APPELLATE CIVIL.

Before James and Rowland, JJ.

BALABUX MARWARI

v.

INDER KUMAR TEWARI.*

1936.

August, 3, 4.

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 11, *Artices* 57, 59 *and* 60—"*deposit*", *meaning of—suit on* hathchitha *account of the nature of a current account between customer and banker—proper article applicable.*

The plaintiff, the heir of one *S* brought a suit on a *hathchitha* account against the defendant and maintained that the suit was governed by Article 60 as the transaction between the parties was of the nature of a current account between a customer and his banker.

In second appeal it was contended that the expressions used in the *hathchitha* were *dena nikla* and *dena raha* (debt owing and found owing) and therefore the entries could not refer specifically to deposit for which the usual Hindi word is *amanat*.

Held, on a construction of the *hathchitha* that the course of business evidenced was of the nature of a current account between a customer and his banker and therefore Article 60 applied to the case.

In the absence of a legal definition the word "deposited" in Article 60 must be taken to have been used in the popular sense of the word "deposit" rather than the technical sense in which the word is used for certain legal purposes.

Gobind Chintaman Bhat v. *Kachubhai Gulabchand*(1) and *Ichhadhanji* v. *Natha*(2) and *Dharam Das* v. *Ganga Devi*(3), dissented from.

Perundevitayar Ammal v. *Nammalvar Chetti*(4), *Subrahmanian Chettiar* v. *Kadiresan Chettiar*(5) and *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi*(6), followed.

* Appeal from Appellate Decree no. 815 of 1933, from a decision of Babu Kshetra Nath Singh, Special Subordinate Judge of Ranchi, dated the 6th of March, 1933, confirming a decision of Babu Nirmal Chandra Ghosh, Munsif of Ranchi, dated the 3rd of February, 1932.

(1) (1923) 73 Ind. Cas. 978.
(2) (1888) I. L. R. 13 Bom. 338.
(3) (1907) I. L. R. 29 All. 773.
(4) (1895) I. L. R. 18 Mad. 390.
(5) (1916) I. L. R. 39 Mad. 1081.
(6) (1888) I. L. R. 16 Cal. 25.

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Appeal by defendant no. 2.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Khurshed Husnain and *N. N. Sen*, for the appellant.

Rai G. S. Prasad and *Rai Paras Nath*, for the respondents.

ROWLAND, J.—The appellant before us was defendant no. 2 in the original suit. The claim was for balance due to the plaintiffs on a *hathchitha* account in respect of money deposited with defendants nos. 1 and 2 as bankers in an account opened in the name of Sheogobind Tewari, husband of plaintiff no. 3 and father of plaintiff no. 1 and grandfather of plaintiff no. 2. The plaintiffs impleaded not only these two defendants who had been partners in the firm, but also the receiver of the estate of Lachmi Narayan; but as against the receiver the suit was dismissed. The Munsif decreed the suit against defendants nos. 1 and 2 and this decision was upheld by the Subordinate Judge on appeal.

In this second appeal which is presented by defendant no. 2, Balabux Marwari, two points are taken. The first is that the claim against Balabux is barred by limitation. The other point is that the plaintiffs are debarred from getting a decree in the suit without having first taken a succession certificate authorizing them to realise debts due to the late Sheogobind Tewari. The courts below have treated the transactions between the parties as being of the nature of a current account between a customer and his banker, the money standing to the credit of the customer being repayable on demand and have counted the period of limitation under Article 60 of the Limitation Act from the date when the demand is made. It is contended for the appellant that limitation should have been calculated under Article 59 or Article 57 from the time when the loan was made, subject to any

extension of time to which the plaintiffs might be entitled having regard to sections 19—21 of the Act.

