiff in this case is the proprietor of a partnership firm known as Modern Sanitary Engineers and Contractors, Delhi, while the defendants are two sons and a widow of R. S. Nathu Ram Kukreja of Delhi.

In or about the year 1940, R. S. Nathuram (hereafter referred to as the defendant) obtained a contract from the Public Works Department for the construction of a Civil Hospital at Quetta. On the 4th December, 1940, the defendant sublet the sanitary, drainage and water-supply part of the said contract to the plaintiff, the principal conditions of subletting being that the plaintiff would allow the defendant 6½ per cent on the net amount received from the Public Works Department in respect of the work entrusted to him, that the plaintiff would carry out the work according to the specifications of the department, that the defendant would pay the plaintiff 90 per cent of the bill presented to him every month for the work done whether he got any payment from the department or not and that the final amount would be paid to the plaintiff after the preparation of the final bill. t

The defendant paid the plaintiff certain sums of money, but the plaintiff claimed that he was entitled to an increase in the rates owing to general increase in the price of goods on account of the Second Great World War. The defendant assured him that if the rates of the contract were increased by the Public Works Department he would make a corresponding increase

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in the rates in respect of the work entrusted to him. The Public Works Department increased the rates of the contract by as much as 90 per cent and paid the defendant at the enhanced rates. The defendant completed the building in due course and handed it over to the Public Works Department on the 30th September, 1944. The plaintiff alleges that the Public Works Department accepted the final bill of the plaintiff in or about the year 1946.

The plaintiff claimed that in view of the provisions of the agreement between the parties the plaintiff was entitled to the whole of the amount received by the contractor from Government in respect of the money paid by the Public Works Department for sanitary, drainage and water-supply portion of the contract less 6½ per cent and that as payment had not been made to him at that rate he was entitled to the balance paid by Government to the contractor for this purpose. The defendant repudiated this claim, and in the year 1946 the plaintiff brought an action against the defendant for rendition of accounts in the Court of the Senior Subordinate Judge at Quetta. He valued his suit at Rs. 1,100 and stated that he was bringing a suit for accounts as the defendant had received payments at rates of which the plaintiff was ignorant. He stated further that if accounts were taken a sum of Rs. 9,000 to Rs. 30,000, would be found due from the defendant to the plaintiff. According to him the cause of action arose on the 12th December, 1940, when the work was sublet to the plaintiff and again on 30th September, 1944, when the defendant finished his part of the work and on the dates when a demand for accounts was made and rejected. The communal disturbances which broke out in the year, 1947, compelled the parties to migrate to India and it is surmised that the suit brought by the plaintiff at Quetta was dismissed in default under the provisions of the Code of Civil Procedure.

On the 25th July, 1950, the plaintiff brought a fresh suit for rendition of accounts against the legal representatives of R. S. Nathuram who had since died. This suit was brought in the Court of a Subordinate Judge at Delhi. The trial Court decreed claim and the order of the trial Court was upheld by the learned District Judge in appeal. A learned Single Judge of this Court, however, set aside the order of the courts below on the ground that a suit for rendition of accounts was not maintainable as relationship between the parties was neither of trustee and beneficiary nor of principal and agent. The plaintiff has come to this Court in appeal and the question for this Court is whether the learned Single Judge has come to a correct determination in point of law.

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to be expended for the principal, to compel an accounting thereof and to recover the unexpended balance, and by a ward against his guardian in respect of the property entrusted to the latter. The plaintiff in a suit for account can succeed only if he establishes that the relationship between the parties is of such a character as to impose on the defendant the duty to render an account *Sri Ram v. Ram Kishan Dass* (1), *Nalini Kumar Chakrabartty v. Gadadhar Choudhury and others* (2), *Kanhayalal Supdubhai v. Hiralal Deoram* (3). He must establish the existence of facts entitling him to an accounting, namely that the person upon whom such an obligation is sought to be imposed (the obligor) has received some property not his own, that the person seeking to impose the obligation (the obligee) is the owner of the property in respect of which the obligation is sought to be imposed, that the obligor did not receive the property as mere bailee, that the obligor received it into his possession and control, and that there is privity of contract between the obligee and obligor *Panmal Lodha and another v. Omraomal Lodha and others* (4). The whole basis of a decree for accounts is a liability on the part of the defendant to account and the first issue to be determined in every such suit is whether or not the plaintiff is entitled to an account. The mere fact that it would be convenient to have the accounts examined in the presence of the defendant will not render the defendant liable to account *Nalini Kumar Chakrabarthty v. Gadadhar Chaoudhury and others* (2).

