

CALCUTTA HIGH COURT

Tea Financing Syndicate, Ltd

Vs

Chandra Kamal Bezboruah

(Page ,J.)

12.03.1929

JUDGMENT

Page, J.

1. This is a suit to recover Rs. 69,942-15-0 and interest thereon alleged to be due under an agreement between the parties of 3rd February 1920 as the balance of a mutual open and current account.
2. The defendant does not pretend that he has not received from the plaintiffs the money for which he is being sued but I do not conceive it to be my duty to pass any comment upon his conduct in relying upon the defence which has been urged before me. In this connexion I desire to cite and make my own the words of Lord Justice Pry in *Reeves v. Butcher*¹ I have not to determine whether the defence here set up is handsome or conscientious but whether it is good in law, and I am of opinion that it is.
3. Now, the defence is that the claim is barred by limitation.
4. The suit was brought on 22nd February 1924, and therefore, unless the account in respect of which the claim is made was a mutual open and current account it is barred by limitation under Article 59, Lim. Act.
5. This suit originally was tried before my brother Buckland, and a decree was passed in favour of the plaintiffs for Rs. 909-7-0. Against that decree an appeal was preferred, and the case was remanded by an Appeal Bench because the learned trial Judge had decided the case solely upon the form of the account annexed to the plaint, without taking into consideration the agreement of 3rd February 1920, and it was ordered that the suit should be tried de novo.
6. The Appeal Bench delivered judgment on 5th January 1928, and on 18th May the plaintiffs by petition applied for leave to amend the plaint with a view to alleging that after 18th September

1920 the parties had agreed that the defendant should be given a further year from 3rd February 1921 within which to pay off the loans advanced to him. That petition was rejected.

7. Again at the retrial an application was made by the plaintiffs for an amendment of the plaint in order that it might be alleged that if this account was not a mutual, open and current account, and prima facie was time barred there had been a part payment of the principal on 25th February 1921 which took the case out of the Statute of Limitation.

8. Having regard to Order 7, Rule 6 and to prevent any embarrassment to the defendant in my discretion I have refused to allow such an amendment of the plaint. The issue to be determined therefore is, whether the account which is the foundation of the claim is governed by Article 85, Lim. Act, which runs as follows: For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties, 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.

9. Now, the last item in the account is a credit item in favour of the defendant of Rs. 1,103-11-5 on 25th February 1921; i.e , within three years before the suit was filed. But, what is a mutual, open and current account where there have been reciprocal demands within the meaning of Article 85. At the trial a number of authorities were cited for the purpose of showing that an account in one particular form or another came within the ambit of Article 85. But an authority is only of value for the principle of law to be extracted from it, and when once the principle is understood it tends to confuse the issue for the Court to consider the special facts of other cases instead of concentrating its attention upon the facts of the particular case to be determined.

10. The meaning of a mutul account was stated with singular clarity by Vice Chancellor Turner in *Phillips v. Phillips* [1852] 9 Hare 471 and no better explanation of the meaning of the term mutual account is, I think to be found in any of the authorities: I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would have to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments, a position of the case, which to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to the receipts on one side and the payments on the other, and it is a mare question of set off; but it is otherwise where each party has received and paid: see *also Hirada Bassappa v. Gadigi Mudappa*² *Velu Pillai v. Ghose Mahomed*³ *Ram Pershad v. Harbans Singh*⁴ and *Shivi Gowda v. Ferandes*⁵

11. A perusal of the account annexed to the plaint by itself would lead to the conclusion that it is not a mutual open and current account whether there have been reciprocal demands between the parties.

