1937

DESRAJ CHANANLAL v. RAMJASRAN MADAN-CHAND.

MOSELY, J.

This application will be successful with costs, advocate's fee two gold mohurs.

CIVIL REVISION.

Before Mr. Justice Mosely.

1937

Mar. 6.

BENGAL BURMA TRADING CO. AND ANOTHER v. BURMA LOAN BANK, LTD. AND ANOTHER.*

Mutual open current account—Mutual dealings—Banking account—Deposit to credit of customer—Alternate credits and debits—Payments by customer to reduce debit—Limitation Act (IX of 1908), Sch. I, art. 85.

A mutual account means not merely where one of two parties has received money and paid it on account of the other, but where each of the two parties has received and paid on the other's account, *i.e.*, there is a mutual account where each of two parties has received and paid on account of the other, and what would be recoverable would be the balance of the two accounts.

Phillips v. *Phillips*, 9 Hare 471, referred to.

Transactions between banker and customer can be of the nature of a mutual open current account but that depends on the circumstances of each case. If an account starts with a deposit to the credit of the customer and then consists of a series of alternate credits and debits, and then for a period exceeding three years consists merely in the debit in favour of the bank being reduced by payments by the customer, the account then cannot be called a mutual one. Although the account started as a mutual one it continued on a different footing and changed its nature.

Dau Dayal v. *Piari Lal*, I.L.R. 50 All. 645 ; *Ebrahim* v. *Abdul Huq*, 8 L.B.R. 149 ; *Fyzabad Bank, Ltd.* v. *Ramdayal*, A.I.R. (1924) Pat. 107 ; *Govinda* v. *Ramasami*, 92 I.C. 106 ; *Hajee Syed Mahomed* v. *Ashrufoonissa*, I.L.R. 5 Cal. 759 ; *Hirada* v. *Gadigi*, 6 Mad. H.C. Rep. 142 ; *Joharmal Firm* v. *Hiralal*, I.L.R. 7 Pat. 238 ; *Khushalo* v. *Behari Lal*, I.L.R. 3 All. 523 ; *Maniram Seth* v. *Seth Rupchand*, I.L.R. 33 Cal. 1047 ; *Padwick* v. *Hurst*, 18 Beav. 575 ; *R.M.A.R.R.M. Chetty* v. *V.E.R.M.N. Chetty*, 11 L.B.R. 369 ; *Ram Pershad* v *Harbans Singh*, 6 Cal. L.J. 158 ; *Sewa Ram* v. *Mohan Singh*, (1886) P.R. No. 44 p. 83 ; *Tea Financing Syndicate* v. *Chandrakamal*, I.L.R. 58 Cal. 649, discussed.

Dangali for the applicants.

Chowdhury and *Ray* for the respondent.

* Civil Revision No. 300 of 1936 from the judgment of the Small Cause Court of Rangoon in C.R. Suit No. 1850 of 1935.

1937

BENGAL BURMA TRADING CO. v. BURMA LOAN BANK, LTD.

MOSELY, J.—The plaintiff-respondents, the Burma Loan Bank, Limited, (In Liquidation), obtained a decree in the Small Cause Court, Rangoon, against the Bengal Burma Trading Company and its two partners, P. C. Nandy and M. P. Mukerjee, for Rs. 247-2-3 and Rs. 125 interest at 2 per cent per mensem from 1933, in all for Rs. 372-2-3, the amount due on their banking account overdrawn. The account was closed in May 1933. The suit was filed in February 1935. The trial Court held that the suit was not barred by Article 85 of the First Schedule to the Limitation Act, as the account was mutual, open and current, and that is the main question in this application in revision.

The account it would seem was opened in April 1928, when for some time it was alternately in credit or overdrawn for small sums. From December 1928 it was always overdrawn and it was last overdrawn in June 1929, which is the date of the last business transaction shown in the accounts. Repayments, however, were made up to May 1933. The overdraft was secured by a promissory note for Rs. 375, Exhibit A, executed on the 19th November 1928.

The trial Court held that the account was a mutual and current one. It is said that the defendants had failed to prove that it was converted into a loan account, and the mere fact that they did not draw any money after 1929 was not sufficient to show that the account had ceased to be a current and mutual one. It was held, therefore, that Article 85 applied.

