APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

1922. *August* 29.

SATAPPA JAKAPPA KOCHCHERI AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1 TO 5), APPELLANTS *v.* ANNAPPA BASAPPA PATIL AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 6 AND 8 TO 10), RESPONDENTS*.

Indian Limitation Act (IX of 1908), Article 85—Mutual, open and current account—Reciprocal demands.

The question whether an account is a mutual, open and current account within the meaning of Article 85 of the Indian Limitation Act (IX of 1908) depends upon the nature of the dealings between the parties. It is sufficient if the dealings are such that the balance might have been in favour of either party: it is not essential that the balance should in fact have been in favour of one at one time and of the other at another.

Per CRUMP, J.:—"The words 'where there have been reciprocal demands between the parties' in Article 85, taken literally, may no doubt give rise to some difficulty, but those words have been interpreted as meaning that the nature of the accounts is such as to create reciprocal demands. They are in fact words in the nature of a definition, but are not intended to postulate that there should have been reciprocal demands in fact".

SECOND appeal against the decision of D. A. Idgunji, Assistant Judge of Belgaum, confirming the decree passed by V. V. Pandit, Subordinate Judge at Belgaum.

Suit for accounts.

The plaintiffs alleged that the family of defendants Nos. 1 to 4 owned a shop in Belgaum; that the plaintiffs had dealings with the shop from 1897: that the Khata in defendants' shop was in the name of deceased Annappa Balappa, father of plaintiffs Nos. 2 to 4; that the suit was filed to recover the sum due to plaintiffs with interest after taking accounts; that the shop owed more than Rs. 2,000 to plaintiffs, but they restricted their claim to Rs. 2,000.

Defendants Nos. 1, 2, 5, 7, 8, 9, 10 and 11 admitted plaintiffs' claim.

* Second Appeal No. 48 of 1921.

Defendants Nos. 3, 4 and 6 contended *inter alia* that the plaintiffs' suit was not in time ; that the plaintiffs' debt was never admitted ; that no admission was made which would satisfy the requirements of section 19 of the Limitation Act.

The Subordinate Judge held that the transactions in suit were proved ; that the transactions were loans as the two main items of Rs. 1,000 each on the 30th October 1897 and 10th October 1901 respectively were loans ; that the requirements of section 19 of the Limitation Act were not fulfilled as the acknowledgments relied on by the plaintiffs had not been signed by any one at all ; that in the account books interest had been credited in Annappa's Khata from time to time, but the calculation of interest was not sufficient to meet the requirements of section 20 of the Limitation Act ; that the cause of action accrued on the date of the advance and the claim was in time as regards the items within three years before the date of suit. A decree was accordingly passed for Rs. 276 with interest thereon.

On appeal, the Assistant Judge agreed with the view taken by the Subordinate Judge and confirmed the decree.

The plaintiffs appealed to the High Court.

Nilkanth Atmaram, for the appellants.

A. G. Desai, for the respondents.

SHAH, AG. C. J. :—The facts which have given rise to this appeal are briefly these. The plaintiffs sued to recover Rs. 2,000, or such other sum as may be found due on the accounts between them and the defendants, alleging that the plaintiffs had dealings with the defendants extending over a long period commencing in the year 1897. Defendants Nos. 1 to 11 formed a joint family and had their business at Belgaum. All

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the defendants except defendants Nos. 3, 4 and 6 admitted the plaintiffs' claim, but the defendants Nos. 3, 4 and 6 contended that the plaintiffs' claim was out of time. It appears from the plaint that the date of the cause of action was first stated as follows:— "On 1st July 1916 when the receiver refused to pay us off or in July 1917 when the defendants' shop was closed or in November 1916, i. e., at the end of the commercial year." But apparently this was scored out and by an amendment the following was substituted for it "from 30th October 1897 on respective dates on which the dealings were effected". There was also an amendment in paragraph 6 of the plaint, wherein it is stated : "In the said shop at the end of every year, the balance has been shown in the name of the said Anapa. This has been done up to 18th July 1917 and this suit is brought within three years from this date, and in the former suit it has been admitted by Anapa Basapa and Bhairapa Basapa that it is an amount of deposit and that interest has been paid from time to time. Therefore the plaintiffs' suit is not barred by limitation. Though interest was not paid off every three years, it was shown as balance every year, and also because it was an amount of deposit, the suit is not barred by limitation."

I may also mention that in the partition suit relating to the defendant's family, the present plaintiffs were joined as parties, and because some of the defendants objected to the Receiver who was appointed in that suit paying the amount now in question, the present suit was filed by the plaintiffs.

The only question of importance between the parties was one of limitation. The trial Court decided against the plaintiffs on the ground that these were not deposits but loans, and it held that the mere book entry of interest from year to year would not bring the

case within the scope of section 20 of the Indian Limitation Act. Therefore it decided to allow only those items to the plaintiffs which were admittedly within three years prior to the date of the suit deducting those payments which were made within that period, treating the current account as really beginning at that stage. The debit and credit items prior to three years before the suit were left out of consideration. On that footing a decree was passed in favour of the plaintiffs for Rs. 276 with interest at 9 per cent.