12. It is an account of payments made and received by the plaintiffs alone, and does not purport to refer to any receipts or payments by the defendant on the plaintiffs' account. The terms of the agreement of 3rd February 1920, in my opinion, lead to the same conclusion. To my mind it is clear that the object and effect of that agreement was to create a security for the repayment of any sums which might be advanced by the plaintiffs up to Rs. 80,000 by the hypothecation of the tea crop for the current year in which the advances were to be made. It appears that the defendant was anxious to obtain financial assistance in order to exploit the resources of his tea garden during the year 1920-1921, and approached the plaintiffs with that object in view. It was for this purpose that the agreement of 3rd February 1920 was entered into. It is an agreement whereby the plaintiffs agreed to accommodate the defendant to an extent not exceeding Rs. 80,000 subject, inter alia, to the condition that advances will be made for so long and to such extent only as you shall, under the condition and circumstances of my gardens and crop in your discretion think fit, and that you may discontinue them as and whenever you consider expedient under such condition and circumstances with one month's notice to me.

13. It was agreed that the defendant's account in the plaintiff's books should bear interest at 9 per cent per annum with half yearly rests and incidental charges, and the amount for the time being due to you on the said account will be repaid by me to you on demand, or if no demand be made within one year from the date hereof.

14. The security was created by a hypothecation of the entire-tea crop and produce of the garden, and the defendant agreed to: send and transmit the said tea to Calcutta to you for the purpose of same being sold in Calcutta by public auction for such price as you consider reasonable.

15. Provision was also made to enable the plaintiffs to take steps by seizure of the crop or otherwise to protect their security if the defendant did not hold or transmit the crop to the plaintiff pursuant to the agreement. On 18th September 1920 the plaintiffs gave notice under the agreement, as they were entitled to do, demanding repayment of the advances made up till that date : with interest thereon within 7 days from date otherwise we shall take such steps to realize same as advised by our solicitors.

16. It appears from the account, and is not now disputed by the defendant that after 18th September 1920 certain sums were debited against him in the account as having been paid under the agreement by the plaintiffs, and it was proved by oral evidence before me that on 28th December 1920 and the 25th February 1921 two sums of Rs. 999-11-11 and Rs. 1,103-1 L 5 being the sale-proceeds of tea transmitted by the defendant to the plaintiffs under the agreement, were received by the plaintiffs.

17. In my opinion upon the evidence adduced at the trial this account was not: a mutual open or current account where there have been reciprocal demands between the parties within Article 85, Lim. Act. To my mind the account and the agreement upon which it was based provided for a loan by the plaintiffs to the defendant to be discharged pro tanto by the proceeds of tea transmitted by the defendant to the plaintiffs under the agreement, and the account is what it purports to be, namely, an account of moneys paid and received by the plaintiffs on the defendant's behalf and:

where one party has merely received and paid moneys on account of the other it becomes a simple case: per Vice-Chancellor Turner, *Phillips v. Phillips* [1852] 9 Hare 471

18. I invited learned Counsel for the plaintiffs more than once to state whether there was any period of time after the agreement was entered into when the defendant was in a position to say to the plaintiffs: "I have an account against you" and the only answer that I received was that inasmuch as the sales by the plaintiffs must be by public auction the defendant was entitled to claim that the plaintiffs should satisfy him that the tea had duly been sold by public auction, But that is no evidence of a mutual account. The agreement provided that the defendant should not be entitled to challenge the quantum of the proceeds of the sales, and the right to call upon the plaintiffs to satisfy the defendant that the sales had been by public auction is one thing, it is quite another that the defendant should be in a position to say that having received and made payments on behalf of the plaintiffs he was entitled to demand from the plaintiffs payment of the balance due from the plaintiffs to him in respect of such receipts and payments. In my opinion, the account in suit was not a mutual account; indeed it was not pretended that the account was one in which there had been reciprocal demands made between the parties, for there was no evidence and no argument to the effect that the defendant had ever made or was in a position to make any sort of demand whatever upon the plaintiffs in respect of this transaction. In my opinion the claim in the present case is a claim for money lent under an agreement that it shall be repaid on demand and inasmuch as the demand was made on 18th September 1920 the suit is barred by limitation. It is not uninteresting although in no way do I base my judgment upon it, to recall that on 1st June 1928 after the application for the amendment of the plaint had been dismissed the present plaintiffs became the assignees from the Indian Planters' Agency Company, Limited, of all their rights against the defendant in respect of the agreement of 3rd February 1920 for a consideration of Rs. 5,000, which, however, according to the oral testimony at the trial it so happens has not yet been paid. Learned Counsel on behalf of the plaintiffs further urged that even if the account was not a mutual open and current account within Article 85 the demand of 18th September 1920 was not to be regarded as putting an end to the account and in support of his contention he referred to subsequent entries of payments appearing in the account as having been made on behalf of the defendant by the plaintiffs. But there was no evidence and there was no argument to the effect that these subsequent payments were made under the agreement at the request or with the assent of the defendant. In my opinion the plaintiffs are entitled to receive no more than the amount decreed by my brother Buckland at the first hearing namely, Rs. 909-7-0,

