CALCUTTA HIGH COURT

The Tea Financing Syndicate Ltd

Vs

Chandra Kamal Bez Barua

(Rankin ,C.J.)

25.07.1930

JUDGMENT

Rankin, C.J.

1. This suit was brought so long ago as 1924 by a Company, the Planters Agency Co. Ltd., against the defendant, Bezboruah, the proprietor of a Tea Estate in Assam called the Boloma Tea Estate. Pending suit the plaintiff Company assigned its interest to the Tea Financing Syndicate Ltd. which has been substituted as plaintiff, but this assignment may for the present purpose be ignored.

2. The suit is brought upon a dead of hypothecation dated 3rd February 1920. This deed in effect provided that the plaintiffs would make advances or grant other pecuniary accommodation to the defendant to an extent not exceeding Rs. 80,000 to enable him to work and carry on the Boloma Tea Estate; but it was expressly stipulated by the concluding words of the deed that advances would be made for so long and to such extent only as the plaintiffs in their discretion should think fit, and that the plaintiffs might discontinue them as and when' they considered it expedient with one month's notice to the defendant. The defendant, by the dead, hypothecated to the plaintiffs the entire tea crop for the season 1920 and the produce thereof and agreed to send and transmit the said tea as soon as it was manufactured and in a fit state for transmission to Calcutta to the plaintiffs in order that it might be sold in Calcutta by the plaintiffs by public auction and for such price as the plaintiffs might consider reasonable. It was declared that until the tea should be so consigned and transmitted, the defendant would hold the same in trust for the plaintiffs and at the plaintiffs' absolute order and disposal. It was further agreed that the defendant's account in the plaintiffs' books should be made up with interest at 9 per cent per annum with half-yearly rests and that all costs, charges and expenses incurred by the plaintiffs in connexion with the security and the amount for the time being due to the plaintiffs on the said account should be

repaid by the defendant to the plaintiffs on demand or, if no demand be made, within one year from the date of the deed.

3. The plaintiffs allege that, pursuant to this deed, they advanced moneys to the defendant and received from him consignments of tea, proceeds of which after sale they credited to the defendant; and that these dealings were carried on, on a mutual, open and current account with the defendant, commencing from 3rd February 1920, and ending on 30th June 1921. The suit is brought for some Rs. 70,000 as balance of this account. The defendant, by his written statement, sets up a claim, apparently by way of equitable set-off for damages for the plaintiffs' refusal to advance to him the full sum of Rs. 80,000 mentioned in the deed. This part of the defence has been abandoned. In addition, the defendant denies that his account with the plaintiffs was a mutual, open and currant account. He also denies that it ended on 30th June 1921 and says that the last advance made by the plaintiffs was on 14th September 1920 and that the last consignment of tea was sent about the last week of August 1920. The defendant further denies the correctness of the account annexed to the plaint and pleads that the plaintiff's claim is barred by limitation.

4. The main point in the case is whether or not the plaintiff's claim in view of Article 85 of the Schedule to the Limitation Act of 1908, is barred, save as regards the sum of Rs. 909-7-0 being the amount of six items in the account which represent amounts debited to the defendant within three years before suit, namely between February and June 1921. It is to be observed that the suit as framed is founded upon an agreement between the parties contained in the deed of 3rd February 1920 and that no further or other agreement is pleaded. The correspondence put in evidence at the trial comprises a letter from the plaintiffs to the defendant, dated 17th January 1920 proposing certain terms; the next letter disclosed is a letter from the defendant to the plaintiffs, dated the 28th of that month and referring, not to the letter of the 17th, but to another letter of the 23rd. It stated that the plaintiff's offer "to undertake the work of financing my Boloma Tea Estate under the usual terms for season 1920" was accepted and it asked that the letter of hypothecation be sent for the defendant's signature; it further stated that the defendant had gone through the draft of the hypothecation bond forwarded to him and desired the words "at public auction" to be added in the place where they now appear.

5. It is clear that this letter does not purport to be an acceptance of the offer contained in the letter of the 17th January and that, if the plaintiffs do not succeed upon the deed of hypothecation, they have neither pleaded nor proved any further contract to which they could have recourse. The letter No. 573 of the 23rd January was an important letter and was not disclosed. It had been subsequently referred to in the correspondence between the parties: of. letter dated 28tb-29th June 1920, from the plaintiffs to the defendant, and as it dealt with the question whether the

plaintiffs should find the money necessary to discharge the debit balance due to the National Agency Company, who had acted as financiers to the defendant for the preceding season, it was well in the mind of the plaintiffs. A copy-properly numbered and in the proper place- is in the plaintiff's letter book, but it was not disclosed, it was not produced at the trial and it does not appear to have been referred to at the trial.

