APPELLATE CIVIL.

Before Mr. Justice Mosely, and Mr. Justice Dunkley.

1938

Jan. 18.

DAW HNIT

v.

C.T.A.R.A. ANAMALAI CHETTYAR.*

Banker and Customer—Relationship—Money payable on demand—No duty of debtor to find his creditor—Chettyar bankers—Moneys deposited on current account—Period of limitation to sue—Limitation Act, Sch. I, art. 60—Insolvency of banker—Creditor's tender of proof not a "demand"—Annulment of adjudication—Position of the parties—Provincial Insolvency Act, s. 37.

The relationship of a customer and his banker is not merely that of an ordinary creditor and debtor; there is a number of implied superadded obligations between the parties. One of the implied terms of the contract is that money handed to the banker is only payable after a demand, and there is also no duty of the debtor to find out his creditor and pay him his debt.

Joachimson v. *Swiss Bank Corporation*, (1921) 3 K.B. 110, followed.

The position is the same with regard to Chettyar bankers in Burma and moneys deposited with them on current account are payable only on demand. Art. 60 of the Limitation Act applies for the recovery of such moneys.

Gulab Rai v. *Sandhi*, I.L.R. 15 Lah. 242; *Juggi Lal* v. *Kishan Lal*, I.L.R. 37 All. 292; *K. C. Mukerji* v. *Badri Das*, I.L.R. 17 Lah. 481, referred to.

M.M.K. Kottayan Chettyar v. *Palaniappan*, 10 L.B.R. 161, dissented from.

When a creditor tenders proof of his debt and makes his claim in the insolvency of his banker, he is not making a "demand" within the meaning of Art. 60 of the Limitation Act. In insolvency, for the right of demand and remedy by suit, which the creditor formerly had, is substituted the right to share equally and proportionately in the assets after proof of debt.

If the adjudication is annulled, the claim made by a tender of proof of debt to share equally and proportionately in the assets is also annulled, and the effect of annulment is to remit the parties to their original situation. A deposit does not lose its character when on annulment of his adjudication the banker is handed back his property.

Ba Han for the appellant. The District Judge dismissed the suit on the ground that the appellant's money was kept with the Chettyar on current account, and that art. 57, and not art. 60, of the Limitation Act

* Civil First Appeal No. 43 of 1937 from the judgment of the District Court of Mandalay in Civil Regular Suit No. 20 of 1936.

applied. The Court relied on *M.M.K. Kottayan Chettyar* v. *Palaniappan* (1) which proceeds on the basis that money on current deposit with a Chettyar banker is payable at once without demand.

Kottayan Chettyar's case is grounded on *Foley* v. *Hill* (2) which is supposed to lay down the proposition that the relation between a banker and a customer who pays money into a bank is an ordinary relation of debtor and creditor. This is not correct. What it says is this —money when paid into a bank ceases altogether to be the money of the customer; it is then the money of the banker who is bound to return an equivalent by paying a similar sum to that deposited by the customer when he asks for it. He is not bound to keep it or to deal with it as the property of his customer; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay the customer when demanded a sum equivalent to that paid into his hands.

What is sought to be established is that the position of a banker is not that of a person who holds a *quasi fiduciary* position to his customer.

In *Joachimson* v. *Swiss Bank Corporation* (3) the question whether the making of an actual demand is a condition precedent to the bringing of an action to recover money loaned to the banker by the customer on current account was considered. It was decided that the customer is under an implied obligation to make an actual demand for the amount standing to his credit on current account as a condition precedent to a right to sue for that amount. It was also pointed out that *Foley* v. *Hill* is only confined to the point that the banker is a debtor and not a trustee of the customer.

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(1) 10 L.B.R. 161. (2) 2 H.L.C. 28.
(3) (1921) 3 K.B. 110.

