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in which the testator signed his will while lying in his bed. There were two attesting witnesses, one of whom the testator could see and could be seen by him, and the other witness was so placed behind a curtain that neither could he see, nor could be seen by, the testator; it was held, however, that both witnesses were sufficiently in the presence of the testator to make their attestation valid. That we think is a very fair case to follow in the case of a *purda nashin* lady. It is unquestionable that had the fold of the door been removed the testatrix in this case would have been able to see the witnesses who signed and attested her will. It also appears to our mind that the testatrix could have seen them by putting her head forward.

That being so, we think probate of the will should be granted.

We accordingly set aside the decree of the lower Court and decree the appeal. But under the circumstances we do not think we ought to make the respondent pay the costs, for upon the evidence before the District Judge he was right in refusing probate

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice O'Kinealy

ISHUR CHUNDER BHADURI (PLAINTIFF) *v.* JIBUN KUMARI BIBI (DEFENDANT).*

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Limitation Act, 1877, *Arts.* 59 *and* 60—*Money deposited—Banker and Customer—Money lent—"Deposit"—"Trust"—Cause of action—Demand.*

The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that s. 60 and not s. 59 of the Limitation Act was applicable to the case; the cause of action therefore arose at the date of the demand and the suit was not barred.

* Appeal from Appellate Decree No. 1933 of 1887, against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 29th of June 1887, reversing the decree of Baboo Bulloram Mullick, Subordinate Judge of that district, dated the 29th of December 1886

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The *dictum* of WHITE, J., in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1), that "the word 'deposit' in the Limitation Act as distinct from 'loan' points to cases where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from.

IN this case the plaintiff in his plaint stated that there was a money-lending business carried on in the names of the defendant's husband Meher Chand and her son Golap Chand Nowlakha at Bander Nil, Serajgunj; that his brother, the late Brojo Sunder Bhaduri, used "to deposit money from a long time in the *tahabil* of the said business," in the name of his eldest brother, the late Ram Sunder Bhaduri, and in his own name, and he used to draw interest, &c., on the same; that after the death of the said Brojo Sunder Bhaduri in 1282 (1875) the plaintiff used to deposit money with the defendant's firm, and received up to the month of Bysakh 1290 (April 1883) interest, &c., from the same through his brother Grish Chunder Bhaduri; that the amount of interest on the money deposited was at the rate of eight annas per cent. per mensem, and that the sum of Rs. 3,866-4-7½ was due to him on account of principal and interest; that a hundi was drawn on the 22nd Srabun 1292 (6th August 1885) on the defendant's firm at Calcutta, but that it was dishonored, and that subsequently in Bhadro 1292 (August 16th—September 16th 1885) Grish Chunder Bhaduri went to the defendant's place of business in Calcutta, and demanded the money, which, however, was not paid. The plaintiff consequently on 8th March 1886 instituted this suit for the amount claimed, stating that his cause of action arose in Bhadro 1292, when the demand was made.

The only defence material to this report was that the suit was barred by limitation, the defendant not admitting the statements in the plaint "as to the time when and circumstances under which the cause of action arose."

The Subordinate Judge, as to the facts of the case, said in his judgment:—

"It is admitted that defendant owned and carried on banking business at Serajgunj under the name of Meher Chand and Golap Chand. The firm used to receive deposits of money from various parties, and paid interest thereon

(1) 6 C. L. R., 470.

at stipulated rates. In respect of petty deposits no interest was paid. It appears that the firm closed business about the end of 1288 B. S. (March—April 1882), when the manager left Serajgunj and a subordinate officer was left in charge for purposes of a winding up. There is no dispute that one Brojo Sunder Bhaduri deposited in the firm divers sums of money in the name of Ram Sunder Bhaduri and Brojo Sunder Bhaduri. The date of the first deposit is not known, but it is manifest from the proceedings that the amounts deposited carried interest, that divers sums were withdrawn, and an account was struck at each year's end. An abstract of the account was furnished to the depositors under the hand of the defendant's servant. In 1282 B. S. Brojo Sunder died, but the account was continued by his brother Grish Chunder, who followed the footsteps of his deceased brother till the collapse of the firm. It is alleged in the plaint that the business carried on with defendant's firm partook of the nature of a trust, that the rate of interest stipulated for was 8 annas per cent. per month, and that it lasted until Bysakh 1290 B. S., when interest was paid for the last time. It is alleged that on the 22nd Srabun 1292 defendant dishonored a hundi for Rs. 2,000 drawn upon her; and a demand for the withdrawal of the whole of the deposit, including interest, made in Bhadro following not having been complied with, the present suit has been brought for its recovery. Certain damages are also claimed as having been sustained in consequence of the dishonor of the hundi and non-compliance with the demand. The present suit has been brought by the plaintiff as executor to the estate of Brojo Sunder Bhaduri, deceased. Defendant, in her written statement, has little to say against the claim of the plaintiff on the merits, and her vakeel has distinctly given me to understand that in regard to the merits it is not her intention to raise a contest."

