

Mishra Bandhu Karyalaya And Ors. vs Shivratanlal Koshal on 29 April, 1969

Equivalent citations: AIR1970MP261, AIR 1970 MADHYA PRADESH 261, 1970 JABLJ 723, ILR (1973) MP 88, 1970 MPLJ 475

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Bench: A.P. Sen

JUDGMENT

A.P. Sen, J.

1. This is an appeal brought by the defendant No. 1, M/s. Mishrabandhu Karyalaya, Jabalpur and its partners, from the Judgment and decree of the 5th Additional District Judge, Jabalpur, dated 31st August 1964, decreeing against them, the plaintiff Sheoratanlal Koshal's claim (A) for recovery of Rupees 15,307.04 paise with interest @ 6% per annum thereon from the date of suit, i.e., from 1st January 1963 till realisation, due on account of the arrears of royalty payable to him on the sales effected upto the end of December 1959 of the book entitled 'Saral Middle School Ank Ganeet', written by his son-in-law Maniram Vishwakarma, the copyright of which had been assigned to him; (B) for rendition of account of the sales effected by them of the book in question and other allied publications thereof, as per the Hyderabad Syllabus or otherwise, during the years 1960, 61, 62 and until the date of accounting, so as to ascertain the amount of royalty which had accrued thereon and become payable to him @, 15% of the sale proceeds; (C) for interest @ 6% per annum, on the amount of royalties due each year, payable from 1st January of the following year; (D) for declaring that they do not have any right, title and Interest in the book in question, or, in any other publication thereof, as per the Hyderabad Syllabus, and that the plaintiff had the sole right to such publications; and (E) for perpetually restraining them from printing or publishing the book entitled 'Saral Middle School Ank Ganeet', as originally published, or in any of its revised or amended forms according to the Hyderabad Syllabus or otherwise.

2. The relevant facts giving rise to this appeal, are these. Under Exception 2 to S. R. 2 below Fundamental Rule 47, the Director of Public Instruction Madhya Pradesh under Memo. No. 4257/S dated 9th November 1951 (Ex. P-I), had permitted the aforesaid Maniram Vishwakarma, Assistant Master, Government Multipurpose Higher Secondary School, Jabalpur, (hereinafter referred to as the "author") to undertake the work of writing a textbook on Arithmetic (in four parts) for use in Clauses V to VIII, subject to the conditions, namely, that (i) he retained no Interest in the sale of copyright, (ii) he disposed of the manuscript in lump sum not exceeding Rs. 1,500/-, and (iii) his legitimate work- did not suffer on that account. In terms of that order, the author having written

such a book on Arithmetic, effected an outright sale of its copyright in favour of his father-in-law Sheoratanlal Koshal. (hereinafter referred to as the "plaintiff"), in consideration of a payment of Rs. 1,200/- for such assignment under the terms of an agreement dated 9th March 1962 (Ex. P-4), executed between them, whereby the plaintiff became the assignee of the copyright having been conveyed all rights therein, including the rights of its publication, realisation of profits accruing therefrom and the right to royalty on all its sales, etc. The defendant No. 1, M/s. Mishrabandhu Karyalaya. Jabalpur, a firm of printers and publishers, through Basant Kumar Mishra the defendant No. 3, a member of that firm who also happened to be in management of its business along with Jagdish Prasad Mishra the defendant No. 2, entered into a publishing agreement dated 13th March 1952 (Ex. F-5) with the plaintiff. That agreement granted to the defendants a right to publish the work in question, on the following conditions: (i) the right of publication was transferred to them in lieu of their paying to the plaintiff a royalty at 15 % of all their sales, (Clause 1), (ii) an account of royalty had to be made annually, in the month of December each year, (Clause 2), and (iii) the plaintiff was entitled to inspect the account of sales of the work in question effected by the defendants; (Clause 3), (iv) the plaintiff had to get the book suitably altered to bring it in conformity with the syllabus in Arithmetic of any other State if prescribed in course of its studies, and for this he was not to be separately remunerated, (Clause 4), (v) if any alteration in the syllabus was effected in the State of Madhya Pradesh, he was to have the book suitably altered by the author himself and the defendants, in that event, had to print its amended edition also on the aforesaid terms failing which he would be entitled to have it printed elsewhere (Clause 6).

3. We regret to find that the defendants who claim to be publishers of some repute have throughout betrayed in this case a lack of business integrity by not adhering to their contractual obligations for personal gain. After having acquired the sole and exclusive right of publishing the work which has become a prescribed text-book in different States and, therefore, a source of considerable profit to them, the defendants have ever since displayed a callous indifference to fulfil their part of the contract in several ways, viz., (i) in submission or rendition of yearly accounts of royalties @ 15% of total sales as required to be furnished, in the month of December of each year, and (ii) in payment of such royalty on the sales, annually, as stipulated. After persistent demands, the defendants eventually rendered on 16th April 1960 an account (i) of the royalties which had accrued due up to the end of December 1959, and (ii) of the stock-in-trade in their hands as on 26th January 1960, whereby they unequivocally acknowledged their liability to pay Rs. 15,790.46 paise. Towards this, they only paid Rs. 2,000 on 18th April 1960, still leaving a balance of Rs. 13,790.40 paise in arrears. Apart from their admitted failure in making payment of Rs. 13,790.40 paise, the defendants have also failed to render an yearly account of the royalties, on sales effected in all the following years, nor have they paid the royalties which have become due thereon, i.e., for the entire period after the year 1959.

The plaintiff had by his 1st notice dated 27th February 1961 (Ex. P-27), called upon the defendants to render an account of the royalty which had become due for the year 1960, with a request for its payment, together with the arrears of royalties up-to-date within a week, failing which he threatened to take legal action for its recovery. Despite that notice, the defendants did not comply with the demand for payment of the amounts that had become due. The plaintiff, by his 2nd notice dated 25th April 1961 (Ex. P-28), pointed out that they had persistently failed to pay the royalties accrued

due during the earlier years which were in arrears. The plaintiff further complained that they had also, in breach of the agreement between the parties, published another text-book on the subject called 'Purva Madhyamik Ank Ganeet' (in three parts) for use in the very same classes for which they had already undertaken to publish and sell the 'Saral Middle School Ank Ganeet' and being interested in promoting the sales of that book in the market, had been acting in a manner detrimental to his interests. Therefore, by the same notice, the plaintiff revoked and terminated the publishing licence which he had created in their favour.

4. The plaintiff averred that by the agreement dated 13th March 1952 (Ex. P-5), he had not assigned the copyright in the book in favour of the defendants, but had merely created a licence authorising them to print, publish and sell copies thereof which however stands revoked as a result of his notice dated 15th April 1961 (Ex. P-28), and that after the revocation of that licence, the defendants had no right to pirate that work as originally published or in any other manner as they liked, nor had they any right to appropriate to themselves the profits accruing from its sales. That profits have been earned by the defendants from such sales is an irrefutable fact which is unmistakably clear from the facts on record which speak for themselves. The book 'Saral Middle School Ank Ganeet' was first published in or about 1952 and since then there were later editions of this work. Till about the years 1957-58, that book was in four parts; thereafter, it appeared in the Mahakoshal region in three parts, with the introduction of a unified syllabus; while it still appears in four parts in the old Vidarbha region as before. After publication of the first and subsequent editions, the book has been sold by the defendants ever since the year 1952. It appears that they have also, without reference to the plaintiff, had the book revised to bring it in conformity with the Hyderabad syllabus, and it has in that revised form been sold in the State of Andhra Pradesh. Apart from this, they further published a "1962 edition" for use in Madhya Pradesh, after having it adapted to the metric system which has now been introduced in the course of studies under the instruction of the Director of Public Instruction. Madhya Pradesh issued to the Heads of all Educational Institutions. That revised edition of the original work was brought out by the defendants without reference to the plaintiff or the author who had a right to revise it. In Schedules 'A' and 'B' annexed to the plaint, the plaintiff had particularised the large number of mistakes which have crept in the "1962 edition" published by the defendants.

5. The defendants in denial of this claim, have raised different pleas in their written statement. First of all, they allege that the author was the real owner or beneficiary under the agreement dated 13th March 1952, (Ex. P-5); that they had directly entered into that agreement with him; and that the plaintiff was only a benamidar at whose instance a suit of this nature would not lie; that the name of the plaintiff had been nominally entered in that deed at the instance of the author himself who being in Government service did not want to figure in the transaction. In other words, they alleged that the plaintiff was neither a party to the real agreement which they had with the author nor did he ever come into the picture at the time of settlement of its terms; that the publication of the book was not in pursuance of the alleged agreement as set up by the plaintiff, but was in furtherance of a contract with the author himself; that there was no privity of contract between the parties, and that, therefore, the question of performance of any of the terms of the alleged agreement did not arise.