6. Leaving this matter for the moment, I come to the transactions of the parties under the contract. The defendant proceeds to draw upon the plaintiffs for substantial sums required by him for the purposes of his tea estate and the plaintiffs to make provision for his drafts. The Rs. 80,000 mentioned in the deed of hypothecation was a sum which had been fixed upon after an examination by the plaintiffs of the defendant's estimate of the sums which his garden would require and the sums which it could be relied upon to produce by the sale of tea. The plaintiffs, on 9th April 1920 intimate that the market has become very unsteady and that if this condition continues they may be compelled to ask the defendant to reduce his estimated drafts. On the 19th of the same month the defendant writes to explain that he had himself been placing orders with suppliers for various stores and on 22nd the plaintiffs refer him to the letter of 17th January 1920 and say that by that letter they asked for a commission of 2 per cent for the supply of store3 and that to this the defendant had agreed. Accordingly they object to his purchasing in his own requirements and say that they have organized a stores department in order to exercise proper check and control over the supply of stores to their various garndens and constituents. To this the defendant, on 29th April, replies that he understands that all stores should be ordered through the plaintiffs or commission will be payable to the plaintiffs; that he does not mind for small matters and is willing to pay them commission on the goods that he has ordered for himself. The plaintiffs on 3rd May write that they do hot want any commission from him on stores which have not been supplied by them and say: "As agents, is it not desirable that your enquiries should come to us ?" About this time the previous agents begin to press for settlement of the balance due to them. The plaintiffs remind the defendant that he was to manage this matter for himself and though the defendant, in June asked the plaintiffs to find at least Rs. 10,000 for this purpose, the plaintiffs by their letter of 28th-29th June, to which I have already referred, refused. By 11th June the plaintiffs are writing to the defendant that he is only manufacturing a small quantity of tea, that in view of the abnormal condition of the trade, they have fixed Rs. 25 per maund as the price at which the advances will be made. They say that the defendant has drawn Rs. 37,000 and is to regulate his future drawing accordingly. On 8th July the plaintiffs complain that they find little or no attempt on the defendant's part to curtail expenditure, his drawings having amounted to Rs. 40,401. On 22nd July the plaintiffs complain of the quality of the tea of which samples had been sent by the defendant for the purpose of obtaining broker's report thereon. They complain that they are not getting the weekly crop return and samples at the end of every week and threaten to

stop further advances and to ask for the return of their money if these conditions are not complied with.

7. On 6th August the plaintiffs say that they have fixed the limit of overdraft at Rs. 48,000, that Rs. 45,000 had been advanced and that, unless the defendant puts them in sufficient funds, they will not be able to protect his latest draft. On or about 10th August there is a letter which shows that the defendant is forwarding a consignment of tea to the plaintiffs. This consignment may be identified as Invoice No. 1 and it appears to have consisted of 73 chests. This tea does not seem to have arrived in Port at Calcutta until the 3rd week of December. On 12th August (as appears from the letter of the 14th) the defendant had a conversation with the representative of the plaintiffs who agreed to advance him a further Rs. 6,000 for the next four months at the rate of Rs. 1,500 per month. In the meantime samples of tea comprised in Invoice No. 1 had been submitted to the brokers and the average valuation given turned out to be only four-annas to six-annas per pound-a most disappointing figure, the basis on which the Rs. 80,000 had been fixed being nine annas per pound. This is mentioned by the plaintiffs in their letter of 17th August and on 19th they refer to their promise to furnish the 'defendant with Rs. 1,500 each month towards the garden expenditure and state that if they are to make further advances the defendant must place them in funds. They refer to a bill of Messrs. R. D. Mukherjee & Co., Forwarding Agents and say that, unless they receive a remittance, they will be obliged to refer this firm to the defendant for payment. Notwithstanding a long letter of protest from the defendant the plaintiffs repeat this attitude with reference to the bills of R. D. Mukherjee & Co., Octavious Steel & Co. and K. C. Dutta & Co., for stores and materials supplied to the defendant. At the end of August and beginning of September the plaintiffs definitely refuse to-hand over the defendant's drafts and begin to demand remittances to enable-them to settle various bills that are coming in on the defendant's account. The defendant writes letters of protest. and on 10th September the account, as. now sued upon, is sent to him made up to the end of June 1920 showing a debit balance of Rs. 39,258. The defendant is asked to confirm this account by return of post, but does not do so. The defendant, on 13th September, protests that, if' he had sufficient funds to work the property, he would not have entered into the hypothecation of his crop "thereby-letting you enjoy the commission, interest etc." On 15th September the plaintiffs say that they have allowed him Rs. 1,500 per month, but that, if he is not in a position to pay the pending bills, the plaintiffs will settle them and the amounts thus paid will go in reducing the limit of the advances payable. They say that the debt will not be cleared up even if the season's crop is sold at a fair price and that even if your property puts in 1,600 maunds of: crops which is still doubtful, what commission shall we earn on it ? You cannot expect to-raise money at this market at 9 per cent per annum.

