Abdul Razack and ors. Vs. Mahammad Rahamatullah and ors.

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Court : Andhra Pradesh

Decided On : Nov-08-1963

Reported in : AIR1964AP522

Judge : Jaganmohan Reddy and ;Chandrasekhara Sastry, JJ.

Acts : Trusts Act, 1882 - Sections 88

Appeal No. : Appeal No. 755 of 1954 with Cross objections and C.R.P. No. 1499 of 1954

Appellant : Abdul Razack and ors.

Respondent : Mahammad Rahamatullah and ors.

Advocate for Def. : P. Ramachandra Reddy, Adv. for ;R. Venkata Subba Rao, Adv. and K. Raghava Rao, Adv. in Cross objections, ;A. Kuppuswamy, Adv. for ;A. Bhujanga Rao, Adv. and ;R. Ramalinga Reddy, Adv.

Advocate for Pet/Ap. : P. Ramachandra Reddy, Adv. for ;R. Venkata Subba Rao, Adv. and K. Raghava Rao, Adv. in C.R.P. No. 1499/54

Disposition : Appeal and Revision allowed

Judgement :

Jaganmohan Reddy, J.

1. This appeal and the Civil Revision Petition arise out of the same order passed by the Subordinate Judge of Cuddapnh in I.A. No. 55 of 1954 in O.S. No. 2 of 1149 dated 16-9-1954 giving certain directions regarding the mode of taking accounts. The suit was filed by the six plaintiffs for a declaration of their title to and for possession of the plaint schedule properties consisting of two items of land, a house, vacant sites and five buses, and for an account from the first defendant in regard to his management of immovable properties and collections from the bus service from May 1942upto the date of the suit. The first plaintiff is the son of one Abdul Nabi. The other plaintiffs are first plaintiff's sisters. Abdul Nabi, the 1st defendant and late Ameen Saheb were three brothers. Abdul Nabi died in 1930 when the plaintiffs were minors leaving a house, vacant sites and lands shown in the plaint 'A' schedule and considerable cash to the extent of Rs. 12,000/-. He had also forest and abkari contracts. It is alleged that he entrusted all his property to his elder brother, Ameen Saheb, with a direction to protect the plain-tiffs and manage the properties and deliver them to the first plaintiff after he attained majority. After the plaintiffs' father's death, both Ameen Saheb and the first defendant took upon the management of the properties on plaintiffs' behalf. The first defendant was looking after the lands and contract business on behalf of the plaintiffs, while Ameen Saheb looked to the management of the rest of the properties. In so far as it is relevant, it may be stated that Ameen Saheb purchased five motor buses described in the 'B' schedule of the plaint and conducted bus service from Cuddapah to Nell ore and Proddatur to Nellore under the name of 'Amin Motor Service'. In this motor service, one P. T. Gopalacharlu was also a partner with Ameen Saheb till 5-4- 1942 when he relinquished his interest and executed a receipt. On 15-4-1942 Ameen Saheb executed a will whereby all the properties belonging to the plaintiffs' father including the buses in question were delivered to the first plaintiff and he died a few days afterwards. But as the first plaintiff was young and inexperienced to carry on the management of the lands and bus service himself, the first defendant undertook to manage the bus service on a fixed salary of Rs. 50/- per month and executed a letter dated 5-5-1942 agreeing to render proper accounts to the first plaintiff. The buses in the 'B' schedule were put in possession of the first defendant, who was also managing the plaintiffs' lands by leasing them to tenants and collecting rents thereof., It was