To sum up, the contentions of the defendants were: firstly, that they never had rendered any account to the plaintiff as regards the royalty of the book in question; that the real fact was that the statements of accounts rendered on 16th April 1960 covering the period upto the end of December 1959 were delivered to the author but to retain a benami character of the transaction, as was mutually agreed upon, the name of the plaintiff had been nominally inserted therein; secondly, that there was no concluded contract which could be the foundation of a suit because the alleged agreement had yet to be finalised which was only of a tentative nature; thirdly, that they did not admit any liability for payment of Rs. 15,790.46 paise, as alleged; fourthly, that there being no privity of contract between the parties, there was no question of any breach of contract nor of rendition of accounts between them; fifthly, that there was no breach of the original contract with the author as he had been asked to bring the book in conformity with the changed syllabus after introduction of the metric system in academic session 1961-62; that he, on the contrary, neglected to carry out the required alterations in the book and, as a result, they were requested to get the book revised by one L. C. Jain, a lecturer of the Mahakoshal Mahavidyalaya, Jabalpur; that the inaccuracies, therein, if any, were not intentional or deliberate and had been rectified in the later editions; sixthly, that the agreement in question resulted in an absolute assignment of the copyright, and was not a mere licence to publish on certain terms; seventhly, that they had requested the author for a revision in the rate of royalties looking to the rise in cost of raw materials and he agreed to their proposal by reducing the rate of royalty to 12.15 per cent by his letter dated 16th April 1960 (Ex D-6), and while effecting this revision, he had taken away the original agreement' the benami nature of the transaction, however, was retained by continuing the transaction in the name of the plaintiff, lastly; that the alleged agreement was for a consideration forbidden by law and, was therefore, legally not enforceable, besides being opposed to public policy and was, therefore, void and unenforceable under Section 23 of the Contract Act. Even otherwise, they alone had the right to print and publish the book in question, but in breach of that agreement, the author had given it for publication to M/s. Narbada Book Depot, Jabalpur, in the year 1960, and since then that concern was selling the book in the market, to their great detriment and in violation of their copyright in the work. For this, the defendants asserted "that they had reserved their right to sue for damages separately", but apparently no such suit has so far been filed. They had, instead, launched a prosecution against both the author Maniram Vishwakarma and his assignee the plaintiff-Sheoratanlal Koshal, for alleged infringement of their copyright, which, however, ended in their acquittal.

6. The learned Judge has decreed the plaintiff's claim. His findings are that (i) the plaintiff has purchased the copyright in the book 'Saral Middle School Ank Ganeet' from the author Maniram Vishwakarma, for a cash consideration of Rs. 1,200/-, under the agreement dated 9th March 1952 (Ex. P-4); (2) the agreement was neither forbidden by law, nor opposed to public policy under Section 23 of the Contract Act, as the assignment of his rights was with the permission of the Director of Public Instruction; (3) there was a concluded contract between the plaintiff-Sheoratanlal and M/s. Mishrabandhu Karyalaya, through its managing partner Basant Kumar Mishra, on the terms embodied in the agreement dated 13th March 1952 (Ex. P-5); (4) that document was not merely a tentative draft, but represented the terms and conditions on which the defendant-firm was granted the sole and exclusive right of publication of the book in question; (5) on a true construction of the agreement in question, there was no assignment of any copyright in favour of the defendant

firm but only a licence which was revocable on the breach of any of its conditions; (6) the defendant-firm had rendered an account on 16th April 1960, acknowledging its liability to pay Rs. 15,790.46 paise towards the arrears of royalty upto the end of the year 1959 and of the stocks-in-trade as on 26th January 1960; (7) by virtue of the copyright in his favour, the plaintiff became the owner of the book, and not a mere benamidar of the author, Maniram Vishwakarma and was, therefore, entitled not only to recover the amount of Rupees 13,790.46 paise remaining due, but also to rendition of accounts and to the grant of a perpetual injunction. Accordingly, the learned Judge has decreed the entire claim in suit.

7. Before the Copyright Act, 1957 (Act No. 14 of 1957) was enacted by Parliament, the existing law relating to copyright in India, i.e., its statutory basis, was the British Parliamentary legislation to be found in the Imperial Copyright Act, 1911 (1 and 2 Geo. V, Ch. 46) as modified by the Indian Copyright Act, 1914 (Act No. 3 of 1914). Apart from the fact that the Imperial Act did not fit in with the changed constitutional status of India, it was necessary to enact an independent self-contained law on the subject of copyright in the light of growing public consciousness of the rights and obligations of authors and in the light of experience gained in the working of the law as in force during the last forty years. New and advanced means of communications like broadcasting, litho-photography, etc., also called for certain amendments in the existing law, apart from making therein provision for the due fulfilment of international obligations in the field of copyright which India might accept. That was the object with which the Copyright Act, 1957, was enacted, and it attempted a complete revision of the law of copyright which appeared to be inevitable due to the changed circumstances.

8. We are, however, concerned with the state of things prevalent prior to 21st January, 1958, when the Copyright Act, 1957 (Act No. 14 of 1957), was brought into force. The law then in force was the Imperial Copyright Act, 1911 (1 and 2 Geo. V, Ch. 46) which, with slight modification, was made applicable to this Country by the Indian Copyright Act (Act No. 3 of 1914). The Imperial Copyright Act, 1911, either as operating *proprio vigore* or as applied by the Indian Copyright Act, 1914, was "a law in force in the territory of India immediately before the commencement of the Constitution", and it, therefore, continued to be in force as the law of the land by virtue of Article 372(1) of the Constitution. We consider the following passage in Copinger and Skone James on Copyright, 9th Edn., pp. 428-9, as describing the position correctly:

"The United Kingdom Copyright Act, 1911, extended to India as part of His Majesty's dominions, but certain modifications were introduced by the Indian Copyright Act, 1914 (No. 3 of 1914). The effect of Section 18 of the Indian Independence Act, 1947 (10 & 11 Geo. VI, C 30) appeared to be that copyright protection both in India and with respect to works originating there remained unchanged."

For a fuller discussion of this subject, see the decision of the Madras High Court in *Blackwood and Sons Ltd v A. N. Parasuraman*, AIR 1959 Mad 410

9. Under the law then prevalent i.e., according to the provisions of the earlier enactments, the first owner of the copyright is the author and his right of assignment is dealt with in Section 5 (2) and (3)

of the Indian Copyright Act, 1914, We believe the law on that aspect still remains the same with some modifications, even under the new Copyright Act, 1957. The only change that is relevant for our purposes is, that under the old law, the non-registration of the copyright had not the effect of entailing the dismissal of an action in respect of infringement of copyright commenced when the Act of 1914 was in force see, *Balantrapu Venkata Rao v. Valluri Padmanabha Raju*. ILR 51 Mad 180 = (AIR 1927 Mad 981). Wallace, J., in that case, followed the view expressed in *N. V. Savory Ltd. v. World of Golf Ltd.*, 1914-2 Ch 566, under the allied Fine Arts Copyright Act, that mere failure to register does not deprive an artist of his copyright. That appears to us to be a correct and reasonable view. The Indian Copyright Act, 1914, had nowhere made any provision for the registration of copyrights. Under the Copyright Act, 1957. it appears that under Sections 13 and 45, the registration of book with the Registrar of Copyrights, is a condition for acquiring copyright with respect to it. A plain reading of the several provisions of the Act, leaves no doubt in our minds that a copyright in a book now is only secured if it is an original compilation and has been duly registered according to the provisions of the 1957 Act. Once it is so registered, the author is deemed to acquire property rights in the book. The right arising from the registration of the book can be the subject-matter of civil or criminal remedy, so that, without it the author can have no rights, nor remedies in spite of the fact that his work is an original one. We are, however, concerned with the state of law prevalent under the Imperial Copyright Act, 1911, enacted by the British Parliament, subject to such modifications as stated in the Indian Copyright Act, 1914. It is necessary for us to deal with this aspect because the learned counsel for the appellants, during the course of his arguments, obliquely suggested that the copyright of the book in question "Saral Middle School Ank Ganeet" not being registered, neither the author nor his assignee had any kind of right or remedy. The whole object of this discussion is to remove that misconception.

10. Under the law relating to copyright then prevalent, to which we have already referred, viz., the Imperial Copyright Act, 1911, as adopted or modified to suit Indian conditions by the Indian Copyright Act, 1914, a person had an inherent copyright in an original composition or compilation without the necessity of its registration. Under the English enactment (Sections 1 and 2) copyright may subsist subject to the provisions of the Act "in every original literary, dramatic, musical artistic work."

11. While we are dealing with this aspect, it is also necessary for us to dispel the doubt expressed by the learned counsel for the appellants that no copyright can be had in respect of a textbook on arithmetic like 'Saral Middle School Ank Ganeet', because it would necessarily be, in a different, form, compilation of certain arithmetical problems originated by others. We are clearly of the view that the assumption of the learned counsel is wholly unfounded. Neither original thought nor original research is essential for a literary work to be original under Section 1, Schedule I, of the Indian Copyright Act, 1914. The Judicial Committee of the Privy Council in *Macmillan and Co. v. K. and J. Cooper*, AIR 1924 PC 75, while interpreting Section 2 of the Imperial Copyright Act, 1911, had stated:

"The word 'original' does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of literary work' with the expression of

thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work--that it should originate from the author."