On the question of limitation the Subordinate Judge held that the case was governed by Art. 60 of Sch. II of the Limitation Act of 1877; that the period of limitation ran from the date of the demand; and that, the demand having been made within three years before the institution of the suit, the suit was in time. He accordingly gave the plaintiff a decree for the amount due.

The Judge on appeal held that the suit was one for money lent, and was governed by Art. 59, Sch. II of the Limitation Act, under which limitation began to run from the time when the loan was made. He, therefore, held that the suit was barred, and reversing the decision of the Subordinate Judge dismissed the suit.

From this decision the plaintiff appealed.

Baboo *Jadub Chunder Seal* for the appellant.

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Baboo *Mohesh Chunder Chowdhry*, Dr. *Rash Behari Ghose* and Baboo *Sharoda Churn Mitter*, for the respondent.

The following cases were referred to:—

Hingun Lall v. *Debee Pershad* (1); *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (2); *Tarini Prasad Ghose* v. *Ram Krishna Banerjee* (3); *Brammayi Dasi* v. *Abhai Churn Chowdhry* (4) *Nasir bin Abdul Habib Fazal* v. *Dayabhai Itchachand* (5) and *Jaffree Begum* v. *Mahomed Zahoor Ahsun Khan* (6).

The judgment of the Court (WILSON and O'KINEALY, JJ was as follows:—

This is a suit against a banker, or his representative by the representative of an alleged customer of the bank, to recover money deposited with interest.

(After stating the facts as above, and noticing other grounds on which the lower Appellate Court had reversed the decision of the first Court, the judgment continued.)

The remaining ground on which the decree of the first Court was reversed, the ground of limitation, gives rise to more difficulty. The question is whether the case is governed by Art. 59 or Art. 60 of Sch. II of the Limitation Act. Art. 59, dealing with "money lent under an agreement that it shall be payable on demand," prescribes a period of three years from the time "when the loan is made." Art. 60 dealing with "money deposited under an agreement that it shall be payable on demand," prescribes three years from the time "when the demand is made." If the former of these articles governs the case as held by the lower Appellate Court, the suit is barred. If the latter governs, as held by the first Court, the suit is in time.

There can be little doubt probably that the money of a customer in the hands of his banker is money lent. And that Art. (59) might apply to the case if Art. 60 were not present. Probably too on the same supposition such money would often be money received to the use of the customer within the meaning of Art. 62. But the question is not whether such a case is

(1) 24 W. R., 42.
(2) 6 C. L. R., 470.
(3) 6 B. L. R., 160.
(4) 7 B. L. R., 489.
(5) 10 Bom., 300.
(6) 2 N. W., 409.

covered by the words of Art. 59 or any other article, but whether Art. 60 applies to it; for if it does, the more specific provision must prevail.

Assuming money paid to a man's credit with his banker to be money lent to the latter, the loan is at least of a very special kind, having many peculiarities, which have often been pointed out. And the question is whether such a transaction is a deposit within the meaning of Art. 60. That in ordinary and popular language it is so there can, we think, be no doubt. Take up a newspaper, and look at the returns of any bank which publishes the details of its position, and you will always find public and private deposits used in the sense of balances. Indeed "deposit" seems to us the word which any one not a lawyer would be more likely to use than any other to express money in a bank.

In the schedule in question the term "deposit" or its correlatives are used in the article now in question, and in Arts. 133 and 145. In the latter two instances, which have to do with moveable property, it is clear from the context that the deposit meant is a deposit of goods to be returned in specie, and that is in accordance with the old use of "deposition," with which all lawyers are familiar. In Art. 60, dealing with money, it is equally clear that a return in specie is not contemplated. It is so first, because it would be contrary to the ordinary usage of the language to hold such a thing; deposits of money are made, for instance, under many Acts of the Legislature with public officers and others, and no one ever heard of the idea of the return of the identical coins deposited. It is clear, secondly, because the word "payable" excludes such an idea.