The plaintiffs appealed to the District Court, and the learned Assistant Judge who heard the appeal affirmed that decision. It appears from the judgment that the principal point argued before the lower appellate Court was whether these payments were in the nature of deposits or were loans in respect of which the suit would have to be filed within three years from the respective dates. Though the learned Judge was satisfied that there was mutual and current account between the parties, he held that these were to be treated as advances made from time to time, and that only those items were recoverable which were within three years. The learned Judge adopted the same method of determining the amount due on that basis as the trial Court and accepted the conclusion of that Court.

The plaintiffs have preferred this second appeal and it is contended on their behalf, that the lower Courts are wrong in their view as to the point of limitation. The appeal is sought to be supported on three grounds relating to the question of limitation, and it is a singular circumstance in the case that all the three grounds are raised practically for the first time in this Court. The grounds upon which limitation was sought to be saved in the lower Courts have practically been given up, and we have to consider the points urged in support of the appeal now. First, it is urged that the account

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is a mutual, open and current account evidencing reciprocal demands between the parties, and that Article 85 of the Indian Limitation Act applies. Secondly, it is urged that these accounts have been all written by one or the other of the defendants or by a clerk who was in their employ, and that limitation is saved under section 20 of the Act. Thirdly, it is urged that even taking the view that these advances are to be taken as loans from time to time, the payments made within three years must be taken to satisfy the earlier advances, even though they may have been time-barred, i.e., the appropriation should be made in accordance with the provisions of section 61 of the Indian Contract Act, and that in that view of the matter a much larger sum than the sum allowed by the lower Courts would be found due.

As regards the second of these points, I may state at once that it is a new point; and it appears from the judgment of the lower Court, and from paragraph 6 of the plaint, that the ground as to part payments of the principal appearing in the handwriting of the debtor was not urged in that Court. The trial Court omitted to consider that aspect of the case on that ground. The consideration of that point would necessarily involve the determination of the question of fact as to which of these items were written by the debtors themselves or by their Munim, and in the case of entries made by the Munim, as to whether he was their agent duly authorized in that behalf as required by section 20 of the Indian Limitation Act. In view of the fact that, though the plaintiffs had the opportunity of amending the plaint, they omitted to raise this particular point, I do not think that that ground could be allowed at this stage.

As regards the third point, it seems to me that there is really no answer to it on the part of the respondents.

The lower Courts are clearly in error in treating the account as beginning practically at the date from which the advances are treated as being within time. It is a running account, and there is no reason why the payments within three years should not be treated as appropriated to the satisfaction of the earlier advances, even though these advances may be time-barred at the date of the suit or at the date of the part payment. The amount which would be found due to the plaintiffs on this basis is in dispute, but having regard to the view which we take of the first point, which I shall presently deal with, it is not necessary to pursue this point any further.

The first point is really the most important point, and by no means easy of decision. It is quite clear to my mind that the question about Article 85 of the Indian Limitation Act was not realized by the plaintiffs in either of the Courts below, and certainly was not put before the Courts for their consideration. It is, however, open to the plaintiffs to rely upon Article 85, for the very nature of the accounts would show that that is the proper article to apply. The lower appellate Court has expressed the opinion that the account between the parties was mutual and current. Under Article 85, what we have to consider is whether the account between the parties was mutual, open and current indicating reciprocal demands between the parties. The account is in the name of Annapa Balapa, now represented by the present plaintiffs. The account commenced in the year 1897, and has been since that date an open and current account between the parties up to the year 1916. The present suit was filed on the 20th March 1918, and is clearly within three years from the close of the year in which the last item appearing in this account is to be found. The whole question is whether the accounts kept from year to year indicate a mutual

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open and current account where there have been reciprocal demands between the parties.

It has been urged by Mr. Nilkanth in support of his argument that in view of the decision in *Madhav* v. *Jairam*[1] it is sufficient if the account is mutual, open and current and that there is no need to prove reciprocal demands. I am, however, unable to accept this reading of the decision in *Madhav* v. *Jairam*[1]. The Article itself requires that the account should be one in which there have been reciprocal demands between the parties. The nature of the account in that case satisfied that requirement of the Article, and the observations in that case must be read with reference to the facts in that case. If those observations are to be read in the sense in which Mr. Nilkanth has asked us to read them, I do not think that they would be in accordance with the terms of the Article; and, speaking for myself, I do not think that it was meant that the requirements of the Article could be dispensed with. Such a result could not have been intended. The difference appears more in the language used than in the meaning indicated. Mutual dealings such as are referred to in section 8 of Act XIV of 1859, would ordinarily indicate a mutual, open and current account where there have been reciprocal demands. I shall not attempt in the present case to define as to what would constitute a mutual, open and current account indicating reciprocal demands. For the purposes of this case it is not necessary to do so. Speaking with reference to the accounts we have in this case, and they are all accounts in the books of the defendants, they indicate a mutual, open and current account, and the only question is whether they indicate reciprocal demands between the parties. One has only to go through the accounts to find that they are kept