12. The real test in adjudging the originality of a work is whether it involved any skill, labour and knowledge of the author and that being fulfilled, he would be 'protected by law', and no one else was permitted to steal or appropriate to himself the result of his labour, skill and learning. As their Lordships have most appropriately stated, the provision of Section 2 of the Imperial Copyright Act was based on the moral principle resting on the Eighth Commandment. 'Thou shall not steal'. Apart from this, the originality in writing of a successful text-book in a subject like arithmetic lies upon the skill of the author. Some authors have not the art or the necessary skill to make a compilation nor are all compilations of the same nature or quality. That is the reason why one dictionary, gazetteer, grammar, map, almanac, encyclopedia, guide-book, etc., would sell and not the others. There lies the skill of the author of the work which brings to him commercial success. The contention that no originality can be claimed in such works can, therefore, hardly be accepted. For instance, a reference to the Shorter Oxford Dictionary or the Webster's New International Dictionary would plainly show the difference in treatment of the same words in contrasting ways. In Copinger and James on the Law of Copyright, 9th Edn., pp. 148-49, the law has been summarised as follows:

"In the case of compilations such as dictionaries, gazetteers, maps, arithmetics, almanacs, encyclopedias and guide books, new publications dealing with similar subject-matter must of necessity resemble existing publications, and the defence of 'common source' is frequently made where the new publication is alleged to constitute an infringement of an earlier one."

Thus, it is clearly recognised that all such books are capable of having a copyright in them. In text-books on arithmetic or books of the above description, the amount of originality of the author may be small, but the extent of his thought, skill and labour may be tremendous, and it is that which is protected by law. We are, therefore, of the view that the book 'Saral Middle School Ank Ganeet' will certainly be an "original work", within the meaning of the English Copyright Act as applied to British India, and, therefore, the author and/or his assignee not only had or has a copyright therein but also had the right to enter into a publishing contract of any kind in respect thereof.

13. In this case we are concerned with the simplest type of literary copyright, namely, the right to print, publish and sell copies of the particular book in question, and in the case of a simple text-book on arithmetic, no complications as regards any dramatic or film rights can possibly arise. In determining the question whether a particular agreement relating to this was an absolute assignment or a mere licence, the effect of the opinion of Viscount Sumner delivered in the House of Lords in *Message v. British Broadcasting Co. Ltd.*, 1929 AC 151 (HL) seems to be that one has to look on the real meaning of an agreement rather than the particular, in that case unfortunate, choice of words of the parties. In other words, the real meaning of an agreement rather than the mere choice of words has to be looked into in deciding whether there was a complete or partial assignment of the copyright or a mere licence to print, publish and sell copies of the work in

question. We would now refer to the contentions raised at the Bar.

14. The learned counsel for the appellants has assailed the decree under appeal on the following grounds:

- (1) The plaintiff being merely a benamidar was not entitled to sue for any of the reliefs asked for, since there was no privity of contract between the parties;
- (2) The document dated 13th March 1952 (Ex. P-5) was simply a "tentative draft" and not a "concluded contract" between the parties. At any rate, it was a "unilateral" document, executed by the plaintiff, and the mere addition of the word 'approved' by Basant Kumar Mishra, a partner of the defendant-firm could not mean its acceptance, and, therefore, the matter was still at the stage of negotiation between parties which had not matured into an enforceable contract;
- (3) Alternatively, on a plain reading of the said agreement, the copyright of the book had itself been transferred in favour of the defendant-firm and not merely a licence to publish on conditions: and, at any rate, it was an irrevocable licence which would not be terminated by notice;
- (4) The failure of the author to revise the book in question was itself a breach of covenant which disentitled him or his assignee from claiming any equitable relief, for rendition of accounts, or, for grant of an injunction;
- (5) Having himself terminated the contract by his notice dated 25th April 1961 (Ex. P-28), the plaintiff could not fall back on its terms, for claiming any royalty for the period subsequent thereto; and his claim. If any, was to sue for damages; and (6) The claim for recovery of Rupees 13,790.46 paise, the alleged amount due, as per the Statements of account dated 16th April 1960 (Exs. P-6 to P-8), was barred by limitation.

None of these contentions is really well founded and they must all be rejected for reasons we shall presently state.

15. As to the first, the contention that the plaintiff Sheoratanlal Koshal was a benamidar of the author Maniram Vishwakarma and not the real owner of the copyright can hardly be accepted. The allegation in the written-statement that the author, being a Government servant, could not openly engage himself in any kind of business which yielded profit to him without permission of the Director of Public Instruction, or, that securing of such permission, besides entailing endless enquiries by Government, was also by no means easy, or that the author, being a Government servant, was precluded under the Government Servants Conduct Rules from effecting any assignment of his rights and had, therefore, nominally utilised the name of his father-in-law namely the plaintiff Sheoratanlai Koshal, stands falsified by the plea inserted by way of amendment showing that such permission to the author was duly accorded by the Director of Public Instruction to

undertake the work of writing in four parts a text book on arithmetic for use in Clauses V to VIII by his Memorandum No. 4257/F dated 9th November 1951 (Ex. P-1).

Now, when a plea of this nature is raised, the onus probandi to substantiate the transaction to be benami must necessarily be on the person making the allegation, and it has to be established by strictest evidence. The defendants had, therefore, the burden of proving by cogent and convincing evidence that the alleged assignment of copyright in favour of the plaintiff was a colourable or fictitious transaction intended to defeat any provision of law. We, however, find no justification for this assumption. Indeed, there was no occasion for the author Maniram Vishwakarma to have adopted any device of this kind because he had been permitted by the Director of Public Instruction himself not only to undertake the work of writing a text book on arithmetic but also to make an outright sale of his copyright for a lump sum payment under Exception 2 to S.R. 2 below Fundamental Rule 47. In pursuance thereof, he duly assigned his rights therein.

16. The Court's duty is to give effect to the actual bargain of the parties according to their intention, and when the transaction is in writing, the intention of the parties has to be gathered from the actual words used in the instrument unless they are such as not to convey their intention correctly. In Copinger and Skone James on Copyright, 9th edition, P. 376, the different forms in which such agreements in common use partake are set out thus:

"Agreements between authors and publishers fall roughly into four classes, namely:--

(1) outright sales of copyright in consideration of a single payment;

(2) licences for a period on royalty terms;

(3) profit-sharing agreements: and (4) publication on commission, no rights in the work being vested in the publishers."

Under the terms of the agreement dated 9th March 1952 (Ex. P-4) between the parties, the author Maniram Vishwakarma had parted with 'all his rights' in lieu of the payment of a price. For a correct interpretation of that contract, we must primarily look to document itself. It reads:

"This agreement is made this day 9th of March 1952 between Shri Maniram Vishwakarma son of Shri Nanhebbhai Vishwakarma resident of Jabalpur (hereinafter for the sake of brevity referred to as the 'Author') of the one part and Shri Sheoratanlal Koshal son of Shri B. L. Koshal resident of Mandla (hereinafter for the sake of brevity referred to as the 'publisher') of the other part.

Whereas the author has written a book on Arithmetic for the Middle Classes in four parts, the manuscript of which is ready and fit for publication. And whereas the publisher is desirous of starting publications and the author is willing to entrust the publication thereof to the said publisher.

That the publisher shall pay Rs. 1200/- (one thousand and two hundred only) in all to the author for the said four parts of the books.

That the publisher shall print or cause the said books to be printed in four volumes to be used for middle classes. The books may be named by the publisher according to his choice.

The books may be published by the publisher himself or he may in his discretion transfer his publishing rights to some one else. For the publication of the said books for the said sum of Rs. 1200/- (one thousand and two hundred only), the author conveys all rights to Sheoratanlal.

The author has received Rs. 500/- (Five hundred only) today and has handed over the manuscript to the publisher. The balance of the sum amounting to Rs. 700/- (Seven hundred only) shall be paid to the author within a period of three months by the said publisher.

The publisher will have a right to get the work revised, translated or rewritten by the author if and when necessity arises on account of change of syllabus or any other like reason and. in the event, will be liable to reimburse the author suitably. In the event of the author refusing to rewrite or revise the work, the publisher will be at liberty to get it suitably rewritten and revised by someone else. However, when the work is rewritten or revised by someone else, the publisher will be liable to safeguard and maintain the high standard and prestige of the work done by the author.

The publisher shall not act in any way which may be detrimental to the interest of the books or their reputation and the rights of the publisher will be liable to be forfeited in case the publisher acts in a manner detrimental to the interest or reputation of the books.

That the author hereby declares and assures the publisher that the book written by him is his sole work and would not infringe the copyright of another.

M. R. Vishwakarma, Author.

Sheoratanlal, Publisher."

Apart from the words 'the author conveys all his rights', the other terms are clearly indicative that the agreement between the parties was of the first category, i.e., it was an agreement for an outright sale of the copyright without reservation of any kind by the author in respect of any right whatever in himself. The plaintiff had, therefore, full legal title to the copyright and as a logical consequence thereof, he also had acquired the right to enter into a publishing contract like the agreement dated 13th March 1952 (Ex, P-5) with the defendants. A fortiori, the plaintiff had a right to sue then in his own name for his royalties thereunder and for the other consequential reliefs flowing from his legal

ownership in the work, i.e., the right to an account of profits, which is only an equitable remedy incidental to the right of injunction, if there was any infringement of his copyright and, upon that event, also of recovering the infringing copies, if any which were pirated from the work in question.

17. From a perusal of the terms appearing in the agreement taken as a whole and particularly the operative portion thereof, we find that the executant had unequivocally and in categorical language "assigned" his copyright. The recitals of the document are plain enough and the terms are susceptible of no other construction than this that the author Maniram Vishwakarma had made an outright sale of his copyright in favour of the plaintiff Sheoratanlal Koshal in consideration of payment of Rs. 1,200/- for the making of such assignment. The contention is not that the arrangement so arrived at was either forbidden by law or was against public policy and, therefore, void and unenforceable under Section 23 of the Contract Act. The submission is that the plaintiff had no right to sue, being a mere benamidar.