The first ground in revision is that the accounts were not proved. The cashier who kept the books was not available, but the accounts were proved by his assistant, Ramanand Singh (P.W. 2), who knew his handwriting and who swore to the second defendant, Nandy, having come and made the nine or ten payments alleged in 1932 and 1933.

1937

BENGAL BURMA TRADING CO. v. BURMA LOAN BANK, LTD.

MOSELY, J.

As to limitation, Article 85 of the Second Schedule to the Limitation Act provides that a suit for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, must be instituted within three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account.

In *Hirada Basappa* v. *Gadigi Mudappa* (1), Holloway J. observed,

> "In order that accounts might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

Similarly, in *Ebrahim Ahmed Mehter* v. *S. Abdul Huq* (2) it was said that a "mutual account" means not merely where one of two parties has received money and paid on account of the other, but where each of two parties has received and paid on the other's account.

It has been doubted in some reported cases whether a banking account can be said to be a mutual account as between banker and customer merely because the account opened with a deposit in favour of the bank, and because subsequently the customer incurred indebtedness to the bank by overdrawing. It has been doubted whether such transactions can be deemed to to be mutual accommodation. The ordinary lay meaning of "mutual account" is what is given in *Dau Dayal* v. *Piari Lal* (3), where it was agreed by both sides, and held by the Court, that for an account to be mutual there must be independent transactions between

(1) 6 M.H.C. Rep. 142. (2) 8 L.B.R. 149.
(3) (1928) I.L.R. 50 All. 645.

the two parties, *i.e.*, two sets of transactions. In one set, one of the parties should hold the position of a creditor and the other a debtor, and in the other set of transactions the positions should be reversed.

The dictum of Vice-Chancellor Turner in *Phillips* v. *Phillips* (1) is often quoted :

"A mutual account means not merely where one of two parties has received money and paid it on account of the other, but where each of the two parties has received and paid on the other's account, *i.e.*, there is a mutual account where each of two parties has received and paid on account of the other, and what would be recoverable would be the balance of the two accounts."

But see the remarks of Rankin C.J. on this definition in *Tea Financing Syndicate, Ltd.* v. *Chandrakamal Bezbaruah* (2) where it was pointed out that the cross claims may be for the sale of goods or money lent, etc. It was said there that for Article 85 to be applicable there must be cross-claims arising out of a course of dealing which evidences or is referable to an intention of set-off.

In *Padwick* v. *Hurst* (3) it was said that "mutual accounts" mean not where one party only has received from (and made payments on behalf of) the other, but where each of two parties has received from (and paid on account of) the other.

Their Lordships of the Privy Council raised the question in *Maniram Seth* v. *Seth Rupchand* (4) but did not decide it. They said :

"A question has been raised as to whether the dealings between the parties were mutual as well as open and current and involved reciprocal demands between the parties * * * * *. The dealings were certainly not the ordinary ones of banker and customer, but rather in the nature of mutual accommodation."

(1) (1852) 9 Hare. 471.
(2) (1930) I.L.R. 58 Cal. 649.
(3) (1854) 18 Beav. 575.
(4) (1906) I.L.R. 33 Cal. 1047.

1937

BENGAL BURMA TRADING CO. v. BURMA LOAN BANK, LTD.

MOSELY, J.

In *Govinda Nadan* v. *A.Y.R.M.R.M. Ramasami* (1), a case of the High Court of Madras, Odgers J. said that the account in suit resembled exactly a bank pass book, where deposits and withdrawals of moneys took place from time to time, the balance being in favour of either the customer or the bank at any given moment. He agreed that there did not appear to be independent obligations on both sides, and that a mere shifting of the account from one side to the other was not enough to constitute mutual obligations.