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Art. 60 refers to "money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable." A current deposit, which is another name for money kept on current account with a banker, is payable not at once but only on actual demand. The Indian High Courts have taken the same view. *Juggi Lal* v. *Kishan Lal* (1); *Gulab Rai* v. *Sandhi* (2); *K. C. Mukerji* v. *Badri Das* (3).

The next point is whether the appellant's proof of debt on September 23rd, 1927, can be considered as a demand within art. 60. A debtor who proves his debt in insolvency does not, and cannot, demand the payment of the entire debt. He only expects a rateable share from the assets of the insolvent. Dividends were paid out to the appellant on three occasions. The demand referred to in art. 60 must refer to a demand for the entire amount deposited and the demand must be ineffective. The appellant's proof of debt which has resulted in payments to her on three occasions is not therefore a demand within art. 60.

Even if there is such a demand the fact that the adjudication of the respondent has been annulled invalidates all acts except those done by the Court or the receiver. S. 37, Provincial Insolvency Act.

Clark for the respondent. The plaint shows that the appellant never claimed that the money deposited with the chettyar firm was money deposited under an agreement that it shall be payable on demand within the meaning of art. 60 of the Limitation Act. In this case art. 57 is the proper article applicable.

Joachimson's case relates to English banks. The banking custom among the chettyars is not the same. In fact there is no proof of what the custom is.

(1) I.L.R. 37 All. 292, 295. (2) I.L.R. 15 Lah. 242, 245.
(3) I.L.R. 17 Lah. 481.

In any event there was a demand when the appellant proved her debt in insolvency. More than three years have elapsed since then, and her suit is time-barred even if art. 60 applies. Under s. 78 of the Provincial Insolvency Act, the appellant is entitled to the benefit of the period from the date of the order of adjudication to the date of the order of annulment; even then more than three years have elapsed. When the adjudication was annulled and the moneys came into the hands of the appointee, there was a demand by the appellant when she was paid her second dividend by the appointee. Further, when the appointee returned the balance money in his hands to the chettyar, it was no longer a deposit by the customer with the banker.

MOSELY, J.—The appellant, Daw Hnit, sued the respondent, C.T.A.R.A. Anamalai Chettyar, a banker who carries on, or formerly carried on, banking business in Mandalay and Mônywa, and perhaps also elsewhere, for Rs. 7,000 (waiving Rs. 97), the balance on the 1st January, 1932, of a deposit made on current account with him. The suit was filed in August, 1936, demand having been made on the 17th August, 1936.

The defence made was that the relationship between the plaintiff and the defendant was that of lender and borrower: that demand for payment was not necessary, or that, if it was necessary, such demand must be deemed to have been made when the plaintiff presented her pass-book for proof of her debt against the defendant in proceedings in insolvency, and that the claim is barred by limitation.

Issues were framed as to the relationship between the plaintiff and the defendant in respect of the suit money, and whether the suit was barred by limitation.

No evidence was recorded, and this suit was decided by consent by a judgment in a similar case (suit No. 23

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of 1936). I note that that was a suit for a deposit made at Mandalay, while this suit is based on a deposit made at Mônywa.

The respondent C.T.A.R.A. Anamalai Chettyar was adjudicated insolvent in June, 1927, and Daw Hnit filed a proof of debt for her claim, which was then Rs. 11,586, on the 23rd September, 1927. The first dividend was paid on the 17th December, 1927. The adjudication was annulled on the 11th February, 1930, for failure of the respondent Chettyar to apply for his discharge. After this the Official Receiver continued to act under an order of the Court passed under section 37 (*1*) of the Provincial Insolvency Act, the property of the debtor having been vested in him, though the Court did not give any written directions to him. Section 37 (*1*) is as follows :

> "37. (*1*) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid, but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing declare."