As already stated, we find that the author having been permitted under Exception 2 to S.R. 2 below Fundamental Rule 17 to undertake the work in question provided he assigns all his rights, there was no occasion for him to enter into a colourable transaction to defeat any provision of law. We may incidentally mention that although the defendants had pleaded that the agreement in question was for a consideration which was forbidden by law and opposed to public policy and, therefore, was not enforceable under Section 23 of the Contract Act and had raised this issue in the Court below, the learned counsel appearing on their behalf has abandoned that stand, and no provision either in the General Book Circulars or in the Government Servants Conduct Rules were brought to our notice to suggest that such contract would be legally invalid. On the contrary. Exception 2 to S.R. 2 below Fundamental Rule 47 not only permits a Government servant to be the author of a book but also enables him to assign his rights under certain conditions.

18. Even otherwise, the onus of establishing a transaction to be benami is on the person who asserts it. This cannot be a matter of presumption and has not only to be averred in the pleadings but also must be proved by legal evidence. In absence of evidence, the apparent title prevails. See, *Smt. Surasaibalini Debi v. Phanindra Moban Majumdar*, AIR 1965 SC 1364. Normally, the proof of a transaction being benami rests not only on direct evidence but also on the relevant circumstances. In absence of any direct proof, the circumstantial evidence may sometime clinch the issue. The real criterion in cases of benami transactions is to consider the source of funds for the acquisition, motive, possession of property, custody of title-deeds, etc. See *Sreemanchunder Dey v. Gopaul Chunder Chuckerburty*, (1866-67) 11 Moo Ind App 28 (PC) and *Gangadara Ayyar v. Subramania Sastrigal*, AIR 1949 FC 88.

In *Gangadara Ayyer's* case, AIR 1949 FC 88 (supra), their Lordships of the Federal Court have stated that source of money for the acquisition of property is an important test, but unfortunately in a case like the present, that is of no avail. Even if it were, we have the testimony of P.W. 2 Sheoratanlal Koshal and P.W. 6 Maniram Vishwakarma that the transaction was real and the assignment of copyright was effected on payment of Rs. 1,200/-. If in the nature of things, there, is no scope for applying these tests, the burden of proving the transaction to be benami would be very much greater. In matters of this description the decision of the Court must rest not on mere suspicion but

only on legal evidence, including testimony of witnesses. On the reasonable probabilities and legal inferences arising from the proved or admitted facts in the case, we are satisfied that the alleged benami nature of the transaction is not established, and, therefore, the apparent title must prevail. Having dealt with the plaintiff as the owner of copyright and having derived benefits of a contract with him, the defendants are really precluded from contending that the real title resides elsewhere. Such an estoppel necessarily arises by reason of their privity of contract.

19-20. Next, the question is whether the parties were still at the stage of negotiations and, therefore, the agreement dated 13th March 1952 (Ex. P-5) had not matured into an enforceable contract. The argument is that the document Ex. P-5, on which the suit is based, is merely a 'tentative draft' of an agreement and did not represent a 'concluded contract' between the parties. Alternatively, it is suggested that it was a 'unilateral document' executed by the plaintiff alone, and the mere addition of the word 'approved' by Basant Kumar Mishra, defendant No. 3. would not mean its acceptance by defendant No. 1 M/s. Mishrabandhu Karyalaya. (After considering the evidence, the Court held that the agreement dated 13th March 1952 (Ex. P-5) truly represented a concluded contract between the parties.)

21. Coming to the third contention raised by the learned counsel, we are satisfied that it is wholly devoid of substance. In dealing with arrangements between authors and publishers, particularly as regards publishing agreements, Copinger and Skone James indicate that no formalities are required, stating:

"Contracts between authors and publishers are not, as in some countries, regulated by any special law, but their validity, construction and enforcement depend upon the ordinary rules of law governing contracts relating to dealings with personal property. In practice, such arrangements vary, through many gradations of formality, from an oral or implied licence to publish a single article to a full-length publishing agreement. It is the informal agreement leaving many essential terms to implication that most often renders difficult the determination of the respective rights of the parties." (p. 375).

According to the learned authors, writing is essential when there is an assignment of copyright or an exclusive licence to publish. As already stated, such agreements form into four distinct categories. We are, however, not left to any implications to ascertain the nature of the right that came into existence, because the terms of the agreement between the parties are embodied in a writing dated 13th March 1952 (Ex. P-5). In the case of such formal agreements, the most important point to determine is whether any copyright is to be vested in the publisher or whether a licence only is intended. In the former case, the publisher will enjoy the full legal title to the copyright and will alone be entitled to enforce the right against third parties. In the case of a licence which in a publishing agreement will normally be an exclusive licence, the grant is subject to certain conditions and on their non-fulfilment, the licence is capable of being revoked. We have no manner of doubt that the real arrangement between the parties was that the copyright in the work belonged to the

plaintiff Sheoratanlal and the defendants' firm M/s. Mishrabandhu Karyalaya was given an exclusive licence to publish it on certain conditions. The position would have been entirely different if the plaintiff had assigned his copyright and stipulated for payment on royalty terms. In that event, the rights of the parties would have been worked out in the light of the decision in *Barkar v. Stickney*, 1919-1 KB 121. In that context, Copinger and Skone James state at p. 379:--

"It seems fairly clear that as the law now stands, an author, who has entered into a publishing agreement in which the copyright is assigned to the publisher on royalty terms, has no right of action for the royalties against an assign of the publisher. Authors, therefore, should keep the copyright themselves and assign no more than a right to publish conditional upon royalties being paid and only assignable if they are provided for."

That, however, is not the case, because the plaintiff had not assigned his copyright on royalty terms but merely entered into a publishing agreement with M/s. Mishrabandhu Karyalaya for retaining in himself the copyright and conferred on them the right to publish the work on payment of certain royalty. The matter depends on the construction of the terms of the agreement dated 13th March 1952 (Ex. P-5), which reads:

^ ^ eSa f'kojruiyky dks'ky] eaMyk dk fuoklh gwaA eSaus tks vad&xf.kr dh iqLrd ftdlk uke vkn'kZ vad xf.kr gS vkSj tks fd fe-

Ldwy dh d{kkvksa ds fy, pkj Hkkxka esa fy[kh xbZ gSA mDr iqLrd ds ys[kd Jh-

euhjke fo'odekZ ls lokZf/kdkj lfgr [kjhn dh gS] ml iqLrd ds izdk'ku dk vf/kdkj eSa tcyiqj ds feJ cU/kq dk;kZy; dks fuEufy[kr 'krksZa ij nsrk gwa fd& feK cU/kq dk;kZy; ls eq>s fedh gqbZ izfr;ksa ds ewY; ij ' izfr'kr~ iUnzg% izfr'kr jk;LBH feyk djsxhA 2 jk;Dyh dk fglkc izfro"kZ fnlEcj ds ekg esa gqok djsxkA 3 eq>s vHkok esjs }kjk fu;qDr O;fDr dks bl iqLrd ds fglkc&fdrke ns[kus dk iw.kZ vf/kdkj jgsxkA ;fn bl iqLrd dks vU; fdllh izfr ds ikB;e ds vuq;i cukus esa fdllh izdkj ds la'kks/ku dh vko';drk gksxh rks eSa iqLrd ds ewy ys[kd ls og dk;Z fu%'kqYd dj k nwaxkA ' ;fn feJ cU/kq dk;kZy; bl iqLrd ds vuqokj dks vU; fdllh Hkk"kk esa izdkf'kr djuk pkgsaxs rks mUgsa bUgha 'krksZ ij mudh izdk'ku dk vf/kdkj jgsxkA ;fn feJ cU/kq dk;kZy; vuqokn izdkf'kr u djs rks eq>s fdllh vU; izdk'kd ls izdkf'kr dukus dk iw.kZ vf/kdkj jgsxkA ml n'kk esa vU; izdk'ku feJ cU/kq dk;kZy; dks fedh gqbZ izfr;ksa ij izfr'kr ,d izfr'kr jk;YVh nsxkA ' ;fn e?; izns'k ds fefMy Ldwy dh d{kkvksa ds bl fo"k; ds ikB;e esa dksbZ ifjorZu gksxk rks eSa ys[kd ls bl iqLrd dk la'kks/ku iwjk dj k nwaxk ftls feJ cU/kq dk;kZy; dks bUgha 'krksZ ij Nkiuk gksxk; vU;Fkk eSa mls fdllh nwljs izdk'kd ds }kjk Niokus esa iw.kZ Lora= jgwaxkA " feJ cU/kq dk;kZy; bl iqLrd dk izdk'ku vkt ls rhu ekg ds Hkhrj djkus dk izoU/k djsaxs vkSj eq>s ' :i;s ,MOgkUl jk;YVh ds crkSj nsaxs tks fd esjs jk;YVh ds fglkc esa n 2 cjkej cjkej fglksa esa nks o"kksZ esa dkV fn;k tk;sxkA " eSa bl iqLrd dk dksbZ laLdj.k u rks Nkiwaxk vkSj u NiokmaxkA eSa bl iqLrd dh Hkk"kk vkSj fo"k; dks la{ksi esa djsd fdllh nwljs ls izdkf'kr u djkmxk vkSj u Lo;a d:axkA iwoksZDr dk;kZy; ds laiknd dks

fo"K; dh j{kk djrs gq, bl iqLrd ea la'kks/ku vkSj ifjorZu djus dk iw.kZ vf/kdkj jgsxkA
eSa fo'okl fnykrk gwa fd bl iqLrd ds izdk'ku esa dksbZ fo"K; ,slk ugha fy;k x;k gS ftlls
fdlh nwljh iqLrd ds izdk'ku dk LoRo dk vigj.k gksrk gksA ;fn blesa ,slk dksbZ nks"k
fudysxk rks mldk mkjnk;h eSa jgwaxkA iwoksZDr dk;kZy; bl iqLrd ds pkgs ftrus
laLdj.k fudkys blesa eq>s dksbZ vkifk u gksxhA mij fy[kk vf/kdkj i= eSaus viuh
psrukoLFkk esa blfy, fy[k fn;k gS fd le; ij dke vk,A rkjh[k &'&'2 n- %&

