

Munshi Govind Prasad, for the respondent, was not called upon.

KNOX, A. C. J. and RICHARDS, J.:—We agree with the view taken by our learned brother in this case. The matter now raised has been decided more than once by this Court in the same way and we are not disposed to take any other view, which might well open a door to fraud. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Alston.

CHITTAR MAL AND ANOTHER (PLAINTIFFS) v. BIHARI LAL AND OTHERS
(DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 85—

“Current mutual account”—Limitation.

Held that a “mutual” account within the meaning of article 85 of the second schedule to the Indian Limitation Act, 1877, is an account of dealings between two parties which are such as to create independent obligations in favour of one party against the other. *Ganesh v. Gyanu* (1) and *Ram Pershad v. Harbars Singh* (2) followed. *Bhawan Singh v. Tika Ram* (3) referred to.

THIS was a suit for the recovery of a sum of Rs. 1,235-15-6 as the balance of an account subsisting between the parties. The plaintiffs alleged that an account of dealings between them and the defendants was opened on Maghsar Sudi 9th, Sambat 1956, corresponding to the 11th December 1899, and that on the 13th of August 1904, the account was stated between the parties and a balance of Rs. 2,394-9-3 was struck in favour of the plaintiffs; that subsequently the plaintiffs realised Rs. 1,479-10-6 on account of the price of wheat sold by them for the defendants, and the defendants were debited with Rs. 312-14-0 on account of interest and other charges, the amount claimed being the balance. The defendants asserted that they had no dealings with the plaintiffs and denied that any account was stated or that any sum was due by them. The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal

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* Second Appeal No. 616 of 1908 from a decree of Khetra Mohan Ghose, Second Additional Judge of Aligarh, dated the 30th of March 1908, confirming a decree of Ram Chandra Chaudhri, Munsif of Hathras, dated the 12th of December 1906.

(1) (1897) I. L. R., 22 Bom., 606. (2) (1907) 6 C. L. J., 158.
(3) Weekly Notes, 1896, p. 186.

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by the plaintiffs the lower appellate court found that the defendants had dealings with the plaintiffs, but that they did not acknowledge their liability by stating accounts in August 1904, as alleged by the plaintiffs. That court accordingly affirmed the decree of the first court upon the ground that the claim was time-barred. The plaintiffs appealed to the High Court.

Mr. G. W. Dillon and Munshi Jang Bahadur Lal, for the appellants.

Babu Durga Charan Banerji and Munshi Gokul Prasad, for the respondents.

BANERJI and ALSTON, JJ.—The suit out of which this appeal has arisen was brought by the plaintiffs appellants to recover from the defendants respondents Rs. 1,235-15-6 as the balance of an account existing between the parties. The allegations of the plaintiffs are that an account of dealings between them and the defendants was opened on Maghsar Sudi 9th, Sambat 1956, corresponding to the 11th of December, 1899; that on the 13th of August, 1904, the account was stated by the parties and a balance of Rs. 2,394-9-3 was struck in favour of the plaintiffs; that subsequently the plaintiffs realised Rs. 1,479-10-6 on account of the price of wheat sold by them for the defendants and the defendants were debited with the sum of Rs. 312-14-0 on account of interest and other charges and that the amount claimed was due by them. The defendants asserted that they had no dealings with the plaintiffs and denied that any account was stated or that any sum was due by them. The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal by the plaintiffs the lower appellate court found that the defendants had dealings with the plaintiffs, but that they did not acknowledge their liability by stating accounts in August, 1904, as alleged by the plaintiffs. It accordingly affirmed the decree of the court of first instance on the ground that the claim was time-barred. The plaintiffs have preferred this appeal, and it is contended on their behalf that having regard to the nature of the dealings between the parties and of the accounts, the suit ought to have been treated as one for the balance due on a mutual open and current account where there had been reciprocal demands between the parties, and that under article 85,