and there will be a decree for that amount in favour of the plaintiffs.

19. As regards costs, this suit is governed by Section 22, Presidency Small Cause Courts Act (15 of 1882). In *Chandanmull Kanoria v. Debi Chand* I held that the question whether the suit was cognizable by the Small Cause Court by reason of the amount or value of the subject-matter depended upon the amount or value claimed by the plaintiff and set out in the plaint. I observed that, in my opinion:

it is not to be supposed that the legislature intended ex post facto to penalize a plaintiff because he had failed to guess correctly which was the proper Court in which to launch his suit.

20. I still am of opinion that the construction that I then put upon Section 22 was the reasonable one: see per Imam, J. in *Sukumari Ghose v. Gopi Mohan Goswami*⁶ In that case, however, my attention was not drawn to the decision of a Division Bench of this Court (Maclean, C.J., Machpherson and Trevelyan, JJ.) in *Ismail Ariff v. Leslie*⁷ in which their Lordships determined that Section 22 is applicable to oases where the sum decreed is within the amount cognizable by the Presidency Small Cause Court. My decision in *Chandanmull Kanoria v. Debi Chand* is, I think, inconsistent with *Ismail Ariff v. Leslie* [1896] 24 Cal 399(SUPRA) which is binding upon me, and I take this opportunity of stating that the construction which I put upon Section 22 in Chandanmull's case was not in accordance with the ratio decidendi of *Ismail Ariff v. Leslie* [1896] 24 Cal 399 and cannot be regarded as stating as correctly the law: see also *Shridhan Gopinath v. Gordhandas Gokuldas*⁸ and per Buckland, J., in suit No. 1657 of 1922 and per Costello, J. in *Rameswar Prosad Kessur Prosad v. Ramapada Ghose and Sons* .

21. In the present case, the plaintiffs have recovered Rs. 909-7-0 but in my opinion, the case was a fit one to be brought in the High Court and the plaintiffs are entitled to a decree for that amount with costs on the scale that is appropriate to suits in this Court in which sums under Rs. 1,000 are received.

22. Such costs will be awarded to the plaintiffs up to the date of the decree passed by my brother Buckland on 2nd December 1926. The costs incurred thereafter by reason of the appeal and the retrial in my opinion have all been thrown away by reason of the fact that the plaintiffs at the retrial have recovered the same amount as was decreed in their favour at the first trial and all the costs incurred after the date of the decree of my brother Buckland, both in respect of the appeal and of the rehearing, must be paid by the plaintiffs-to the defendant on scale No. 2, including any reserve costs, and the costs of the commission which have been incurred since the date of the decree in the first trial.

Cases Referred.

1[1891] 2 Q.B. 509

2[1871] 6 M.H.C.R. 142

3[1893] 17 Mad. 293

4[1907] 6 C.L.J. 158
5[1910] 34 Mad. 513
6[1915] 48 Cal. 190
7[1896] 24 Cal 399
8[1901] 26 Bom. 235