Approved

ckcj [kkbZ eaMyk** Sd/- B. K. Mishra.

lk{kh %&

22. As a matter of construction of the words used by the parties, the agreement really intended a licence only and not an absolute or partial assignment of the copyright, that is to say, it was a publishing agreement with a printers' firm on the usual term of payment of a certain percentage of royalty to the owner of the copyright, and, therefore, the defendant firm M/s. Mishrabandhu Karyalaya acquired no right in the copyright itself but only an exclusive licence to publish. In Halsbury's Laws of England, 3rd Edn., Vol. 8. Paras. 743, and 758 the effect of such agreements has been stated thus:

"A licence may be for a term of years or for a definite period. In which case, in the absence of anything to the contrary in the contract, the publisher will not be restrained from selling, after the expiration of the time specified in the agreement, copies printed during that period. *Warne v. Routledge* (1874) LR 18 Eg. 497 and *Howitt v. Hall* (1862) 6 LT 348. Where under an agreement between an author and his publisher a licence is conferred on the publisher without limitation to any definite period, and where payment to the author is by royalties or by a share in the profits, the licence, although exclusive so long as it exists, is revocable; and the author can restrain the publication of any edition subsequent to the notice of revocation. *Reade v. Bentley*, (1858) 4 K and J 656 and (1874) 18 Eq 497 (supra)," (at p. 408).

"In the case of agreements between authors and publishers, or theatrical producers, it is often difficult to distinguish between a sole and exclusive licence and an assignment of copyright. Where the agreement between the author and his publisher contains no express terms as to the copyright, if the consideration is payment to the author of royalties or a share of the profits instead of a sum of money paid down, the inference is that the copyright is not assigned, but that a sole and exclusive licence is concerned upon the publisher. *Hole v. Bradbury*, 1879-12 Ch D 886 at p. 895, per Fry, J.; *Re. Jude's Musical Compositions* 1907-1 Ch 651 (CA), *Stevens v. Benning*, 1855-6 De Gm and G 223 and *Commr. of Inland Revenue v. Longmans Green and Co.*

Ltd., (1932) Macg Cop Cas (1928-35) 345," (at p. 414). Applying these principles to the agreement in question, we are clearly of the view that the aforesaid agreement dated 13th March 1952 (Ex. P-5) created a licence in favour of the defendant firm M/s, Mishrabandhu Karyalaya, who thereupon acquired the benefits of a publishing agreement subject to their fulfilling the terms and conditions contained therein. We are fortified in this conclusion by the following observations in Copinger and Skone James on Copyright, 9th Edn., at p. 384:

"But wherever there are continuous obligations on the part of the publisher--for instance, the payment of royalties to the author -- the tendency of the courts is to construe the agreement as conferring upon the publisher a conditional licence to publish rather than as giving him an equitable title to the copyright,"

It seems to follow from these that upon non-fulfilment of any of the terms which are essential to the contract itself, the licence was capable of being terminated by reasonable notice.

23-28. Fourthly, the learned counsel for the appellant is not right in urging that there was failure on the part of the author to revise the work in question in terms of clauses 4 and 6 of the agreement set out above, and that there was, therefore, a breach of the covenants contained therein which disentitled him or his assignee from claiming any equitable relief for rendition of accounts or for the grant of an injunction. (After considering the evidence, the judgment proceeded:) In dealing with the question of breach, the learned Judge held that the defendant firm M/s. Mishrabandhu Karyalaya had committed breach of the agreement (i) in not getting the book revised through the plaintiff by the author according to the metric system, (ii) in not having the 1962 edition altered and corrected by the author and that it contained numerous mistakes and inaccuracies which were not there in the work as originally published, and (iii) in not rendering to the plaintiff regular accounts of the royalties payable to him under the agreement and in nonpayment of the royalty which has fallen due thereunder for the years in question. We are fully in accord with these findings reached by the learned Judge for the reasons advanced and would, therefore, hold that there was no breach of Clauses 4 and 6 of the contract by the plaintiff. On the contrary, agreeing with the learned Judge, we would further hold that the defendants themselves had committed breach of the various covenants contained therein, particularly in regard to (i) submission and rendition of the yearly accounts of royalties in the month of December each year; (ii) their failure to pay Rs. 13,790.46, the balance of royalties which had admittedly accrued due upto the end of December 1959, and of royalties which had and have fallen due for the years subsequent thereto (Clause 1), upto the date of institution of suit and thereafter; (iii) the revision of the book by a person other than the author, and the taking out its altered or revised editions, without reference to the plaintiff to whom the copyright therein belonged (Clauses 4 and 6); and (iv) by the pirating of the work in the open market by its publication and sale, after revocation of the licence by the plaintiff's notice dated 15th April 1961 (Ex. P-28). These were breaches of essential terms of the contract itself, which per se would entitle the plaintiff to treat the contract to have come to an end.

29. However, before dealing with that aspect, we would like to add that the learned Judge has also been right in arriving at his other conclusion, viz., that the publication of a rival text-book 'Purva

Madhyamik Ank Ganeet' by the defendants, was not in contravention of the agreement between the parties, and, therefore, its publication and sale could not be prevented. That is so, far a twofold reason, namely-- (i) there was no restrictive covenant in the agreement prohibiting the defendants from engaging into a competitive trade, and (ii) the publication of an elementary text-book on a subject like Arithmetic which must of necessity, be drawn from a "common source" available to all, cannot be treated to be in contravention of a publishing agreement like the one with which we are dealing at present. In Halsbury's Laws of England, IIIrd Edn., Vol. 8, Para 760, the law is stated thus:

"A publisher on royalty terms is entitled to publish a competing book, and an agreement not to do anything to injure the author's right to royalties will not be implied : Cescinsky v. Routledge (George) and Sons, Ltd. (1916) 2 KB 325 at p. 329 per Rowlatt, J."

30. The case of Mathewson v. Stochdale, 1806-12 Ves 270 is instructive. In that case, the dispute was as regards a certain list which was maintained in the India House and had been published by the plaintiff. It was alleged that the defendant had copied that list and thereby infringed the plaintiff's copyright. The Court, however, held that all human events were equally open to all who wished to add to or improve the materials, already collected by others, thus making an original work, and no man could monopolise such a subject The judgment goes on to say that every man may take what is useful from the original work, improve, add to and give to the public the whole, comprising the original work, with the additions and improvements made by him and in such a case, there is no invasion of any right. But a copy, much less a servile copy, of a work cannot be allowed to stand. In Hanfstaengl v. W. H. Smith and Son, (1905) 1 Ch 519, the definition of a 'copy' was adopted from an earlier decision which runs as follows:

"A copy is that which comes so near to the original as to give every person seeing it the idea created by the original,"

and then follows a passage from the House of Lords' case in Franz Hanfstaengl v. H. R. Binos and Co., 1895 AC 20, to the following effect:

"The question may be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lend one to say that the alleged infringement is a copy on reproduction of the original."

In Jarrold v. Haywood, 1870-18 WR 279, the dispute was in respect of certain scientific books that the plaintiffs pleaded that his books were the result of his individual labour and skill. The principle enunciated therein, was as follows:

"If any part of a work complained of is a transcript of another work or with colourful additions and variations and prepared without any real independent literary labour such portion of the work is piratical. But it is impossible to establish a charge of piracy when it is necessary to track mere passage and lines through hundreds of pages or when the authors of a work challenged as piratical have honestly applied their labour to various sources of information available."

It would thus appear that a 'copy' is that which comes so near the original as to suggest the original to the mind of the reader. The dictum of Kekewich, J. in 1908-1 Ch 519 (supra) has throughout been followed and applied in India. See. Sitanath Basak v. Mohini Mohan Singh, 34 Cal WN 540 = (AIR 1931 Cal 233), Mohendra Chandra Nath Ghosh v. Emperor. AIR 1928 Cal 359, Kartar Singh v. Ladha Singh, AIR 1934 Lah 777 and Gopal Das v. Jagannath Prasad, ILR (1938) All 370 = (AIR 1938 All 266).