On the other hand, it was held that banking transactions of the nature described were mutual in *Khushalo* v. *Behari Lal* (2), and *Sewa Ram* v. *Mohan Singh* (3). In the last mentioned case the head note is to the effect that even in banking transactions where the balance is now on one side and then on the other, and the change does not appear to arise from a merely accidental and passing overpayment Article 85 does apply. Or, as it was put in the judgment, Pontifex J's dictum in *Ashrufoonissa*'s (4) case could only be justified if the payments by the defendant in excess of his liability were such as to show an intention on his part of wiping out the previous overdrawals *and nothing more.*

The earliest case where any doubt was expressed as to whether there could be mutuality between banker and customer is this last mentioned case, *Hajee Syed Mahomed* v. *Mussamut Ashrufoonissa* (4). The judgment was delivered by Pontifex J. In this case, after the initial deposit the customer's account was usually overdrawn, but there was sometimes a balance in her favour. After the last date of these, payments continued for nearly a year in reduction of the liabilities,

(1) (1926) 92 I.C. 106.
(2) (1881) I.L.R. 3 All. 523.
(3) (1886) P.R. No. 44, p. 83.
(4) (1880) I.L.R. 5 Cal. 759.

but the balance was always against the customer. Pontifex J. said :

"Now, I must say that I should have considerable hesitation in holding that there was ever between these parties a mutual account, although in the instances which I have mentioned, the defendant had in fact paid monies into the plaintiff's bank which were in excess of his liabilities ; for I do not think that the defendant could at any time have said—' I have an account against you, the banker '."

A little further on it was said that the defendant had a demand against the bank whenever the balance was in his favour, and, therefore, there were only reciprocal demands down to the last date when there was a balance in the customer's favour.

I do not agree with the learned Judge when he went on to say that the "last item admitted or proved in the account" means the last admitted item on the defendant's side of the account, which is the last reciprocal item. It appears to me that the last item must mean simply the item last entered in the account, on whatever side. It appears that in *Ashrufoonissa*'s case Pontifex J. meant to hold that there was never a continuing account of the customer *v.* the banker, though occasionally he might have had a demand against the banker.

Many of the previous judgments on this point were quoted by Mukerjee J. in *Ram Pershad* v. *Harbans Singh* (1), where he interpreted Pontifex J. as meaning that if the balance was generally in favour of the banker the account between them could hardly be a mutual one. He said that mutual accounts are such as consist of reciprocity of dealings between the parties, and did not embrace those having items on one side only, though

(1) 6 Cal. L.J. 158.

1937

BENGAL BURMA TRADING CO. v. BURMA LOAN BANK, LTD.

MOSELY, J.

made up of debits and credits. By "accounts which have items on one side only" I presume, is meant unilateral transactions though consisting of both debits and credits. It was said that the accounts could only be called mutual down to the date when the defendant made his last payment to the banker.

R.M.A.R.R.M. Arunachallam Chetty v. *V.E.R.M.N. Somasondaram Chetty* (1) was a case where the two Chettyars lent each other money, and it was held that the last payments were made by the indebted party as further loans, and not in partial discharge of the debit balance against him.

In *Tea Financing Syndicate* v. *Chandrakamal* (2) where the judgment of Page J. in *Tea Financing Syndicate, Limited* v. *Chandrakamal Bezbaruah* (3) was reversed, the criterion of independent obligation was upheld. That was a case where the plaintiffs made advances to the defendant who consigned tea for sale to the plaintiffs not merely by way of discharging the debt, but designed to create a credit to set off against the debt. It was said that the obligation to account for the proceeds of the tea received was an independent obligation on the plaintiff, though the proceeds were intended to be applied in liquidation of the advances.

In a case cited *Fyzbad Bank, Limited* v. *Ramdayal Marwari* (4), a judgment of a Bench, which was delivered by Kulwant Sahay J., after discussing *Ram Prashad*'s case (5), came to the opposite conclusion. I am bound to say that I cannot understand the details given in this judgment. It says, (at page 109), that on several occasions during the period from 1913 to 1916 the defendant could have said to the plaintiff : "I have an account against you." Then it goes on to say that

(1) 11 L.B.R. 369.
(2) (1930) I.L.R. 58 Cal. 649.
(3) (1929) I.L.R. 56 Cal. 575.
(4) A.I.R. (1924) Pat. 107.
(5) 6 Cal. L.J. 158.

after February 1913 the balance was always against the defendant. It said that although a shifting balance was a test of mutuality, its absence was not a conclusive proof against mutuality, and the account in question showed mutual credits and debits on both sides, so that the balance had been in favour of one side and sometimes of the other. It quotes *Velu Pillai* v. *Ghose Mahomed* (1), which says, not that there must be a shifting balance to make an account mutual, but that that was a possible and likely incident of the transaction with regard to which the account was kept.