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schedule II of Act No. XV of 1877, the claim was not time-barred. If what is contended for on behalf of the plaintiffs is correct, the account between the parties would be a mutual, open and current account. Upon the findings of the court below that no account was stated by the parties and no balance was struck, the account remained open, and if dealings continued between them it was a current account. We have then only to consider, whether it was a mutual account. It was held in *Ganesh v. Gyanu* (1), that "the dealings to be mutual must be transactions on each side creating independent obligations on the other, and not merely creating obligations on one side, the other being merely discharges of these obligations. The test of a shifting balance, sometimes in favour of one party and sometimes in favour of the other, though valuable as an index of the nature of the dealings, is not by itself always decisive." The same view was held by the Calcutta High Court in *Ram Prasad v. Harbans Singh* (2). In *Bhawan Singh v. Tika Ram* (3) this court held that article 85 of schedule II of Act No. XV of 1877 applies to a case where the course of business has been of such a nature as to give rise to reciprocal demands between the parties. If, therefore, in this case the dealings between the parties were such as to create independent obligations in favour of one party against the other, the account between them was a mutual account, and in that case limitation would run, under article 85, from the close of the year in which the last item admitted or proved was entered in the account. It is true that in the plaint the plaintiffs put forward the case of an account stated; but having regard to the allegation in the plaint that there was an account between the parties and to the further fact that the account produced by the plaintiffs might be considered to be an open, current and mutual account, the court ought to have determined whether the account was of that description and whether there was a balance due to the plaintiffs from the defendants. This was not done by the lower appellate court, although it found that there were dealings between the parties. We think that the case should go back to the court of first instance for the purpose

(1) (1897) I. L. R., 22 Bom., 606. (2) (1907) 6 C. L. J., 158.

(3) Weekly Notes, 1896, p. 166.

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of determining whether there was a mutual, open and current account between the parties of the nature pointed out above; whether the claim for the balance of such an account was or was not time-barred under article 85 of the second schedule to Act No. XV of 1877, and whether any and what balance was due to the plaintiffs. We accordingly allow the appeal, discharge the decrees of the courts below and remand the case to the court of first instance under order 41, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it on the merits, having regard to the observations made above. The parties respectively will abide their own costs of this appeal. As to other costs hitherto incurred, the Court in finally deciding the suit will pass proper orders.

Appeal allowed : Cause remanded.

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Before Mr. Justice Banerji and Mr. Justice Alston.

HARBANS TIWARI (PLAINTIFF) v. TOTA SAHU AND OTHERS (DEFENDANTS).
 Civil Procedure Code (1882), sections 44, 45—*Misjoinder—Pre-emption—Two sales to same vendee—Suit in respect of both sales—Joinder of vendors as defendants.*

Of the four owners of undivided shares in immovable property three sold their interest in the property, and the fourth sold his interest separately at a later date to the same vendee. A pre-emptor sued for pre-emption on the basis of both these transactions, impleading as defendants the vendors and a rival pre-emptor as well as the vendee. *Held* that the suit was not bad for misjoinder of either causes of action or parties. *Bhagwati Prasad Gir v. Bindeshri Gir* (1) dissented from. *Kalian Singh v. Gur Dyal* (2) referred to. *Held* also that the vendor is not a necessary party to a suit for pre-emption. *Hira Lal v. Ram Jas* (3), *Lok Singh v. Balwan Singh* (4) and *Ram Sarup v. Sital Prasad* (5) referred to.

THE facts of the case were briefly as follows :—

Four persons were owners of a certain property. They executed a sale-deed thereof, which, however, was registered on behalf of only three of them, as doubts arose whether the fourth,

* Second Appeal No. 663 of 1903, from a decree of E. H. Ashworth, District Judge of Gorakhpur, dated the 11th of April 1903, confirming a decree of Bhawani Chandra Ghakarvarty, Subordinate Judge of Gorakhpur, dated the 28th of September, 1907.

(1) (1883) I. L. R., 6 All., 106.

(3) (1883) I. L. R., 6 All., 57.

(2) (1881) I. L. R., 4 All., 163.

(4) Weekly Notes, 1903, p. 239.

(5) (1904) I. L. R., 26 All., 549.