It is contended on behalf on the plaintiff that the relationship between the plaintiff and the

- (1) A.I.R. 1927 Lah. 566  
 (2) A.I.R. 1929 Cal. 418  
 (3) A.I.R. 1947 Bom. 255  
 (4) A.I.R. 1953 Cal. 244



defendant was of beneficiary and trustee or of principal and agent, and consequently that the plaintiff is entitled to a rendition of accounts. A trust, as defined in the Trust Act, 1882, is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner for the benefit of another, or of another and the owner. It is a relationship of a fiduciary character with respect to property, not one involving merely personal duties. It subjects the person by whom property is held to equitable duties to deal with the property for the benefit of another person and, in the case of an express trust arises from the intention of a person to create a trust directly or indirectly. An express trust may be established even though the parties did not intend to create a trust, even though they did not call it trust and even though they did not understand precisely what a trust is, it is the manifestation of intention and not the actual intention which determines whether a trust has been created.

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A number of features distinguish a trust from a contract. Trust always involves an equitable ownership whereas a contract is a legal obligation based on an undertaking supported by a consideration which obligation may or may not be fiduciary in character. The beneficiary of a trust has the beneficial interest in the trust property, the beneficiary of a contract had only a personal claim against the promisor. There is a fiduciary relationship between the trustee and the beneficiary but not between the promisor and promisee or between the debtor and creditor. To constitute a trust there must be distinct fund which the trustee is required to preserve intact and for which he must eventually account. To constitute a contract there is no such fund and the person receiving money has unrestricted use thereof being liable to pay similar amount, whether with or without interest, to the payer or to a third person.

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There is only a personal obligation to pay the money. If, therefore, a question arises whether the parties to a transaction intended to create a debt or a trust, the court should enquire whether they intended that the person receiving the money should have the beneficial as well as the legal interest in it. If he was intended to have the beneficial and legal interest, if he was intended to have the use of the money as his own and to be under a merely personal obligation to pay the money to the payer or to a third person, a debt is created. If on the other hand, it was intended that the beneficial interest in the money should remain in the payer or should pass on to a third person, a trust is created. Where the language of the parties does not clearly show their intention, all the circumstances must be considered in order to determine whether a debt or a trust was intended. If it was intended that the person receiving the money should hold it for the benefit of another, a trust is created. If, on the other hand, it was intended that he might use it as his own being under a merely personal liability to pay a similar amount of money, a debt is created (Scott on Trusts, section 12.2).

Now, what was the intention of the parties when they entered into the contract over which the present controversy has arisen? The learned counsel for the plaintiff contends that the relationship between the defendant and the plaintiff was of a trustee and a beneficiary for the agreement between the parties indicates that the defendant undertook to refund to the plaintiff every pie in excess of 6½ per cent received by him from Government. According to him, a fiduciary relationship arose between the parties under the principles embodied in sections 88 and 94 of the Trusts Act, for the defendant was to be trustee not only in respect of the sums in excess of 6½ per cent but also in respect of the enhanced payments made to him by Government.

Our attention was invited prominently to a decision reported as 1950 East Punjab 92 in which a Full Bench of this Court observed that a suit for accounts is not necessarily confined between principal and agent and that whenever it is necessary in order to ascertain the amount of money due to the plaintiff, he may ask the Court to pass a preliminary decree for accounts to be taken by or under the supervision of the Court.