averred that the first defendant had fraudulently got transferred the patta for item I of the plaint 'A' schedule in his name and had not been rendering accounts of the collections in the bus service. It is also stated that in anticipation of the plaintiffs' suit, the first defendant was trying to nominally transfer the 'C' certificates and 'G' permits of the buses in question in favour of his friends Khader Mohideen and others. Subsequent to the filing of the suit, the plaintiffs amended the plaint by alleging that they had come to understand that the said buses have been nominally transferred at first in favour of the 2nd defendant and then in favour of the third defendant's company of which the second defendant's brother was the managing Director. The said alienations were said to be nominal and intended to defeat the plaintiffs' claim. Inasmuch as the Interlocutory Application, I.A. No. 56 of 1954 relates only to the question of buses and does not deal with other matters dealt with by the preliminary decree, we will confine ourselves only to the averments in respect of these buses. The first defendant contended that these buses belonged to him, that he is the owner and had title and possession of the same and was running them on his own account, that the sale was not fraudulent or nominal, and thatit was a genuine sale. Defendants 2 and 3 also supported the first defendant and said that they had paid consideration and that the sales were genuine. These contentions were, however, negatived. It was held that the defendants had no title or proprietary rights in these buses, that these buses belonged to the minors and that the first defendant had come by way of managing the same on behalf of the plaintiffs after the death of their father, and paternal uncle, Ameen Saheb, and that the transfer was not bona fide but fraudulent. In The result, the learned Subordinate Judge passed a preliminary decree on 23-9-1919 in favour of the plaintiffs holding all the allegations made by them proved.

2. Against the judgment and decree of the Subordinate Judge, appeals Nos. 816 of 1949 and 154 of 1950 were filed in the High Court of Judicature, Madras. Appeal No. 816 of 1949 was filed by the first defendant, and the other by defendants 2 and 3 being appeal No. 154 of 1950. In so far as the lands are concerned, they are not relevant for the purposes of this appeal; and in so far as the preliminary decree related to the buses, the defendants in these appeals challenged the finding. Subba Rao, J. (as he then was) dismissed these appeals on 22-1-1954 and confirmed the decree with certain directions to which we shall

refer presently. Against this judgment of Subba Rao, J., a Letters Patent Appeal was filed being L.P.A. 46 of 1954 which came up before the Hon'ble The Chief Justice and one of us. But this appeal was also dismissed on 21-1-1959. After these appeals were deposed of, a commissioner was directed to take accounts and during the course of the accounting, it was urged by the plaintiffs that not only the accounts relating to the three buses viz., M.D.D. 22; M.D.D. 39 and M.D.D 68 but also the accounts with respect to the three buses which were purchased and substituted for them after the preliminary decree was passed, should be taken. The respondents before us, however, contended that the enquiry must be confined to the directions given in The preliminary decree and if any buses have been purchased from out of the income, accounting in respect of those buses cannot be within the four corners of those directions. This contention seemed to have found favour with the learned Subordinate Judge who held that the accounts must be confined to the running of the three buses specified in the preliminary decree and no more.

3. The learned advocate for the appellant Sri P. 'Ramachandra Reddy, urges before us that these directions are not in accordance with law. The basis of his argument is that the first defendant, being in a fiduciary capacity, is liable to render an account, not only of all the incomes earned from the specific buses but also in respect of acts of his in relation to those buses, and is liable to render an account for the profits made directly or indirectly and consequently all those who had notice of the fiduciary capacity of the first defendant and who intermeddled with the minors' property and their estate such as the respondents against whom there was a categorical finding that they had purchased these buses nominally with full knowledge that the buses belonged to the minors. Before Subba Rao, J., the respondents herein contended that there was no prayer in the plaint against them and that the Subordinate Judge was wrong in giving a decree against them. In The High Court, however, the plaintiffs had filed an application for amendment of the plaint. That application was allowed by Subba Rao, J., who consequently held that the finding of the Subordinate. Judge on the evidence that the defendants 2 and 3 were running the buses from the data of their purchase under a secret arrangement between the parties could not be disturbed and the deletion from the decree of the direction for rendition of accounts passed against defendants 2 and

3 also could not likewise be disturbed. He further held that defendants 2 and 3 were not bona fide purchasers without knowledge of the plaintiffs' rights to the buses. In this view the learned Judge dismissed the appeals. But in doing so, ho made the; following observations :

'It is said that there was a change in the routes, that one bus was sold and that the buses became useless after some time. The applicants can take out an application for suitable directions in final decree proceedings.'

In the Letters Patent Appeal, the scope of the argument was confined, only to the amendment, but the Bench did not accept it with the result the liability to render accounts by defendants 2 and 3 (respondents herein) had become final and cannot now be challenged. The only question is what is the scope and liability of the respondents in rendering an account in respect of the profits of the buses. The relevant clauses of the preliminary decree are Clauses 3, 7 and 8 which are in the fallowing terms:

(3) that the defendants do put plaintiffs 1 to 3, 5 and 6 in possession of the motor buses M.D.D, 22, M.D.D. 39 and M.D.D. 68 specified in schedule 'B' hereunder or pay them their value as determined in The final decree proceedings.