The appointee continued to act in the same way as if he had been receiver, and distributed a second dividend on the 6th June, 1930, and a third dividend on the 1st January, 1932, which left Rs. 7,097 due to Daw Hnit. It had always been thought up to that time that the appointee had the power to distribute the estate to the creditors. It was, however, pointed out in a reference made in these very proceedings (Civil Reference No. 5 of 1936 by a Full Bench of this Court)* that the appointee had no such powers, and that the

* (1936) I.L.R. 14. Ran 254.—*Ed.*

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property of the debtor was merely vested in him for the purpose of making the property available to the creditors if they wished to file regular suits for the satisfaction of their claims, or the balance of their claims.

This judgment was passed in March, 1936, and the assets of the debtor were returned to him after that date. The present suit then was filed some little time after that.

If the relationship between the parties was that of lender and borrower, the article of limitation applicable is Article 57, which gives a period (for money payable for money lent) of three years from the date when the loan is made. The plaintiff's contention, on the other hand, was that Article 60 applied : which reads :

"60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable."

The limitation is three years from the date when the demand is made.

The learned District Judge when dismissing the plaintiff's suit relied on the case of *M.M.K. Kottayan Chettyar* v. *Palaniappan* (1), a judgment passed in January, 1920. I have no doubt that that decision is no longer good law and must be dissented from. That was a case of money, originally deposited with a Chettyar on *thavanai* account, remaining in the Chettyar's hand after the expiry of the period of deposit. It was money retained on current account, and it was held there that the article of limitation to be applied between customer and a banker was Article 57. In that case Sir Daniel Twomey C.J. said (page 163) :

"In the absence of any special agreement, such as an agreement for a fixed deposit, the relation between a banker and

(1) 10 L.B.R. 161.

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customer who deposits money with him is the ordinary relation of debtor and creditor and the money is repayable 'on demand' in the legal sense, *i.e.*, it is payable at once without demand. Article 60 applies only in cases where an express demand is necessary to render the money repayable."

He also said :

"Money on current deposit with a Chettyar banker is payable at once. No demand is necessary to render it payable."

Robinson J. in a concurring judgment said :

"It is settled law in England that the relation between a banker and his customer who pays money into his bank is the ordinary relation of debtor and creditor, and does not import anything more than a mere loan,"

quoting *Foley* v. *Hill* (1), a decision dating from a time when banking, even in England, was comparatively undeveloped.

The learned District Judge held that he was bound by this ruling. He said that there was nothing to show that the money was deposited under an agreement that it was to be repaid on demand, though the judgment elsewhere inconsistently proceeds on the lines that money deposited on current account is never a deposit within the meaning of Article 60. The District Judge also held that there was nothing in the Limitation Act to prevent time running from the expiry of the insolvency proceedings, and that demand had been made when proof of the debt was tendered. The learned advocate for the respondent has again repeated the case to us on the same lines. Dr. Ba Han, for the appellant, to whom I am indebted for a painstaking and lucid argument, has quoted the case of *N. Joachimson* v. *Swiss Bank Corporation* (2). The question there

(1) 2 H.L.C. 28. (2) (1921) 3 K.B. 110.

was whether the customer of a bank can sue the banker for the balance standing to the credit of his current account without making a previous demand on the banker for payment. That was a concurrent decision of three Judges of the Court of Appeal. Bankes L.J. pointed out (page 119) that it could not be the ordinary relation of creditor and debtor, and that there must be quite a number of implied superadded obligations. Unless this were so, he said, the banker, like any ordinary debtor, must seek out his creditor and repay him his loan immediately it becomes due,—that is to say, directly after the customer has paid the money into his account—, and the customer, like any ordinary creditor, can demand repayment of the loan by his debtor at any time and any place. Atkin L.J. said (page 127) that the terms of the contract between the bank and its customer appear to include the following provisions :

"The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to follow from the ordinary relations of banker and customer."

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He went on to say (pages 129-130) :

"The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract ? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material. In the case of such a contract as this, if I have correctly stated the manifold terms of it, it appears to me that the parties must have intended that the money handed to the banker is only payable after a demand. The nature of the contract negatives the duty of the debtor to find out his creditor and pay him his debt. If such a duty existed and were performed, the creditor might be ruined by reason of outstanding cheques being dishonoured. Moreover, payment can only be due, as it appears to me, at the branch where the account is kept, and where the precise liabilities are known. And if this is so, I apprehend that demand at the place where alone the money is payable must be necessary."