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It was contended that in view of the number of payments received by the defendant, in view of the long period of time during which the payments were received, and in view of the fact that the figures of the payment received were in the exclusive knowledge of the defendant, the Court should exercise the discretion vested in it by law and order the rendition of accounts under rule 16 of order 22 of the Code of Civil Procedure.

The terms of the agreement by which the parties are bound are embodied in two documents. Exhibit P. 6, which is a letter addressed by the plaintiff to the defendant, is in the following terms:—

“We confirm the talk which our M/s R. D. Singh and J. C. Bakshi, had with you:—

- (1) That you have entrusted the above work to us.
- (2) That we will allow you 6½ (six and a half) per cent on net amount received from the department for this work.
- (3) That we will carry out the work according to the specifications and instructions issued from the department.

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- (4) That you will pay us 90 per cent of the bill presented to you every month for the work done, irrespective of the fact whether you get payment from the department or not, and the final amount, i.e., 10 per cent will be paid to us when the final bill is prepared.
- (5) That all the excavation and brick work occurring in the above work will be carried out by you.
- (6) That at least one month clear will be given to us before handing over to enable us to fix the sanitary fittings etc.
- (7) If we will not carry out the work according to the specifications of the department and if any penalty is imposed on you for our part of the work we will be responsible to pay that.
- (8) That you will inform the department that you have appointed us as your sanitary sub-contractors.

Please confirm the above and oblige".

The defendant accepted the offer contained in Exhibit P. 6 by means of communication Exhibit D. 1, which runs as follows:—

"I confirm your above quoted letter subject to the following conditions—

You will be responsible to me and to the department for your part of the work in all respects whatsoever till its maintenance period is over. The final payment will be made when the final bill will be completed and passed by the department.

Please confirm above and oblige".

These two documents make it quite clear that the plaintiff was to carry out the work relating to the sanitary, drainage and water-supply in the Hospital at Quetta on behalf of the defendant according to the specifications and instructions of the Public Works Department. He was required to present the bills to the defendant for the work done by him and the defendant was required to pay 90 per cent of the amount of the bills to the plaintiff regardless of whether the defendant got anything from the department or not. The remaining 10 per cent of the amount of the bill was to be paid by the defendant to the plaintiff when the final bill was passed by the Public Works Department. The plaintiff was to allow the defendant 6½ per cent on the net amount received from the Public Works Department for the work entrusted to the plaintiff. The plaintiff was to be responsible to the department and to the defendant for his part of the work in all respects whatsoever and final payment was to be made to him by the defendant after the completion and passing of the final bill by the department. These terms leave no doubt in my mind that the contract between the defendant and the plaintiff was simple contract between a contractor and a sub-contractor. According to the agreement the defendant was to pay the plaintiff in accordance with the rates accepted by the Public Works Department less a sum of 6½ per cent which the defendant required as his own remuneration. The plaintiff had no privity of contract with the Public Works Department and was not responsible to the said department in any way whatsoever excepting only that he had to carry out the work according to the specifications and instructions of the Department. His responsibility was only towards the defendant with whom he had entered into a contract. It is true that no specific sum of money was mentioned by the defendant for payment to the plaintiff and that it appears to have

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been intended that the defendant would pay the plaintiff a sum equivalent to the amount received from Government in respect of this portion of the contract less a sum of 6½ per cent. Clause 4 of the letter, Exhibited P. 6, appears to indicate that the defendant was to pay the plaintiff 90 per cent of the bill presented to him every month for the work done, irrespective of the fact whether the defendant got payment from the department or not, and that the final amount of 10 per cent was to be paid to the plaintiff after the preparation of the final bill. The fact that 90 per cent of the bill was to be reimbursed to the plaintiff every month, irrespective of whether the defendant got payment from the department or not, makes it quite clear that the amount which the defendant owed the plaintiff was a debt or a personal liability. The defendant did not manifest an intention, directly or indirectly, of holding the money received by him from Government in trust for the plaintiff. It is true that the final payment of 10 per cent was to be made after the final bill had been prepared, but this condition was imposed only with the object of ascertaining the amount which was to be paid by the defendant to the plaintiff. This stipulation did not make the defendant a trustee for the plaintiff of the money received by him from Government. No fiduciary relationship existed between the parties and the defendant was under no obligation to render accounts to him. The defendant was the owner of the money received from the Public Works Department for this amount represented the price of the goods supplied and remuneration for the services rendered by the defendant to the Public Works Department in accordance with the terms of the contract. The plaintiff had no right or interest in this sum of money and had no beneficial interest therein. He had only a personal claim against the defendant for the work done by him for the latter. The circumstances of the case leave no doubt in my mind that the