Mr. Khurshed Husnain for the appellant invited our attention to the expressions used in some of the entries in the *hathchitha* which are substantially acknowledgments of receipts of money and acknowledgments of the amount standing at the time of the entries to the credit of Sheogobind Tewari. He points out that the entries do not refer specifically to deposit for which the usual Hindi word is '*amanat*' and contains expressions '*dena nikla*' and '*dena raha*', which he says should be translated as 'debt owing' and 'found owing'. Mr. Khurshed Husnain relies on *Gobind Chintaman Bhat* v. *Kachubhai Gulabchand*(1) for the proposition that when one person hands over money to another on the understanding that it is not a gift, but has to be repaid when demanded, that would be a transaction ordinarily of the nature of a loan and the onus lies on the person claiming repayment to prove the existence of circumstances which turned the loan into a deposit. When, therefore, the money had been left in the hands of a trader who was not a banker, the Bombay High Court found difficulty in accepting the contention that it should be treated as money deposited for the purposes of Article 60. This view seems to be consonant with earlier decisions of the Bombay High Court, but a different view has been taken elsewhere. In *Ishur Chander Bhaduri* v. *Jibun Kumari Bibi*(2) the question was considered with reference to Article 60 of the Limitation Act of 1877. It was observed that probably the money of a customer in the hands of his banker is money lent; and that if Article 60 were not present the matter might fall within one of the other Articles. But it is also pointed out that assuming it to be money lent, the loan is of a special kind. For the purposes of Article 60 the learned Judges observed that in ordinary and popular language the money

(1) (1923) 73 Ind. Cas. 978.
(2) (1888) I. L. R. 16 Cal. 25.

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of a customer standing to his credit in the accounts of a banker is money deposited, although for certain other purposes the term 'deposit' is limited to goods which are placed in the custody of a person with a view to their being returned in specie. "In Article 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". Therefore as the learned Judges pointed out, "to give any meaning at all to Article 60 we have to look for a case in which one man places his money in the hands of another on the terms that an equivalent sum has 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 they said: "we think the case of the banker and his customer is exactly such a case".

Article 60 had been construed in the opposite sense by a Division Bench of the Bombay High Court in *Ichhadhanji* v. *Natha*(1), Sargent, C.J. acceding to the argument that in the case of a deposit in its technical sense there must be an express trust, and holding that Article 60 could not apply to any transaction which the law regarded as a loan. This decision and the Calcutta decision to which I have referred were considered by the Madras High Court in *Perundevitayar Ammal* v. *Nammalvar Chetti*(2) and the Calcutta view was accepted as being the better law. In *Dharam Das* v. *Ganga Devi*(3) the above decisions were considered and following the Bombay authority it was held that a suit to recover money deposited with a banker on a current account was governed by Article 59 and not Article 60. Those are

(1) (1888) I. L. R. 13 Bom. 338.
(2) (1895) I. L. R. 18 Mad. 390.
(3) (1907) I. L. R. 29 All. 773.

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the decisions under the Limitation Act of 1877, the last being decided in the year 1907. In the very next year Article 60 was amended in a sense which makes it clear that the Legislature intended the Calcutta and Madras view to be the law. That concludes the matter so far as the relations between a banker and his customer are concerned. In *Subrahmanian Chettiar* v. *Kadiresan Chettiar*(1) the same principle was held to be applicable to money left in the hands of a trader who is not a banker. Such money, it was held, will be money deposited provided the circumstances are such as would make it money of a customer if the depositee is a banker. The decisions in *Ichhadhanji* v. *Natha*(2) and *Dharam Das* v. *Ganga Devi*(3) were considered but were not followed. Those in *Ishur Chander Bhaduri* v. *Jibun Kumari Bibi*(4) and *Perundevitayar Ammal* v. *Nammalvar Chetti*(5) were approved and with great respect I would say that the view taken is the correct view. As was stated in one of the Bombay decisions, the exact point which imposes on dealings between a creditor and debtor the characteristics of a deposit of money for the purposes of Article 60 has never been precisely set forth by the Legislature. I feel sure it is not the same characteristic which is necessary to constitute a deposit for certain other purposes such as a trust which would create priority over other debts in case of insolvency or liquidation. In the absence of a legal definition I think we may say, following the Calcutta and Madras High Courts, that regard will be had to the popular meaning attached to the expression "deposited" rather than to the technical meaning which the word 'deposit' has for certain legal purposes; that is to say, we ought to see whether what happened between the parties was of the nature of that sort of current account which a customer keeps with his banker. The Court of first instance in this connection pointed out that the sums deposited though substantial were not sums which the defendants

(1) (1916) I. L. R. 39 Mad. 1081.
(2) (1888) I. L. R. 13 Bom. 338.
(3) (1907) I. L. R. 29 All. 773.
(4) (1888) I. L. R. 16 Cal. 25.
(5) (1895) I. L. R. 18 Mad. 390.