31. Applying these principles to the present case, we are unable to find any material showing that the "Purva Madhyamik Ank Ganeet" published by the defendants, was a copy or a colourful imitation of the 'Saral Middle School Ank Ganit' written by the author. Suffice to say, the laws of copyright do not protect ideas, but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The rule appears to be settled that the compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. See, Spiers v. Brown, 1858-6 WR 352, Reade v. Lacy, (1861) 128 RR 508 and Hotten v. Arthur, (1863) 136 RR 249, cited by Bamet and Ganga Nath JJ., in ILR (1938) All 370 = (AIR 1938 All 266) (supra).

32. In Sita Nath Basak's case, 34 Cal WN 540 = (AIR 1931 Cal 233) the Calcutta High Court expressed its opinion that in this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. That view was followed with approval by the Allahabad High Court in ILR (1938) All 370 = (AIR 1938 All 266) (supra). The learned counsel for the respondent has not attacked this part of the judgment under appeal, and there appears to us no evidence on record which would justify any finding of the kind that the book in question was a colourful imitation of the other, merely because there was similarity in treatment. Unless there is a minute scrutiny of alleged similarities and dis-similarities and extensive and lengthy comparison, no conclusion to that effect is possible. It is not only proper but essential that the issue of this kind should be tried with the aid of experts who should be appointed Commissioners to investigate and report on similarities. As already stated, neither has any such comparative material been placed on the record from which we could arrive at a conclusion, nor were any arguments addressed to us on this aspect. The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether the work complained of is or is not a colourable imitation of another, is essentially a question of fact and the burden of proving that fact was undoubtedly on the plaintiff who has led no evidence. The learned Judge has, therefore, rightly held this against the plaintiff.

33. Even otherwise, that decision of his as regard "Purva Madhyamik Ank Ganit", is unassailable on principle. Similarity may be a point in issue in this class of cases, but mere similarity in treatment is not enough. See 34 Cal WN 540 = (AIR 1931 Cal 233) (supra). That is so, because the sameness of a thing delineated does not necessarily also produce a similarity in delineation. The mere resemblance of a work by itself, is not an evidence of piracy, when the subject dealt with is common. Any fair dealing with a work has always been kept out of the mischief of the Copyright Act, particularly if the books are based on material which is common property.

Accordingly, the Calcutta High Court in Moulvi Umar Ali v. Jnan Ranjan Mitra, (1935) 39 Cal WN 949, while dealing with a book on Elementary Geography, stated that the author of the work complained of, was at liberty to draw upon common sources of information available to all. The test, therefore, is not the resemblance of a few passage here and there, but the general impression that is left in one's mind which is of the essence, and must be regarded as the relevant criterion in determining whether a colourable imitation has been produced. When a question of this nature arises, the Court has, therefore, to keep in mind both the external and internal features of the two books. By "external feature" is meant; the get-up and the overall scope of the publication. By "internal feature" is meant the general lay-out of the subject-matter; the manner of its treatment and the amount of material contained in the book in question. See, S. K. Dutt v. Law Book Co., ILR (1954) 1 All 289 = (AIR 1954 All 570). That depends upon the degree of resemblance which makes one a mere slavish copy of another. The workable test of what constitutes a copy or colourable imitation which emerges from the authorities cited by us earlier appears to be this, that in order to constitute the infringement of a copyright, there should be "direct or indirect use" of the aforesaid features of the plaintiff's work in which copyright in him subsists. There is nothing to show that that test is fulfilled in this case.

34. Equally unacceptable is the next contention, namely, that the plaintiff having himself terminated the contract by his notice dated 25th April 1961 (Ex. P-28), could not fall back on its terms, for claiming any royalty for the period subsequent thereto, and that his claim, if any, was to sue for damages. That notice of revocation reads, thus:

"For the reasons stated in paras 3 and 4 above my client does not intend to keep the publishing rights with you any further and the grant of publishing right to you in respect of the Saral Middle School Ankaganit (all parts according to old syllabus as well as new or unified syllabus) as per agreement dated 13-3-52 is hereby withdrawn, revoked and terminated. My client shall now convey the publishing rights to other persons according to his choice and you are hereby asked not to print and publish any fresh Issue or edition of the aforesaid books, after receipt of this notice. The existing copies may however be sold off or handed over to my client.

Please, therefore, take notice that you shall not hereafter publish or undertake reprinting or do any other act in that behalf in pursuance of the aforesaid agreement which stands cancelled with regard to the above referred books. You are also asked within seven days from the receipt of this notice to give a detailed account of the said books which have been printed, sold, as well as now in stock with you."

The reasons stated therein earlier were: (i) the defendants' failure to pay royalty at 15% on sales every year; (ii) the nonpayment of past arrears of royalties amounting to more than Rs. 15,000/- still remaining outstanding, which they had not paid inspite of repeated demands; (iii) their publication of another book in Arithmetic "Purva Madhyamik Ank Ganeet" (in three parts) contrary to the understanding between the parties and despite protests, and (iv) being interested in promoting sales of that book, the defendants had made it impracticable for the publishing rights to remain with them any longer. To this notice, the defendants replied, by thier lawyer's letter dated 28th June 1961 (Ex. P-32), to the following effect:

"It is true that a written agreement was entered into on 13-3-52 between my clients and Shri Maniram Vishwakarma of Jabalpur (who happens to be your son-in-law) according to which my clients obtained absolute permanent irrevocable copyrights for publication and sale of "Saral Middle School Ank Ganit" (all parts). You are aware that the original document of agreement was given to the author Shri Maniram Vishwakarma on his request and a copy thereof was retained for records by my clients.

According to this agreement the only rights which Shri Maniram wanted and he did receive was that he shall be entitled to a royalty at the rate of 15% on the sale of the aforesaid books which would be revised if and when necessary according to the changing circumstances. Shri Maniram was further given a choice of assigning his rights of Royalty in the books aforesaid to any person whom he might nominate in order to save his position as a Government servant. This he has already done by appointing you his assignee on and from 5-10-54 by a written intimation sent to my clients in this behalf.

X X X X Please note that you cannot assign publishing rights of the books under reference to any person because their copyrights have absolutely and permanently vested in my client ever since 13-3-52 agreement.

X X X X My clients reiterate that absolute rights of publication and sale of books under reference rest in my client. The books would be published as usual and amount of Royalty shall be paid to you or any other person whom Shri Maniram might nominate in future according to the new terms contained in your letter dated 16-4-60 reference to which has already been made above.

Please, therefore, note that you or anybody else including Shri Maniram have absolutely no right of publication and sale of books concerned."

35. In other words, although the defendants were in breach of the contract, they signified their unwillingness to accept its rescission, wrongfully asserted a title to the copyright in themselves which was adverse to that of the plaintiff and thereafter admittedly continued the publication and sale of "Saral Middle School Ank Ganeet" under the terms of the agreement dated 13th March 1952, along with their own "Purva Madhyamik Ank Ganeet". Incidentally, the plaintiff after having

revoked that agreement on account of the breach of its terms by the defendants-firm, M/s. Mishra Bandhu Karyalaya, rightly had the book "Saral Middle School Ank Ganeet" published by M/s. Narbada Book Depot, Jabalpur, another firm of printers and publishers here in mitigation of damages.

That the plaintiff was entitled to enter into such an arrangement has not been questioned before us nor has his right to the rendition of accounts of royalty payable in respect of sales of "Saral Middle School Ank Ganeet" upto 25th April, 1961, the date of revocation of the publishing agreement, been challenged.

36. Indeed, the right of the owner of a copyright to an account of the royalties or profits, as the case may be, accruing from the sales of the book when he has not parted with his copyright, is well settled. The reason for this is that a publishing agreement between an author (or his assignee) and a publisher establishes a fiduciary relationship between the parties, and the former is, therefore, entitled to an account from the publishers. For this purpose, the publisher must produce all books and documents necessary for the proper vouching of the accounts; he is not entitled to charge the author (or his assignee) at a higher rate for the expenses of printing paper, etc., than he himself actually pays; and must give the author the benefit of all trade commissions and discounts. See, Copinger and Skone James on Copyright, 9th Edn., p. 389. That would necessarily be so in a profit-sharing agreement, when the parties enter into a joint adventure like the one in (1858) 4 K and J 658, where both parties had equally taken upon themselves the whole expense and risk of bringing out a publication, by the way of a joint adventure, or a partnership. Even in such a case, the copyright therein does not vest in the publisher but belongs to the author, although the publication of It is on terms that the author and publisher would have an equal share of profits.

37. In a publishing agreement like the present one (Ex. P-5), by which the plaintiff created only a licence to print, publish and sell copies of the book in question in favour of the defendants-firm, M/s. Mishra Bandhu Karyalaya, the right to the rendition of a true account of the sales on which the royalties are payable, exists in the very nature of things. As licencees, they would have to account for the royalties earned by the plaintiff who was the owner of the copyright. However, the parties have not left this to implication, but have expressly made a provision to that effect in Clauses 1, 2 and 3 of the agreement upon a plain construction of which, we must hold that the plaintiff was clearly entitled to a rendition of accounts. Even otherwise, the principle indisputably is, that a licensor generally has (i) the right to an account of all the sales effected by the licensee during the period during which the licence had subsisted even after revocation of the licence, and also (ii) the right to an inspection of all the accounts of sales as maintained by the licensee for that period, for the purpose of quantifying royalties payable during the entire period of the licence, i.e., for the purpose of arriving at the true figure of final royalty payable to him under the agreement, See, Anglo-American Asphalt Co. Ltd. v. Crowley Russell and Co. Ltd., 1945-2 All ER 324, and there is no reason why that principle should not equally be applicable to a licence created in favour of a printer's firm with a view to determine the amount of royalty payable in respect thereof.