relationship between the parties was of contractor and sub-contractor. Indeed the plaintiff had asked the defendant to inform the Public Works Department that the plaintiff had been appointed as sanitary sub-contractor of the defendant. I agree with the learned Single Judge that the relationship between the defendant and the plaintiff was one of contractor and sub-contractor and could by no stretch of meaning be altered into one of trustee and beneficiary. When a person undertakes to pay a sum of money on a later day on the happening of a certain contingency a trust is not automatically created. A trust is created only if the parties manifest their intention that it should be created. I am clearly of the opinion that the two documents which formed basis of the contract did not bring into existence a fiduciary relationship between the plaintiff and the defendant, and it seems to me therefore, that neither the defendant nor his legal representatives are liable to render an account to the plaintiff.

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It was strenuously argued before us that the plaintiff does not know and has no means of ascertaining the precise amounts which were paid by Government to the defendant and consequently that he has no alternative but to bring a suit for rendition of accounts. The evidence on record appears to show that the plaintiff was aware of the precise amounts which were to be paid by Government to the defendant. Even, if he was not aware of these amounts, there was nothing to prevent him from summoning an officer of the Public Works Department and requiring him to produce the records showing the amounts which were actually due or were disbursed to the defendant. The onus of proving the amount which was to be recovered from the defendant lay upon the plaintiff and it was clearly his duty to produce such evidence in order to substantiate his claim.

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Nor is there any substance in the contention that the relationship of principal and agent existed between the defendant and the plaintiff. An agency may be defined as a contract by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which that other assumes to do the business and render an account of it. It is said that the relationship of principal and agent came into existence between the parties as the defendant was to recover money from the Public Works Department and to pay it to the plaintiff after deducting his 6½ per cent. This argument appears to me to be wholly devoid of force. As stated in the preceding paragraph the relationship between the defendant and the plaintiff was that of a contractor and a sub-contractor. The defendant had obtained a contract from the Public Works Department and he sublet a part of it to the plaintiff. The defendant alone was responsible for the payments to the plaintiff, for clause 4 of the agreement, Exhibit P. 6, specifically declares that the defendant would pay the plaintiff 90 per cent of the bill presented to him every month for the work done irrespective of the fact whether the defendant got payment from the department or not. There was no privity of contract between the plaintiff and the Public Works Department and the plaintiff had nothing to recover from the said department. If he had nothing to recover from the Public Works Department, he could not possibly appoint the defendant as his agent to recover anything. The plaintiff was to execute a certain work for the defendant to the satisfaction of the defendant and the Public Works Department and was to receive payment from the defendant. Nothing was due to him from the department and nothing was to be paid to him by the department. He did not and could not appoint the defendant as his agent and cannot require the latter to render an account. It may be that the



defendant proposed to make the payment for the sub-  
contract after he had received payment from  
Government, but that fact alone did not make the  
defendant an accounting party. The relationship  
between the parties was that of contractor and sub-  
contractor or of debtor and creditor and not of princi-  
pal and agent or trustee and beneficiary.

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For these reasons I am of the opinion that the order of the learned Single Judge must be upheld and the appeal dismissed with costs. I would order accordingly.

The 22nd November, 1957.

MEHAR SINGH, J.—I agree.

Mehr Singh, J.

B.R.T.