So far as the Act itself is concerned then, we have, in order to give a meaning to Art 60, to find a case in which one man places his money in the hands of another, on the terms that an equivalent sum is to be paid back on demand, and a case to which, according to the ordinary usage of the language, the term "deposit" is applicable. And we think the case of the banker and his customer is exactly such a case.

Turning to the authorities, the decisions upon the earlier Limitation Acts do not seem to afford any assistance. There in them no provision like that in Art. 60. The only

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provisions as to deposits corresponded rather to Art. 145 and clearly contemplated the return of goods in specie.

The meaning of Art. 60 in the schedule to the present Act has been considered in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1). That case came on second appeal before White and Maclean, JJ. The facts are thus stated in the judgment of White, J.: "It has been found by the lower Appellate Court that in 1861 the plaintiff deposited Rs. 1,000 with the defendant's father, who was to pay upon it interest, which was originally fixed at 15 per cent., but was subsequently reduced to 12 per cent., and that up to the close of the year 1282, corresponding with 1876, the plaintiff regularly received her interest. The agreement made at the time of the deposit was, that the money be repayable on demand." That learned Judge then says that "the lower Appellate Court considers that the transaction was a deposit, and that as the demand was alleged to have been only recently made, the plaintiff is not barred." He dissents from the view that the transaction was a deposit; but he held that, viewing the case as one of loan, the same result followed, for interest had been paid within three years. In giving his reasons for not regarding the case as one of deposit under Art. 60 the learned Judge said: "In my opinion the transaction, though called a deposit, was in point of law a loan upon which interest was to run." We quite concur in thinking that the mere use of the term "deposit" cannot alter the substance of the transaction. And in that case, so far as appears from the report, the borrower was not a banker or a person carrying on any business analogous to banking; nor did the lender keep with him anything similar to a banking account. But the learned Judge added: "I think that the word 'deposit' in the Limitation Act, as distinct from 'loan,' points to cases where money is lodged with another under an express trust, or under circumstances from which a trust may be implied." Maclean, J., is only reported to have said: "I concur in dismissing the appeal." There is nothing to show whether he concurred in the view just cited as expressed by White, J., and that view was obviously not necessary to the decision of the case. We are unable

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to concur in the view there expressed by White, J. Had it amounted to a decision of the Bench, we should have thought it necessary to refer the present case to a Full Bench, but as it does not do so, we are bound to act on our own view of the law.

For several reasons we think "deposit" cannot have been used to mean "trust." In the first place, so to hold appears to be giving a wholly new meaning to the word, for which there is no sanction in popular usage or in the ordinary terminology of the law, or in the context in which the word occurs. In the second place, the case of trust is elsewhere provided for in the Limitation Act. Thirdly, to apply Art. 60 to express trusts might lead to great confusion, and might curtail very seriously the beneficial effects of s. 10 of the Act.

We think, therefore, that the suit is not barred by limitation, and that the decree of the lower Appellate Court must be set aside and that of the Subordinate Judge affirmed with costs in all the Courts.

J. V. W. *Appeal allowed.*

Before Mr. Justice Pigot and Mr. Justice Gordon.

IN THE MATTER OF THE APPLICATION OF PORESH NATH CHATTERJEE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF 24-PERGUNNAHS) AND OTHERS.*

1888 *August* 3.

Appeal—Additional Judge—District Judge—Land Acquisition Act (X of 1870), s. 39—Civil Procedure Code (Act XIV of 1882), s. 647.

An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of s. 39 of the Act. Under s. 647 of the Civil Procedure Code an appeal from the decision of an Additional Judge so appointed lies to the High Court.

THIS was an appeal to the High Court from the order of the Additional Judge of the 24-Pergunnahs, hearing cases under the Land Acquisition Act, 1870, dated the 6th March 1888, refusing to set aside his order of the 1st March made *ex parte*.

Baboo *Horendra Nath Mukerji* for the appellant.

* Appeal from Order No. 209 of 1888, against the order of R. F. Rampini, Esq., Additional Judge of 24-Pergunnahs, dated the 6th of March 1888.