[1] (1921) 23 Bom. L. R. 540.

from year to year extending over a period of twenty years in which the balances have been drawn every year regularly, but no formal adjustment has been made at any time between the parties. The debits and credits are numerous, and it is not possible to contend in the present case for the respondents that all the credits, i.e., the payments by the defendants to the plaintiffs are mere part payments of the advances already made. There were dealings between the parties, the plaintiffs residing at a place near Belgaum and the defendants doing business at Belgaum. This was really a business account on either side and clearly there were reciprocal demands. In my opinion, the accounts in the present case ranging over nearly twenty years clearly show that there was a mutual, open and current account indicating reciprocal demands between the parties. Therefore, the plaintiffs' suit is within time.

It is urged by Mr. Desai that the defendants have been debtors throughout and that, therefore, it could not be treated as an account within the meaning of Article 85. I do not think, however, that any decision has laid that down as a conclusive test of a mutual, open and current account in which there have been reciprocal demands between the parties. It depends upon the nature of the dealings between the parties. It is sufficient if the dealings are such that the balance might have been in favour of either party: it is not essential that the balance should in fact have been in favour of the defendants at some stage.

It is not necessary to deal with the further argument which was urged by Mr. Desai relying upon the Purshis, Exhibit 48, which has been referred to in the trial Court as limiting the plaintiffs' claim to Rs. 2,000. In fact it does not so limit it, and we find at the close of the account that it does not exceed

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Rs. 2,000. We, therefore, vary the decree of the lower appellate Court by substituting Rs. 1,743-14-0 for Rs. 276. In other respects the decree will be confirmed. Costs here and in the lower appellate Court to be paid by defendants Nos. 3, 4 and 6.

CRUMP, J.:—It is somewhat curious that the lower appellate Court in this case came very close to applying Article 85 of Schedule I of the Indian Limitation Act of 1908 without observing that that Article was really applicable. The lower appellate Court correctly described this account as a mutual account, but failed to observe what the consequence would be. The reason no doubt was that parties there confined their attention to other and less tenable points. I agree that this account is within the definition contained in Article 85. That it is open and current cannot be doubted, and it is mutual because there are items upon either side independent of one another which clearly gave rise at one time or another to independent obligations. Therefore, without considering how far the decision in *Madhav* v. *Jairam*[1] is applicable to the facts of the present case, or whether that decision is not perhaps too widely expressed it is clear that on the earlier decision of this Court in *Ganesh* v. *Gyanu*[2] this is a mutual, open and current account within the meaning of the Article in question. The words "where there have been reciprocal demands between the parties" in Article 85 taken literally may no doubt give rise to some difficulty, but those words have been interpreted as meaning that the nature of the accounts is such as to create reciprocal demands. They are in fact words in the nature of a definition, but are not intended to postulate that there should have been reciprocal

(1) (1921) 23 Bom. L. R. 540. (2) (1897) 22 Bom. 606.

demands in fact. It follows that as Article 85 is applicable, the whole claim is in time, and it is unnecessary for us to consider the argument based upon section 20 of the Indian Limitation Act or section 61 of the Indian Contract Act. I need only say that upon these points I concur in the decision just pronounced.

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Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

JAGANNATH NARSINGDAS MARWADI AND OTHERS, SONS AND HEIRS OF THE DECEASED, NARSINGDAS PEMRAJ MARWADI (HEIRS OF ORIGINAL PLAINTIFF), APPELLANTS *v.* RAVJI VALAD TULSIRAM PANSARE (ORIGINAL DEFENDANT), RESPONDENTS*.

1922. *September 5.*

Transfer of Property Act (IV of 1882), section 59—Attestation—No evidence that attestations were not proper—Execution or validity of the mortgage bond not disputed—Question whether the document was validly attested does not arise—Civil Procedure Code (Act V of 1908), Order VI, Rule 8—Indian Evidence Act (I of 1872), section 70.

The plaintiff sued to enforce a mortgage bond. The defendant in his written statement disputed the claim but he did not dispute either the execution or the validity of the mortgage bond. There was no evidence nor was there any indication on the record to show that the attestations were not proper. The first issue raised in the case was whether the mortgage bond was proved. Both the lower Courts held that the mortgage bond was not proved as there was no proof of such attestations as were required by section 59 of the Transfer of Property Act, 1882, and dismissed the plaintiff's suit. On appeal to the High Court,

Held, that the document was proved,

Per *Shah, Ag. C. J.*:—On the ground that there was nothing in the pleadings to show that the plaintiff was put to the proof of attestations; and that in

* Second Appeal No. 721 of 1921.