(7) that defendants 2 and 3 do render an account to plaintiffs 1 to 3, 5 and 6 in respect of the profits of the motor buses M.D.D. 22. M.D.D. 30 and M.D.D. 68, from the date of suit viz., 23-7-1945;

(8) that the plaintiffs be and are at liberty to take separate proceeding for the appointment of a commissioner to take an account regarding the value of the motor buses specified in schedule 'B' hereunder and the income derived therefrom by the respective defendants. * * * * *

In the Interlocutory Application filed by the appellants, it was contended that from The income derived by the running of the three buses specified therein the respondents have purchased, three other buses, which were M.D.D. Nos. 279, 460 and 278 with a seating capacity of 26, 38 and 25 respectively, that these buses have been substituted by the respondents in the place of the suit buses on

the same routes that the substitutions seemed to have been done by the respondents with the object of making it appear as though the suit buses did not run for some period, that the respondents were therefore liable to make good to them these three substituted buses as well as the income derived therefrom on the routes nominally transferred tothem by the first defendant which wag estimated at more than Rs. 8,11,200/- and as well as restore to the appellants the buses M.D.D. Nos. 22, 39 and 68 in the condition in which, they were on the date of transfer or their value on that date, and that they were further liable to deliver The buses, M.D.D, Nos. 279, 460 and 278 which were purchased out o[the income derived from the suit buses. The Subordinate Judge held that the petitioners' (appellants') claim was untenable when they seek an account in respect of The other buses substituted in the place of their buses after their buses, had ceased to ply on the route for some reason or the other, that their right to an account was restricted to their own buses and this right could not be extended to other buses by which right they have come to ply on the routes on which the petitioners' buses were originally plying and that the petitioners (appellants herein) were therefore not entitled to seek any account of The income; or profits of the buses M.D.D. 278, MDD 279 and, MDD 260 or of any other buses. It was his, view that the claim of the petitioners clearly appeared to be fantastic when they seek to claim title and recover The buses MDD 278, MDD 279 and MDD 260 on the ground that these buses being 'improvements' and alleged to have been acquired from the income of their buses, MDD 22, MDD 39 and MDD 68.

4. Before us, the learned counsel for the respondents. Sri A. Kuppuswami, has contended that) the remedy of the appellants cannot exceed the terms of the preliminary decree and when the preliminary decree specifically directs the delivery of MDD 22, MDD 30 and MDD 68, by no manner of interpretation can that order be read as directing delivery of not only those buses but also the substituted buses; and in so far as MDD 22, M.D.D. 39 and M.D.D. 68 are concerned, these buses became useless and immediately after the stay orders in the appeals before The High Court were vacated, the appellants had asked for the delivery of the busts and the respondents had told them that the buses could be taken charge of as they were in The yard in an unserviceable condition, that inasmuch as the appellants did not take delivery of these buses no liability attaches to them and

they cannot therefore be held liable for the value of those buses. It is stated that his clients do not know as to what had happened to these buses because the 2nd respondent company itself was wound up. The account, if at all, according to him, can only be taken in respect of these buses up to the dates on which they ceased to run. Consequently he says that on 23-8-10-19 M.D.D. 22 ceased to run; on 3-10-1049 M.D.D. 68 became useless and that M.D.D. 39 was sold on 14-9-1947 to one Khaja Miah for Rs. 700/- as scrap iron. The learned advocate for the appellants, on the other hand, contends that The appellants were not bound to take, delivery of the buses which were useless when in fact the respondents took charge of the said buses which were in running condition, and it was the bounden duty of the respondents to deliver to the appellants the said three buses in the same condition in which they were at The time when the respondents had taken them. Secondly, they had to camouflage their whole design and to successfully prevent them from asking for a true and proper account, adopted thedevice of purchasing other buses by substituting the original buses, viz., M.D.D. 22, M.P.D. 39 and M.D.D 68 and running them on the same, routes for which the previous buses had permits by transferring those permits on to the new vehicles and consequently not only the respondents, would be liable to render an account of the income derived by running the substituted buses but also entitled to return the assets which made that in-come. The question that falls for determination in this case is to what extent are the respondents liable for an account in law and whether the terms of the preliminary decree can be so construed as to give relief by making them liable to account for the income derived by the substituted buses and for their return or value,