38. We are, however, digressing from the real point in issue, namely, as to the rights 'of the plaintiff, if any, to receive any royalty for the period subsequent to the revocation of licence or to a rendition

of accounts of such royalty in respect of that period, i.e., after the licence had been terminated by his notice. It is urged that upon failure of the defendants to render an account of the royalty earned in December each year and on their admitted failure to pay any royalties which now are in arrears, there was a breach on their part of the essential terms which were so vital that they go to the very root of the contract and the plaintiff, accordingly, had rightly treated the contract as discharged by breach, but after a termination of that contract by the notice dated 25th April 1961 (Ex. P-28), his only remedy for the period subsequent was to sue for damages for alleged infringement of his copyright and not in a claim for an account of royalties. While we agree that after revocation of the licence, the plaintiff's remedy was in damages for the period subsequent and not for royalty, nevertheless, the claim in respect of that period in substance is one for damages. The reason for this decision of ours follows hereafter.

39. The answer to this problem is to be found in certain leading principles of the law of contract in the English common law which may be taken as well settled, Breach of contract always entitles the injured party to bring an action for damages. It may also entitle him to treat the contract as discharged, but he can only treat it as discharged on proving that the breach is either of the entire contract or of some term which is so vital that it goes to the root of the contract. The breach must be such as to show that the party in default has repudiated his obligations under the contract. Before the time for performance arrives a party to the contract may declare his intention of not performing the contract. This is called a repudiation of contract or an anticipatory breach. In such a case, the other party is not bound to wait until the actual time for performance arrives; he may immediately treat the contract as discharged and sue for damages. In the case of the repudiation of part of the contract, it is a question of construction whether the part repudiated is so vital as to entitle the other party to treat the whole contract as discharged. However, repudiation by one party does not of itself discharge the contract. The contract is only discharged when the repudiation is accepted by the other party. If the repudiation is not accepted, the contract remains in existence. The party in default may then change his mind and proceed with performance. See, Anson's Principles of the Law of Contract, 22nd Edn., Pp. 437 et seq; Cheshire and Fifoot's Law of Contract, 6th Edn., Pp. 505-6; Halsbury's Laws of England, 3rd Edn., paras 274 and 334 at Pp. 160-1 and 203.

40. In Halsbury's Laws of England, the principles are enunciated thus:

"(i) One of the modes in which a contract may be discharged is by breach, where the promisor has failed to perform his promise and the other party elects to treat them at an end.

(ii) Where one of parties repudiates the contract by showing that he does not intend to perform it, the other party is entitled to sue him for breach of the contract and is absolved from further performance of his part of the contract and if he elects to do this the party in default is not entitled to an opportunity of changing his mind. In such a case, the contract is completely determined, and the party In default cannot insist upon the performance by the other party even of a stipulation which is collateral to the main purpose of the contract.

(iii) In order to amount to repudiation, there must be conduct showing clearly an intention not to fulfil the contract."

41. A fortiori, the breach of the fundamental obligation created by the contract is a cause of discharge. It may, indeed, be said, in general that any breach which prevents substantial performance is a cause of discharge. Whether performance is substantially prevented or only partially affected is, of course, a question that depends upon the circumstances of each case. But the general principle is, in the words of Lord Blackburn in *Hersey Steel and Iron Co. v. Naylor Benzon and Co.*, 1884-9 AC 434; thus:

"Where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'if you go on and perform your side of the contract I will not perform mine', that in effect amounts to saying, 'I will not perform the contract'. In that case the other party may say 'you have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract'."

To bring this principle into operation, the intention of a party not to proceed further with the contract need not be expressly stated. It may be inferred from his acts or omissions. But "repudiation of a contract is a serious matter not to be found or inferred". *Smyth (Rose T.) and Co. Ltd. v. T. D. Bailey, Son and Co.*, 1940-3 All ER 60 at p. 71, per Lord Wright, and the question whether the inference is justified is one of fact dependent upon the nature of the default and the circumstances in which it was made.

42. It must be observed, however, that a contract cannot be terminated unilaterally. Therefore, if one party commits a breach sufficiently serious to constitute a discharge, this does not automatically abrogate the mutual obligations, but merely gives the other party an option either to ignore the breach and to insist upon performance when due, or to accept the repudiation and treat himself as free from further liability. If he adopts the latter course, he can sue for damages forthwith, whether the time for performance is due or not, but if he refuses to regard the contract as discharged, he presents the guilty party with an opportunity to re-consider his attitude. It thus follows that a contract is not automatically discharged by breach but it only gives the injured party an option to treat the contract as at an end. Dealing with the case where a party has refused to proceed further with performance. Lord Simon in *Heyman v. Darwins, Ltd.*, 1942 AC 356 at p. 361, described the position of the other party as follows:

"He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) 'accept the repudiation', by so acting as to make plain that,

in view of the wrongful action of the party who was repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages."

43. These English common law principles are merely re-stated in Section 39 and the other allied sections of the Indian Contract Act, 1872. The right to rescission of a contract under Section 39, arises when the other party fails to perform the contract in its entirety. It reads:

"39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance."

In terms of this section, the renunciation must be absolute. In A. C. Moitra's Contract Act, 2nd Edn., p. 282, the law is stated thus:

"The term 'in its entirety' has been the subject of much judicial discussion, and it is sometimes very difficult to say when the promisor may be said to have refused to perform, or disabled himself from performing, his promise 'in its entirety'. A contract may contain several terms some of which may be subsidiary or ancillary to the main terms which the parties had as their object at the time entering into the agreement. It cannot be said that a breach of every term of a contract, e.g., as to time of delivery and as to time of payment, or even a breach in a material particular, gives the promisee the right of rescission when the breach does not relate to the substance of the promise taken as a whole. To constitute repudiation it must be shown that the party to the contract made it quite plain his intention not to perform the contract. In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration, is whether the acts or conduct of the one do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract, and in order to give rise to a right of action immediately on the renunciation, the renunciation must relate at least to so vital a part of the contract as goes to the root of it. It is not, therefore, every breach but breach of an essential term of a contract alone by one party that entitles the other to repudiate the contract; the breach of non-essential terms entitles the other party to damages only."

44. While interpreting Section 39 of the Contract Act, the Judicial Committee of the Privy Council has in *Murlidhar Chatterjee v. International Film and Co.*, AIR 1943 PC 34 stated:

"The language employed by the Act presents certain problems of construction. When one party to a contract has refused to perform his obligation thereunder so as to give rise to a right in the other party to put an end to the contract, is the latter a person at whose option the contract is voidable, and if he does put an end to the contract, does he rescind a voidable contract?"

XX XX XX In a case within Section 39 the party who rightly 'puts an end to' or 'rescinds' the contract is entitled to damages for the defaulting party's breach. In this sense the contract has not ceased to be 'enforceable by law'. On the other hand, neither party is any longer bound to perform his promise--indeed an offer to do so, if made by either party, could properly be rejected by the other.

XX XX XX The election of the party rescinding, as Cotton L. J. once put it in *Johnstone v. Milling*, 1886-16 QBD 460 at p. 470: 'relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end'."

45. Applying these principles to the present controversy, we have no manner of doubt that the non-remission of yearly accounts of royalties and the non-payment of the royalties which had accrued on sales, were breaches of the fundamental obligation as regards payment of royalty created by the contract in question, which entitled the plaintiff to treat the contract as discharged by breach. As already stated, repudiation or disclaimer occurs where one of the contracting parties evinces an intention not to go on with the contract. Such intention on the part of the defendants was sufficiently evinced by their conduct in not paying the amounts of royalties which have fallen in arrears, not rendering any accounts in respect thereof, for all the years in question, and also in asserting to themselves a title hostile to the plaintiff by falsely claiming in their notice dated 28th June 1961 (Ex. P-32) that they had acquired ownership in the copyright under a direct assignment from the author and that in the alternative, the copyright had been transferred to them under the agreement dated 13th March 1952 (Ex. P-5).

In other words, the defendants had acted in a manner so as to lead a reasonable person to the irresistible conclusion that they did not intend to fulfil their part of the contract. Now, the renunciation of a contract may take place either before its performance is due, or, during the performance of the contract itself. In the present case, the defendants had made it impossible by their own conduct for the contract to go on; and, there was no other alternative left to the plaintiff than to treat the contract as at an end, by the acceptance of their repudiation as discharging it, which absolved or discharged him from any further performance thereof. It is needless for us to stress that the remission of accounts of the royalty earned @ 15% of the sales during the year, annually in the month of December of each year, and the payment of such royalties were the fundamental obligations of the contract, i.e., the "hard core" or the primary obligations, upon the breach of which, the contract itself would necessarily come to an end.