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firm would have been likely to want to borrow as a convenience for themselves, they being traders in a large way of business. One may add that the withdrawals shown in the account do not appear to resemble payments on account by a distressed debtor unable to pay more. They are clearly amounts drawn by the creditor at his own wish, the debtor being apparently ready to pay any sums which the creditor wished to draw at a moment's notice. The use of any specific form of words in the *hathchitha* to state in express terms that the money was money deposited is not necessary if the course of business between the parties establishes that in fact it was so. I am of opinion that the course of business has been correctly understood by the courts below and was of the nature of a current account between a customer and his banker. The first objection of the appellant on the ground of limitation, therefore, fails as on the view that Article 60 is applicable, limitation did not begin to run until a date in May, 1928, and the suit was instituted within three years of that date.

It was, however, faintly suggested by Mr. Khurshed Husnain that if the money is payable on demand, the suit is premature as against his client, as the plaintiff had not proved that he had made a demand from defendant no. 2, Bala Bux. The ordinary rule is, however, that on the plaintiff demanding payment from either of the partners his cause of action has arisen against them all. Mr. Khurshed Husnain desires to escape this conclusion by saying that the partnership between his client and Lachmi Narain was closed down in 1921. But this does not help him, for there is no evidence that the dissolution of partnership was notified to customers of the firm.

The other point taken was that the decree should not have been made in the absence of a succession certificate, having regard to the provisions of section 214 of the Indian Succession Act. This is a point not taken in the pleadings; it was raised in the appellate

court below. The point taken in the pleadings was that the suit was bad for defect of parties, because some brothers of Sheogobind Tewari had not been joined as plaintiffs. One of these brothers was examined as a witness for the plaintiff and deposed that Sheogobind dealt with his own earnings. Out of them he opened this deposit account with which his brothers had nothing to do. It is said that if this is so, the deposit money must be regarded as self-acquired property of Sheogobind and must have passed to his heirs by succession and not by survivorship. One difficulty in giving effect to this contention is that it was not raised in the pleadings, so that the plaintiff did not get a full opportunity of answering it. Then again the account is a running account on which the plaintiffs have drawn from time to time without objection on the part of the bankers; and it also appears on the face of the *hathchitha* book that deposits have been made from time to time on behalf of the plaintiffs since the death of Sheogobind Tewari which took place as far back as 1913. To give effect to the contention raised by the appellant it would be necessary for us to go into questions of fact as to whether the withdrawals made by the plaintiffs after the death of Sheogobind were not sufficient to account for the whole of the old deposits made by Sheogobind and to extinguish that part of the debt, leaving at present recoverable, debt not exceeding what had been deposited by the plaintiffs after the death of Sheogobind with interest thereon. It appears on the face of the pleadings and the *hathchitha* that about thirteen hundred rupees principal was deposited after the death of Sheogobind and this amount with interest thereon is more than enough to come to the total of the present claim which was laid at about eighteen hundred rupees. In the plaint, it is true, of this, Rs. 1,500 is described as principal and Rs. 303 as interest; but I do not think that for such a small discrepancy we should in second appeal be justified in remanding the case for a precise finding as to how much of principal and interest respectively

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should on proper accounting be ascribed to the deposits made by the plaintiffs themselves and how much to the deposits of Sheogobind that may be still outstanding.

In the result I would dismiss the appeal with costs.

ROWLAND, J. JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before James and Rowland, JJ.

1936.

August, 12.

MUSAMMAT BALKESIA

v.

MAHANT BHAGWAN GIR.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 9, *Order IX, rule* 4—*whether dismissal of an application under Order IX, rule* 4, *bars a fresh suit on the same cause of action.*

Order IX, rule 4, provides that the plaintiff may bring a suit or he may apply for setting aside the dismissal. If he satisfies the court and obtains an order setting aside the dismissal he proceeds with his original suit. If his application is dismissed he is left to his alternative remedy which is that he may, subject to the law of limitation, bring a fresh suit.

Bhudeo v. *Baikunthi*(1), *Tulshi Singh* v. *Sheosaran Rai*(2) and *Govind Prasad* v. *Har Kishan*(3), followed.

Per Rowland, J.—

Section 9 of the Code declares that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

*Appeal from Appellate Decree no. 1186 of 1933, from a decision of Rai Bahadur Surendra Nath Mukharji, District Judge of Patna, dated the 19th August, 1933, reversing a decision of Babu Rabindra Nath Ghosh, Subordinate Judge of Patna, dated the 30th March, 1932.

(1) (1921) 63 Ind. Cas. 239.

(2) (1926) A. I. R. (All.) 678.

(3) (1928) I. L. R. 50 All. 837.