5. In this case there is absolutely no doubt on the findings in the preliminary decree as confirmed by the judgment of the High Court of Madras in A.S. No. 816 of 1949 and 154 of 1950 that the respondents were not bona fide purchasers without knowledge Of the plaintiffs' title, that the first defendant was in a fiduciary position vis-a-vis the minor plaintiffs and was running the buses as a trustee for them and therefore he was accountable to them for all the profits made by him whether directly or secretly. In the circumstances all those persons, who with the knowledge of the title of the-plaintiffs, intermeddled or acquired properties without any bona fides are in the same position in respect of accountability to the plaintiffs

in relation to that property just as the first defendant is. Section 88 of the Indian Trusts Act, 1882, based on the well-recognised principles of English law, is as follows :

'Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other persons and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.'

This Section gives several illustrations to which it is unnecessary to refer. The principle, however, is quite clear in that a person who is in a fiduciary position and is bound to protect the interests of another person and who takes advantage of the same and makes profit or derives benefit or acts in any manner adverse to the interests of that person he would be liable to that person or holds the benefit as a trustee of that person whose property he had utilised or against whose interests he has utilised or against whose interests he had acted. The principle embodied in that section is wide, It embraces all cases of dealings entered into by the person under circumstances in which his own interests may be adverse to that of the beneficiary. This section also was held not to be exhaustive and is wide enough to cover the case of those transferees who had taken the property with notice of the transferor's defective title. In Lewin's Practical Treatise on the Law of Trusts, Fifteenth Edition, 1950, it is stated at pp. 721 and 722 thus:

'But if the alienee be a purchaser of a legal estate at its full value, then (subject as aforesaid) if he take with the notice of the trust, whether the notice be actual or constructive, he is bound to the same extent and in the same manner as the person from whom be purchased. The rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable encumbrance, as of a covenant or agreement affecting the estate, or a lien for purchase-money. But if a bona fide purchaser have no notice, either expressly or constructively, he then merits the full protection of the court, and his title, even in equity cannot be

impeached.'

At p. 730, it is laid down that the rule that were a person mixes his own private money with the trust money, the court will disentangle the account, and separate the trust from the private money, will equally apply in the case of a person occupying a fiduciary position as a factor, or agent and is even applicable to the case of person borrowing money for a specific purpose for which it was advanced. Hanbury in his text on Modem Equity, Eighth Edition (1962) has put the proposition tersely in the following words at p. 226:

'It has been submitted that a stranger to the trust, who, through his actions, whether well intentioned or merely officious, has been caught up in the toils of the trust, must be designated an espress, and not constructive trustee. For be can undertake liability only by assuming to act as trustee. The phrase 'trustee de son tort' is borrowed from the law relating to administration of assets, and is analogous to 'executor de son tort'

It was also stated a little further down at p. 226:

'It may be said that a stranger who gets into possession of trust money, knowing it to be such, is not rendered liable as a trustee unless either he knew of some dishonest design on the part of the trustee who confided it to his keeping, or he himself oversteps the character of agent, by doing things with the money that only a trustee should do'.

The two cases cited by him viz., Barnes v. Addy, (1874) 9 Ch. A. 244 and Ashaman v. Price and Williams, (1942) Ch. 219 deal with this proposition in so far as the liability of the solicitors of the trustees is concerned. But, in my view, the general proposition, whether he is a solicitor for the trustee or otherwise, is clearly well established because equity will follow into the hands of even strangers; for, in the phrase of Hanbury he who 'has been caught up in the toils of the trust' and has acted in a manner adverse to the interests of the person whose property they have dealt with or has made profits from out of such property, will be accountable. There are two decisions of the Madras High Court dealing with the matter. In Palkonda Zamindar v. Secretary of State ILR 5 Mad 91 at page 105, a Full Bench

of the Madras High Court made the following observations at p. 105:

'It is not every unlawful entry on, or continuance in possession that creates a constructive trust. It is difficult to bring within the compass of a definition the principles by which the Courts have been guided in forcing fiduciary obligationson the consciences of wrong-doers by operation of law; but it may be asserted that the wrongful invasion or continuance in possession of a stranger, whether with or without knowledge of the infirmity of his title, will not make the wrong-doer a constructive trustee unless he has been admitted into possession by a trustee so as to be affected with notice of the trust'.