It would appear then, that the English authority on which Robinson J. based his judgment in *Kottayan Chettyar*'s case (1) has not been good law in England for the last sixteen years. I do not apprehend that Twomey C.J. intended to lay down a different rule for Indian or Chettyar bankers, and his remarks about them appear to have been merely *obiter* in the sense that no distinction was intended to be drawn in that case between English and native banking.

The present respondent carried on a considerable banking business in the ordinary way that such a business is carried on by Chettyars in this country, and the plaintiff had a pass-book and drew on her account, it would appear, in the usual way. It would, I apprehend, be impossible to hold that there was not an implied agreement in this, as in all such cases of deposits on current account with native bankers who do a large business, and may have branches at places other

(1) 10 L.B.R. 161.

than their main place of business, that the money was to be payable on demand. Native banking business in India and Burma has long since developed on English lines. In *Juggi Lal and others* v. *Kishan Lal and Mool Chan and others* (1) Article 60 was applied to the ordinary deposit on current account with a native banker, overruling a previous decision to the contrary in *Dharam Das* v. *Gaga Devi* (2), where it had been held that the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former. In *Gulab Rai-Gujar Mal* v. *Sandhi* (3) it was said that an agreement to pay on demand may be implied and should be assumed in the ordinary course of dealings between a native banker and his customer. In *Kanti Chandra Mukerji* v. *Badri Das* (4), a Bench decision, the same assumption was made, and I have no doubt, as I have said, that the same assumption must be made in Burma, where Chettyar bankers accept deposits on current account on a very extensive scale from their customers and conduct nearly every branch of ordinary banking business as it is understood in England. As Atkins L.J. said, the position would be impossible if a banker were to be liable to repay his customer without demand and thereby dishonouring any outstanding cheques of the customer; and, of course, in the ordinary way no banker would ever want to repay without demand money lying in his hands at no interest or merely at nominal interest, unless he was winding up his business.

It is impossible, in my opinion, to hold that, when the creditor, Daw Hnit, tendered proof of her debt and made her claim in insolvency, she was making "a demand", as that term is used or understood in the

(1) (1915) I.L.R. 37 All. 292.
(2) (1907) I.L.R. 29 All. 773
(3) (1933) I.L.R. 15 Lah. 242.
(4) (1936) I.L.R. 17 Lah. 481.

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Limitation Act. In insolvency, for the right of demand and remedy by suit, which the creditor formerly had, is substituted the right to share equally and proportionately in the assets after proof of the debt. It is true that in one sense, any claim not met in full is "a demand." (See Wharton's Lexicon.) However that may be, there is no doubt that when the adjudication was annulled, the claim made by a tender of proof of debt to share equally and proportionately in the assets was annulled too, save in so far as any payments towards that claim had been made. The effect of annulment is to remit the party whose insolvency is set aside to his original situation. [*Bailey* v. *Johnson* (*1*)], and whatever happened in the insolvency proceedings prior to annulment is considered as if it had not happened, subject to the validation of all sales and dispositions of property and payments duly made, and all acts done by the Court or receiver as provided for in section 37 (*1*) of the Provincial Insolvency Act. The section, of course, does not provide that all acts done by the creditors shall stand as done (as is argued by the respondent), but the very contrary. Mr. Clark, for the respondent, quotes the case of *Brandon* v. *McHenry* (*2*), but that case merely goes to show that where a trustee in bankruptcy had rejected a proof of debt that was a valid act uneffected by the annulment : it stands on the same footing as a partial payment made by way of dividend by the trustee—or, here, receiver—which is likewise validated, and does not affect the question of the claim itself. Section 78 (*2*) itself provides that the period from the date of the order of adjudication to the date of the order of annulment shall be excluded in subsequent suits for recovery of a debt proved under the Act. The demand

(1) (1872) 7 Ex. 263. (2) (1891) 1 Q.B. 538.

contemplated by Article 60 is clearly a demand for the repayment of the whole amount of the deposit due, and not a demand for partial payment, or otherwise every demand for partial payment made by a cheque drawn for it would have to be considered as a demand for payment of the whole deposit,—which is absurd.

