APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

1895. February 21, March 4.

PERUNDEVITAYAR AMMAL (PLAINTIFF)

v.

NAMMALVAR CHETTI AND ANOTHER (DEFENDANTS).*

Limitation Act—Act XV of 1877, sched. II, arts. 59, 60—Money deposited—Banker and customer—Money lent—Deposit—Cause of action—Demand.

A, at the suggestion of B, a shopkeeper, deposited with him certain sums of money on the terms that the money should be repaid with interest on demand. It appeared that B was in the habit of receiving deposits from his customers on such terms. A having died, his widow and administratrix sued more than three years after the date of the deposit to recover the amount deposited, the money having been demanded within three years of the date of the suit:

Held, that the suit was governed by Limitation Act, schedule II, article 60 and not by article 59 and accordingly was not barred by limitation.

CASE referred for the decision of the High Court by N. Subramanyam, Second Judge of the Madras Court of Small Causes, under Civil Procedure Code, section 617, and Presidency Small Cause Courts Act, section 69.

The case was stated as follows:—

"Plaintiff sues to recover from the defendants Rs. 1,978-2-7. The following facts are proved before me:—

One Gopalakrishnama Chetti now dead, the father of the plaintiff and defendants, was a shopkeeper carrying on business at Madras. In addition to the ordinary business of a shopkeeper, he used to receive from some of his customers sums of money which were repayable by him on demand with interest at different rates of interest agreed upon between him and them. One Rangayya Chetti, the husband of the plaintiff, who was a Government servant, was advised by the said Gopalakrishnama Chetti to deposit with the latter his savings on the usual terms, namely, that they should be repayable on demand with interest at 12 per cent. per annum; and accordingly he did deposit various sums of money from time to time which, together with interest at the above rate, amount to the sum now claimed in the suit. The said Rangayya Chetti is now

* Referred Case No. 38 of 1894.

dead and the plaintiff, his widow and legal representative, who has obtained letters of administration to his estate, brings the suit to recover the sum due in respect of the above-mentioned transactions.

The defendants, the sons of the late Gopalakrishnama Chetti, have become partners in the business carried on by their father and have succeeded to all the rights and liabilities of the said firm; and I find on the evidence that they are liable to pay the plaintiff the said sum of Rs. 1,978-2-7, if the suit brought by her is not barred by the Statute of Limitations. Whether the suit is barred or not depends upon the answer to the question whether the suit is governed by article 59 or 60 of the Limitation Act. If article 59 applies, then the suit is clearly barred, for all the deposits by Rangayya Chetti were made more than three years before the suit.

In *Ichha Dhanji* v. *Natha* (1) the Bombay High Court has held following the case of *Foley* v. *Hill*(2) that the relationship between the parties to transactions of the nature is that of borrower and lender, that such suits are governed by article 59 of the Limitation Act and that the cause of action in respect of each deposit arises on the day the deposit is made. On the other hand, the Calcutta High Court in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*(3) has held that suits of this nature are governed by article 60 of the Limitation Act, and therefore the cause of action does not arise until demand is made; and if the view held by the Calcutta High Court is the correct one plaintiff's suit is clearly within time, as I find on the evidence that the demand was made within three years before the date of suit. I am of opinion that the view taken by the Bombay High Court is the more correct one; but in view of the conflict of decisions and at the request of parties, I refer the following question for the opinion of the High Court:—Whether the suit is governed by article 59 or 60 of the Limitation Act and subject to such opinion I reserve my judgment."

Krishnasami Chetti, *Sundaram Sastri* and *Kumarasami* for plaintiff.

Mr. *G. P. Johnstone* and *Venkataramayya Chetti* for defendants.

JUDGMENT.—This is a case referred by the Second Judge of the Court of Small Causes at Madras under section 617 of the Civil Procedure Code, and the question submitted for our decision is

(1) I.L.R., 13 Bom., 338. (2) 2 H.L.C., 28. (3) I.L.R., 16 Calc., 25.

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whether the suit is governed by article 59 of schedule II of the Limitation Act or by article 60.

So far as we have been able to gather the facts of the case from the statement of the Judge they seem to be as follows. The father of the defendants carried on business as a shopkeeper and banker, and the plaintiff's husband deposited with him certain sums of money on the distinct understanding that they were to be repaid with interest on demand. The circumstances that the depositor was a near relative of the banker and the moneys in question (which were the depositor's savings) were handed over to the banker under the advice or at the suggestion of the banker himself, seem to be mentioned by the Judge in the statement of facts if we understand him rightly, for the purpose of showing that there was something in the nature of confidence reposed by the depositor in the banker, and that the transaction was not a simple loan, but a deposit made under special circumstances.