In Kathoom Bi v. Abdul Wahab Sahib, (1939) 2 Mad LJ 208 : (AIR 1939 Mad 313), a Division Bench of the Madras High Court consisting of Leach, C. J. and Abdur Rahman, J., was dealing with a case similar to the one which we are called upon to decide. There the appellant who was entitled to a half share of her father's estate filed a suit against her father's three brothers who, after her father's death, took charge of all his assets including the business which they continued to carry on. The appellant claimed that on the death of her father she was entitled to a half share in her father's properties, and is all the accretions to the estate arising from the business. It was therein held that respondents 1 to 3 were guardians of the appellant and the minor's property being in their hands they must account in full. The fact that they were co-owners of the estate of the appellant's father did not affect their liability as guardians and their relationship was essentially a fiduciary one. In arriving at this conclusion, reliance was placed on a previous decision in Mahomed Abdul Rahim v. Mahomed Abdul Hakim, 61 Mad LJ 139 : ILR 54 Mad 543 : (AIR 1931 Mad 553) and their Lordships after also referring to three English cases viz., Morgan v. Morgan, (1737) I Atk. 489 : 26 E. R. 310; Dormer v. Fortescue (1744) 3 Atk, 124 : 26 E. R. 875; and Doe v. Keen, (1797) 7 T. R. 386 : 101 E. R. 1034 and upon sections 88 and 90 of the Indian Trusts Act, observed at p. 212 (of Mad LJ) : (at p. 315 of AIR) :

"It is not necessary to review the Indian authorities which are in line with the English authorities, but in the course of the arguments our attention was drawn to the case of 61 Mad LJ 139 : ILR 54 Mad 543 : (AIR 1931 Mad 553), where a

Bench of this court (Wallace and Pandalai JJ) applied the principle referred to in a case relating to the business of a Muhammadan family. There a Muhammadan cloth merchant died leaving a widow, two major sons, two minor sons, and three minor daughters. The plaintiff's case was that the major sons on the death of the father continued his business and taking advantage of their position as the eldest male members of the family used in the business the assets of the other members of the family, including the shares if the widow and the minors. The court held that by this assumption of family management -- it did not matter whether the position of the major sons was that of trustees de son tort of executors de son tort -- the relationship was essentially a fiduciary one.

We are of opinion that the position of respondents 1 to 3 in this case was essentially a, fiduciary one. They took charge of the estate of Abdul Rahiman in which the appellant had a half interest at a time when she was a child and in their care and control and they have continued in possessionof the estate. Having got possession of the estate they set up a false claim to be partners in the business in order to get a greater share in the estate than the law allowed and utilised monies belonging to the appellant for themselves. When the appellant eventually escaped from their control they alleged that she had been kidnapped from their custody as her lawful guardians and they have acknowledged their guardianship in the pleadings in this suit. On their own showing respondents 1 to 3 were the guardians of the appellant and the minor's property being in their hands they must account in full. The fact that they were co-owners of the estate, of Abdul Rahiman does not affect their liability as guardians'.

With this statement of law we respectfully agree. In this case also the first defendant set up a false claim to the properties of the minors and a day before the suit was filed with notice that it would be filed, he transferred the buses to the second defendant who shortly thereafter, in his turn, transferred it to the third defendant. The finding that respondents 1 to 3 acted in collusion with one another to deprive the plaintiffs of their property is one which would give rise to an application of the principle adumbrated above. In law, therefore, the plaintiffs would be- entitled to follow the first defendant's property into whosoever hands it goes provided those persons had knowledge and notice that the property was that

of the plaintiffs and all those persons would be accountable to the plaintiffs. We have little doubt that the respondents are not only accountable for the profits made nut of the specified buses but also as to what has been done with those profits; and if any property has been purchased out of it, the plaintiffs would also be entitled to the property and the income made from out of it.