Alternatively it is argued that the money of the debtor came into the hands of the appointee when the adjudication was annulled in February, 1930, and that demand must be considered as having been made, at all events, on the 6th June, 1930, when the second dividend was paid (by the appointee). I do not see how time could run against the creditor while the estate was in the hands of the appointee, who must be considered as in the position of a trustee for the debtor.

It appears to me that all parties were acting under a mutual mistake as to their position, but in any case it cannot be said here also that a claim by the creditor for a partial repayment out of a proportionate share in the assets of the late insolvent was a demand for repayment of a deposit in the sense contemplated by Article 60. It would be truer, perhaps, to say that the creditor made no further claim at all, but the appointee continued to distribute dividends.

In any case, when the position was realized after the judgment in Civil Reference No. 5 of 1936 and the property of the late insolvent was handed back to the debtor, it appears to me that what was handed back to him, so far as regards Daw Hnit's claim, was Daw Hnit's deposit. I do not see how that deposit can be said to have lost its character as such, or how it can be considered as a mere loan from the customer to the late insolvent when it was lying in the hands of the appointee.

I am of opinion that the plaint was in proper form, and that demand proper was never made for return of

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the deposit from the respondent until the 6th June, 1936, shortly after the money had reached his hands. I hold, therefore, that Article 60 applies, and that the suit was in time. The plaintiff's claim must be decreed. There will be a decree accordingly for the amount (Rs. 7,000) claimed, with costs on that amount in both Courts.

DUNKLEY, J.—I agree.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1938

Mar. 4.

BALTHAZAR & SON, LTD.

v.

THE OFFICIAL ASSIGNEE.*

Insolvency—Chose in action—Charge on book debts—"Actionable claim"—Transfer of Property Act, s. 130—Notice to debtor—Trade debts in possession order or disposition of insolvent—Withdrawal of consent of true owner—Chattels and book debts—Possession by true owner of goods, books of account, vouchers and bills—Reputed ownership of insolvent—Rangoon Insolvency Act, s. 52 (2) (c).

Choses in action, though not yet existing, may nevertheless be the subject of present assignment. Nothing passes under such an assignment until the property comes into present existence, when the assignment attaches.

Glegg v. *Bromley*, (1912) 3 K.B. 474; *Tailby* v. *Official Receiver*, 13 A.C. 523; *Vatsavaya* v. *Poosapati*, 52 I.A. 1, referred to.

Whether a charge on future debts is a transfer of an actionable claim within s. 130 of the Transfer of Property Act or not, in either case notice to the debtors is necessary to prevent the transferor from receiving payment from and giving a valid receipt to the debtors. Hence trade debts remain in the "possession, order or disposition" of the assignor, and the effectual way of removing them from his order or disposition is for the assignee of those debts to give or do all in his power to give notice of his claim to the debtors prior to the insolvency of the assignor. In case of chattels a demand for possession or an attempt to take possession by the true owner, prior to insolvency, amounts to a withdrawal of his consent, but in case of book debts the appropriate method of withdrawing consent is to give notice.

Re Ambrose Summers, I.L.R. 23 Cal. 592; *Belcher* v. *Bellamy*, 2 Ex. 303; *Brewin* v. *Short*, 5 E. & B. 227; *Re Neal*, (1914) 2 K.B.D. 910

* Civil Misc. Appeal No. 43 of 1937 from the order of this Court on the Original Side in Insolvency Case No. 4 of 1937.