If article 59 applies, the suit is barred, the transaction having taken place more than three years before the date of the plaint. But if the case is governed by article 60, the suit is in time, the suit having been instituted within three years from the date of the demand.

For the defendant, it is urged, that the money in question is 'money lent' within the meaning of article 59, and *Ichha Dhanji* v. *Natha* (1) is relied on as supporting this contention. For the plaintiff it is argued that regard being had to all the circumstances of the case, the transaction should be held to be a 'deposit' falling under article 60 as laid down in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (2).

We agree with the latter contention. Article 59 should be limited to cases of simple loans not falling within the class of transactions specifically provided for by article 60. There can be no doubt that an essential distinction exists between loans pure and simple to be paid back on demand and deposits with a banker similarly repayable.

This distinction is noticed and recognised in *Tidd* v. *Overell*(3) —where North, J., cites a passage from Pothier in support of his opinion, and adds that that passage equally expresses the law of England on the point under consideration. The statement of the

(1) I.L.R., 13 Bom., 338. (2) I.L.R., 16 Calc., 25. (3) 1893, 3 Ch., 154.

law by Pothier runs thus:—"where a man deposits money in the "hands of another, to be kept for his use, the possession of the "custodee ought to be deemed the possession of the owner, until "an application and refusal, or other denial of the right; for, "until then, there is nothing adverse, and I conceive that, upon "principle, no action should be allowed in these cases without a "previous demand; consequently, that no limitation should be "computed further back than such demand." This is also in substance the view taken by Wilson and O'Kinealy, JJ., in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*(1). The case referred to above, however, seems to be in conflict with the decision of Sargent, C.J., and Nanabhai Haridas, J., in *Ichha Dhanji* v. *Natha*(2) decided the year before, but which does not appear to have been brought to the notice of Wilson and O'Kinealy, JJ.

The ruling in the Bombay case seems almost to imply that money deposited with a banker under an agreement that it shall be payable on demand is in point of law to be treated as money lent and not as deposited. But doubt was thrown upon a very similar proposition in *Pott* v. *Clegg*(3) by Pollock, C.B., who, referring to the facts there, observed:—"I must certainly, with "considerable doubt and diffidence, confess the hesitation of my "own opinion, whether there is not a special contract between "the banker and his customer as to the money deposited, which "distinguishes it from the ordinary case of a loan for money. It "seems to me that is a question for the Jury, who ought to decide "what is the liability of the banker, and whether the money "deposited with him is money lent or not; I could not concur "in the judgment of the rest of the Court without expressing "this doubt, in which, however, they do not partake, as they are "of opinion that money in the hands of a banker is merely "money lent with the superadded obligation that it is to be paid "when called for by the draft of the customer." We venture to think that there is nothing in the relation between a banker and his customer to preclude full effect being given to the intention of the parties in such transactions. Of course, the mere use of the term 'deposit' cannot alter the substance of the transaction should that be otherwise proved to be different. But whether a particular

(1) I.L.R., 16 Calc., 25. (2) I.L.R., 13 Bom., 338.
(3) 16 M. & W., 321.

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transaction is a 'loan' or a deposit is clearly a question of fact to be decided upon the evidence in each case and if *Ichha Dhanji* v. *Natha*(1) be intended to lay down a different rule, we with all deference to the learned Judges who decided that case, are unable to agree with that decision. The view taken in the Calcutta case seems to us to be more reasonable, and we accordingly hold that this case is governed by article 60.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

1895. April 3.

QUEEN-EMPRESS

v.

BASAPPA.*

Criminal Procedure Code—Act X of 1882, ss. 16,350—Bench of Magistrates—Change in constitution of the Court during a trial.

A trial under the Town Nuisances Act of 1889 was begun before a bench of Magistrates and adjourned. On the adjourned date the bench was constituted differently, only one magistrate being present of those who attended on the first occasion; but the trial was proceeded with and resulted in a conviction:

Held, that the conviction was illegal and should be set aside.

PETITION under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the proceedings of C. Ramasesha Ayyar, Deputy Magistrate of Bellary, in criminal appeal No. 83 of 1894, affirming a conviction by the Bench Magistrates of Bellary Town.

The facts of the case are stated above sufficiently for the purposes of this report.

Subramania Ayyar for petitioner.

The Government Pleader and the Public Prosecutor (Mr. *E. B. Powell*) in support of the conviction.

JUDGMENT.—Following the decision of the Calcutta High Court in *Hardwar Sing* v. *Kheya Ojha*(2), with which we entirely agree, we set aside the conviction and sentence and direct that the fine, if paid, be refunded and the case retried.

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(1) I.L.R., 13 Bom., 338.

* Criminal Revision Case No. 30 of 1895.

(2) I.L.R., 20 Calc., 870.