6. It remains therefore to see whether the preliminary decree can be construed as lending scope to this interpretation, It may be stated that till the preliminary decree was passed, there was no mention that any buses were substituted or that any buses were purchased from out of the specified property. Even now, the respondents do not admit that any buses were purchased from out of the income. The submission is based on the assumption that if any buses have been purchased, the respondents would be liable to an account in respect of the profits and the value of the buses or the return thereof in terms of the preliminary decree. We are not to be understood as holding that the three substituted buses have been purchased out of these properties. That will be a matter for enquiry if the scope of the preliminary decree lends support to the contention of the appellants. We have already set out the terms of the order viz., Clause (7) which was passed at a time when neither the appellants nor the Court had any notice of subsequent purchases. Even now the subsequent purchase from out of the profits is denied by the respondent. But the terms of clause (7) of the preliminary decree, in our view, lend support to the contention of the appellant that an account of the profits arising from the running of the buses, M. D. D. 22, M. D. D. 39 and M. D. D. 68, from the date of suit viz., 23-7-1945 could be taken so as to enquire into its utilisation and the makingof any profits or deriving any benefit out of such utilisation. Clause (7) of the preliminary decree states that defendants 2 and 3 should render an account to plaintiffs i to 3, 5 and 6 in respect of the profits of the motor buses M. D. D. 22, M. D. D. 39 and M. D. D. 68 from the date of suit viz., 23-7-1945. If the respondents had purchased new buses with the profits derived by the running of M. D. D. Nos. 22, 39 and 68, the purchase of the new buses and the earning of any income by the said buses which have been substituted is part of the account of the profits earned by the plaint mentioned buses. We are, therefore, of the opinion that the learned Subordinate Judge was wrong in restricting the scope of the enquiry to the income from the specified buses and their value. The appellants

would be entitled to a comprehensive account relating to the profits earned by those three buses which are ascribable to those buses, or to any of the buses which have been purchased out of the profits and substituted for them which, according to the appellants are buses M. D. D. Nos. 279, 460 and 278. In taking the account, the Commissioner will have to decide whether the aforesaid substituted buses have been purchased out of the income of the buses specified in the plaint and the value or return thereof in the event of the failure on the part of the respondents to return the same, and if they have been so purchased, what is their value and what is the income earned therefrom. In other respects, the directions given by the lower Court are confirmed.

7. Mr. A. Kuppuswami further contends that in so far as M. D. D. Nos. 22 and 68 are concerned, the appellants are not entitled to any value thereof because they have not taken the buses though offered; and even if their value is to be fixed, it cannot in any case exceed the value as given in the plaint. In respect of the first contention it is no doubt true that the respondents offered to deliver the same. But since the offer was to deliver the same in an unworkable condition and in fact they were not delivered, the value of the buses as they were at the, time will have to be determined and certainly they cannot be more than the value given in the plaint. This matter will also have to be gone into by the commissioner. In so far as M. D. D. 30 is concerned, the statement that he had sold the same as a scrap for Rs. 700/-and the directions given by the trial court in respect of this have not been questioned.

8. It is also contended by the learned counsel for the appellants that there should also be a direction for the routes to be transferred, because the delivery of the buses would include the transfer of routes. The lower Court has negatived this contention and we think, it is justified in doing so for the reason that no directions can be given for transfer of routes which is within the province of the concerned authority. If the buses are directed to be delivered along with their 'C' certificates, it is open to the appellants to make the necessary applications before the concerned authority for the transfer of routes. But no further direction can be given in this enquiry. With these directions, this appeal is allowed. Costs of this appeal will abide the result. C. R. P. No. 1499 of 1954 is also accordingly allowed inasmuch

as it was filed only by way of abundant Caution, There will be no order as to costs.

Memorandum of Cross-Objections :

9. It is argued by Mr. A. Kuppuswamy that the 2nd defendant could be made liable for an account only for the period for which the bus was in his possession and during which he plied the bus. But the preliminary decree of the trial court as confirmed by the High Court in A. S. Nos. 816 of 1949 and 154 of 1950 in the. Letters-Patent Appeal makes both defendants 2 and 3 liable apparently on the finding that there was some secret arrangement between defendants 1 to 3. In view of the terms of the preliminary decree, the argument that the liability of the 2nd defendant to account has to be restricted in the manner suggested cannot be accepted. The Memorandum of Cross-Objections is dismissed with costs.