The same Judge again in *Joharmal Mathuradas Firm* v. *Hira Lal Shewchand Roy* (2) dealt with an account where the plaintiff had bought and sold goods for the defendant, some transactions resulting in a loss and some in a profit, as a mutual account.

It may be of interest to note an American authority. Wood "On Limitation", (fourth edition, at page 1433), says that when a depositor borrows money from a bank by overdraft and occasionally deposits money which is applied to the overdraft, the transaction is not a mutual one, although it had opened with a credit to the depositor. The same author (at page 278) says that mutual accounts are made up of matters of set off, or are accounts between parties who have a mutual and alternating course of dealing under an implied agreement that one account shall be set off against the other *pro tanto*. In order to prove a mutual account it is sufficient to prove mutual dealings between the parties, creating mutual debts or reciprocal demands.

I do not think it is necessary to agree with what was said in *Dau Dayal*'s case (3), that to constitute a mutual account there must be two independent *sets* of transactions. It is sufficient if there be only one set of

(1) (1893) I.L.R. 17 Mad. 293. (2) (1927) I.L.R. 7 Pat. 238.
(3) (1928) I.L.R. 50 All. 645.

1937

BENGAL BURMA TRADING CO. v. BURMA LOAN BANK, LTD.

MOSELY, J.

transactions, but that set creates alternately debits and credits which are to be *set off* against one another.

It appears to me that transactions between banker and customer can vary in each case so as to fulfil or not to fulfil these conditions. Take the case of a private account which opens with a credit. This is exhausted and an overdraft arranged, or a series of overdrafts. Payments are then made to credit, which satisfy the overdraft, and later payments are made which put the account again in credit. In such a case, debit and credit do not overlap, or are not co-existing, and there can be no mutual account. Another kind of case is a business account where the account is alternately in credit and overdrawn. It may be overdrawn by the amount of the credit and something more. It may then be put in funds by a payment for the amount of the debit and something more. There are alternately lendings by the customer to the bank,—for, a deposit, current or fixed, is merely such a lending,—and lendings, in the shape of overdrawings, by the bank to the customer. This may be considered a case of mutual lending or accommodation. Such an account may be overdrawn for a time, but if there be a possibility of the account being put in credit, and if the period during which it is not put in credit is not an unduly long one, the account may still be a mutual one, for the absence of a shifting balance in that case will not be conclusive. If, however, an account starts with a deposit to the credit of the customer and then consists, as in the present case, of a series of alternate credits and debits, and then for a long period, as in the present case, namely four years, consists merely in the debit in favour of the bank being reduced by payments by the customer, I do not think that the account can still be called a mutual one. Although the account started as a mutual

one it continued on a different footing and changed its nature.

In the present case, no oral evidence except that of the second defendant-appellant has been offered one way or the other as to this, but it is obvious from the accounts themselves that though the defendants at one time overdrew more than the amount for which they had given security by a promissory note, yet from June 1929 onwards they never attempted to overdraw any more, and the account consisted merely of small payments to reduce the overdraft. It would seem that from June 1929 the account ceased to be a business one, and the transactions, as I have said, merely consisted of small payments by the defendants to the reduction of their liabilities. The defendants in fact alleged that their (informal) partnership was (informally) dissolved in January 1931. This state of affairs continued until the close of the accounts and the last payment in May 1933, a period of nearly four years.

For these reasons, I hold that the account had long ceased to be a mutual one, and that Article 85 does not apply.

The article applicable, therefore, is Article 57, and to save limitation it would be necessary to prove an acknowledgment in the handwriting of the defendants, *vide* section 20 of the Limitation Act. The paying-in slips were admittedly not signed by the defendants, and there is no other evidence of their acknowledgment in their handwriting on the record except the time-barred promissory note.

This application in revision will, therefore, be successful and the plaintiff's suit dismissed with costs, advocate's fee two gold mohurs.