46. We regret to say that some of the authorities cited at the Bar have hardly any relevance to the question in controversy. A few of them may, however, be worth noticing. In *Century Spg. and Mfg. Co. Ltd. v. Motilal Dhariwal*, 1966 MPLJ 659 = (AIR 1966 Madh Pra 313), this Court stated that a novation of contract under Section 62 of the Contract Act requires an agreement for rescission, in the context of a substitution of the original contract by a new contract where the promisee before its breach had gratuitously released the promisor from the obligation to perform his original promise. Now, a contract may be discharged, at any time, before breach by a new agreement made by the

parties. Such new agreement may simply rescind the original contract or alter its terms and substitute a new contract in its place. In order to discharge the original contract, it is not necessary that the new agreement should have been performed, as is generally required for accord and satisfaction. For a discharge of the original contract, the new agreement must, however, possess all the attributes which are requisite to constitute a valid contract. A substituted agreement may operate as a waiver of the obligations imposed by the original contract or as a 'defence to a claim arising therefrom. The decision is, therefore, inapplicable to the present case.

In *Tan Ah Boon v. State of Johore*, AIR 1936 PC 236, the Judicial Committee of the Privy Council had, while dealing with a claim for damages for the breach of an alleged contract, stated that a plaintiff could not succeed unless he avers and proves that he had performed or was at all times ready to perform his part of the contract. We can hardly see how this citation helps the learned counsel unless he wants to rely on it in furtherance of his submission that the plaintiffs only remedy after a termination of the contract lay in damages and he himself being in breach, that part of his claim must fail. As we have already held, the plaintiff was not in breach. On the contrary, the defendants themselves had committed quite a few breaches of the contract in question. The decision of the Privy Council in *Tan Ah Boon's* case, AIR 1936 PC 236 (Supra), therefore, is equally of no avail.

Similarly, although *General Billposting Co. v. Atkinson*, 1909 AC 118 and *O'Neil v. Armstrong*, (1895) 2 QB 418 relate to the rights of a party who accepts the discharge of a contract by the acceptance of its breach, the decisions there actually turned on the law of master and servant; and in reality they turned on their own facts. In *General Billposting Co.'s* case (1909) AC 118 (supra), it was held that a promise in restraint of trade, made by a servant, is dependent upon the obligation of the master to employ and pay him, in accordance with the contract of service, and therefore, if he was wrongfully dismissed, he was instantaneously discharged from the obligation of the restraint. In *O'Neil's* case, 1895-2 QB 418 (supra), a seaman had been employed, at an agreed wage, by the Captain of a torpedo-boat which was built in England for the Japanese Government and was on its voyage from England to Japan flying the Japanese flag; the Captain of that vessel was, incidentally, an officer in the Japanese Navy. While the vessel was on its voyage, the Japanese Government declared war against China which, besides making the voyage dangerous, also made it illegal under the Foreign Enlistment Act, 1870, for the plaintiff to serve on board the ship which, flying the Japanese flag became a ship of war. The plaintiff, being warned on these matters, left the vessel at Aden, and thereafter, brought an action to recover the whole of the agreed wages for the entire voyage from England to Japan. Having regard to these circumstances the Court of Appeal held that the seaman was entitled to leave the vessel at Aden, and to sue for the full amount of his agreed wages for the voyage. We are unable to appreciate how these decisions apply to the present controversy.

47. The law is as has been stated by us in paras 38 et seq., of this judgment. In that view of the law, the question that arises is when there is a termination of a publishing contract occasioned by a breach of the fundamental obligations created by acceptance of the breach by the plaintiff in his notice of termination, whether he could fall back upon its terms for claiming any benefit like royalty on sale for the subsequent period, or, whether his right is only to sue for damages. We feel it is not

necessary for us in this case to go into the wider question, namely, whether the injured party after acceptance of the breach of a contract can rely on its terms of "keep it alive" for his own benefit, i.e., for enforcing his rights thereunder against the party in breach. Suffice to say, that after revocation of the licence to print, publish and sell copies of the book "Sara Middle School Ank Ganeet" created in their favour, the injurious publication and sale of that book by the defendants thereafter, in spite of the plaintiff's notice of the termination dated 25th April 1961 (Ex. P-28), clearly constituted an infringement of his copyright therein, and the plaintiff's remedy was to sue for aggravated or exemplary damages.

48. In substance and essence, the plaintiff's claim for that period is for recovery of damages @ 15% of the sale proceeds. Although the plaintiff has in paragraph 14 (c) claimed rendition of accounts of the sales from the year 1960 onwards for purposes of computation of royalty @ 15% of the total sales and interest @ 6% per annum from 1st January 1961, having regard to the revocation of licence w.e.f. 25th April 1961 that claim must be regarded as a claim for damages @ 15% of the sale proceeds which the plaintiff treats as the loss of his business profits he has actually suffered. An action for damages is only one method whereby a plaintiff may seek redress; he will frequently apply for an injunction and, if granted, this can affect the amount of recoverable damages, since prospective loss may have been thereby largely eliminated. More important in relation to damages, is the plaintiff's equitable remedy by way of an account of profits. This remedy is alternative to the action for damages, and is to be preferred by a plaintiff where the defendant has made more profit out of the infringement than the plaintiff has lost. See, *Mayne and McGregor on Damages*, 12th Edn. p. 794. The award of damages for infringement of a copyright, therefore, follows on the same lines as damages in an action for infringement of trade-mark or for passing off. The principal head of damages is the loss of business profits caused by the defendant's infraction of his copyright. We, accordingly, are of the view that the quantum of damages ordinarily claimable, in respect of a period after the revocation of a licence would be the loss of business profits. The plaintiff in such a case need not fall back on the royalty clause, i.e., try to keep alive the contract for enforcing his right to royalty thereunder. Nevertheless, nothing prevents a plaintiff from relying on the rate of royalty provided therein and he may adopt the "lost royalty profits" (in this case, 15% of the sale proceeds), as the basis for calculation of his loss. Even otherwise, the measure of damages under the Law of Copyright on the termination of such an agreement, is; the "loss of profits" which the plaintiff might otherwise have made. See *Copinger and Skone James on Copyright*, 9th Edn. p. 204. In the present case, the plaintiff has chosen to value this loss w. e. f. 25th April 1961 @ 15% of the total sales, and we find no reason to interfere with that part of the claim.

49. Before parting with this aspect of the case, we think it desirable to state that though the remedies given by Section 6 of the Imperial Copyright Act of 1911, are not alternative to those given by Section 7, yet when the owner of a copyright obtains damages under Section 6, it often happens that he can recover nothing further in respect of damages under Section 7. Where the amount of damages awarded under Section 6 covers the price of permission to publish the work in question, the author is not entitled to damages also under Section 7. See, *Copinger and Skone James on Copyright*, p. 207-8. Also, *Sutherland Publishing Co. v. Caxton Publishing Co.*, 1939 AC 178. Thus, damages for infringement under Section 6 and damages for conversion under Section 7 are cumulative but not alternative, and care must be taken to see that the damages awarded under the respective sections

do not overlap. The later point is explained by Green, L. J. in *Surtherland Publishing Co. v. Caxton Publishing Co.*, 1936 Ch 323 at p. 342 as follows:

"As an example of what I mean by overlapping let me take the following case. The owner of a copyright in a book proves that, whereas if it had not been for the infringement he could have sold 1,000 copies, he has only been able to sell 500, the infringer having printed and sold 500 copies. It is obvious that as the possible market for the book is limited to 1,000 copies, if the damages for infringement under Section 6 are fixed on the basis that the copyright owner would have sold 1,000 copies but for the infringement, and at the same time the value of the 500 copies sold by the infringer is fixed for the purposes of Section 7 at the amount for which they were sold, the result will be that the copyright owner will have recovered damages on the footing that there was an available market for 1,500 copies only. If he had sold 1,000 copies there would have been no market for the 500 copies made by the infringer. which would accordingly have had no value. Conversely, if the 500 copies sold by the infringer were worth what they were sold for this could only be so on the basis that the copyright owner was only going to sell 500. In such a case it appears to me that to award to the copyright owner damages for infringement based on his inability to sell 500 copies and at the same time to award him damages based on the sale price of the 500 copies sold by the infringer would not be permissible."

The judgment of the Court of Appeal on this point was affirmed in the House of Lords. These decisions have throughout been followed in India. See *W. B. Yeats v. Eric Dickinson*, AIR 1938 Lah 173; *Dharam Dutt Dhawan v. Ramlal*, AIR 1957 Punj 161 and *Associated Publishers v. K. Bachyan*, AIR 1961 Mad 114.

50. Lastly, the contention that the claim for recovery of Rs. 13,790.46 paise towards the arrears of royalty due upto the end of 1959, was barred by limitation, was eventually not pressed by the learned counsel for the appellant because there is no merit in it. That part of the claim arises as a result of the rendition of accounts by the defendants, as per their statements of account dated 16th April 1964, (Exs. P-6, P-7 and P-8), whereby they acknowledged their liability to pay Rs. 15,760.46 paise towards the royalty for that period and the value of the stock-in-trade in their hands as on 26th January 1960. Towards this, the defendants have only paid Rupees 2,000/- on 18th April 1960, which left a sum of Rs. 13,760.46 paise in arrears. The present suit for the recovery of that amount was brought on 1st January 1963, within 3 years from the date of rendition of account, i.e., well within the period prescribed under the residuary Article 120 of the Limitation Act, 1908 which alone applies to that part of the claim.

51. The result is that the appeal fails and is dismissed with costs. The judgment and decree of the 5th Additional District Judge, Jabalpur, are upheld. Counsel's fee, as per the Schedule or certificate, whichever is less.