8. About this time absence of money had produced a crisis at the garden. Coolies, were starving

and others were absconding. Accordingly, on 18th September, the plaintiffs having received telegrams from the Garden Manager, and letters from the defendant, showing that the defendant. was unable with his own money to keep the property going, gave notice to the defendant under the agreement contained, in the deed of hypothecation to pay back: the advances made together with interest thereon within seven days from the date of the notice. The defendant, on 20th September, blame3 the plaintiffs for having damaged his property by stopping finance, and says that he is going to dispose of the necessary quantity of tea in local sales in order to meet the garden expenditure for the remainder of the season. He further says that he proposes to repay the money advanced by instalments after deducting the loss that has accrued to the garden through the plaintiffs' fault. In December the first consignment of tea sent by the defendant to the plaintiffs is sold by the brokers, and the defendant's account is credited on the 28th with the sum of Rs.995-11-11 in respect thereof. It is also debited with a certain amount of commission which is not calculated at 2 per cent, but at soma other figure, how this figure was arrived at we do not know. At the end of the year the plaintiffs debite) the defendant in the account with various substantial payments made to forwarding agents and other persons on the defendant's account. They also debited an item of Rs. 106 on account of inspection expenses of Mr. Karim, an agent who had been sent by them secretly to inspect the Boloma Tea Estate in the guise of a visitor : see letters of 15th and 27th September 1920.

9. The consignment of tea (invoice No. l), which had been despatched in August and which arrived in December was sold by the brokers on 5th February 1921 and the proceeds were remitted to the plaintiffs on or about 25th February (Ex. H-2). This amounted to Rs. 1,103-11-5 which were credited to the defendant by the plaintiffs on 25th February 1921. The plaintiffs again debited the defendant with commission but not at the rate of 2 per cent. In June of that year they paid certain bills of various agents and suppliers on the defendant's account. These items are within three years of suit and judgment has been recovered for them. Whether the plaintiffs were personally liable to pay these bills is by no means clear; nor is it shown that at the time they paid the bills and debited the defendant, they did so at the express request or with the express consent of the defendant.

10. The learned Judge has held that the dealings between the parties were not dealings upon a mutual open and current account so as to come within Article 85, of the Schedule to the Limitation Act. He has proceeded upon certain observations of Vice-Chancellor Turner in Phillips v. Philips [1907] 34 Cal. 892:

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.

11. It may I think be conceded at once' that if this is the conclusive test, the plaintiffs cannot claim to show that the: test is satisfied. The defendant did not-receive money on account of the plaintiffs and pay money on the plaintiffs'" account. The learned Judge says that all that has happened is that moneys: have been paid and received by the plaintiffs on the defendant's behalf. Accordingly in his view the claim in the present case is for money lent under an agreement that it shall be repaid on demand and the article applicable is. Article 59 of the Schedule to the Limitation Act; thus the plaintiffs are entitled to recover no more than the sum of Rs. 907-7-0 being the amounts paid by the plaintiffs on the defendant's behalf within three years of suit.

12. On this appeal it was contended before us that the dictum of Vice-Chancellor Turner, upon which the learned Judge relies is by no means conclusive as an. interpretation of Article 8,5. Reliance has-been placed upon Hirada v. Gadigi [1871] 6 M.H.C.R. 142where Holloway, Ag. C. J., dealing with. S. 8, Lim. Act of 1859, gave a definition of mutual dealings which has often been referred to and accepted as correct both under that Act and under the subsequent. Limitation Acts:

To be mutual there must be transactions on each side creating independent obligitions on the other and not merely transactions which create obligations on one side those on the other-being merely complete or partial discharges of such obligations.

13. It has further been urged that in the case of Watson v. Aga Mehedee Sherateee [1874] 1 I.A. 346 we have a decision of the Privy Council in which the same section was applied to a case which their Lordships-described as the ordinary course of dealing between principal and agent. Currie & Co. advanced on account of their principal money on the one hand; on the other hand they received all the timber sent down from the forest to them for the purpose of sale sold by them. In the judgment delivered by Sir James Colville, "it was held:

that the account was one continuous account between principal and agent with debits and credits on each side of it and that the con-tract was to pay the balance of that account when it should be struck and that the case therefore fell within Section 8, Act 14 of 1859, there being several items which brought the mutual dealings down to March or May 1868.

14. Upon similar facts the same result has been arrived at under the subsequent statutes of limitation. Namerbumal Chetty v. K. Kottayya [1913] 2l I.C. 773 (Wallis, J); Ratanchand v. Asa Singh [1920] 59 I.C. 669 (Scott Smith, J.); Madhav v. Jairam A.I.R. 1921 Bom. 451 and Abdul Haq v. Shewji Ram A.I.R 1922 Lah. 338. For this purpose it was pressed upon us that the plaintiffs in this case were described as the agents of the defendant and we are asked to hold that they were selling the tea of the defendant as his agents and had stipulated for a commission of 2

per cant in return for their services. Accordingly it was contended that this case must be decided on the reasoning of Wallis, J. in the case to which I have referred:

Here we have on the one side existing between the plaintiff and defendant the relation of creditor and debtor, the plaintiff having advanced money to the defendant and on the other side we have the relation between the . defendant and the plaintiff of principal and agent, the defendant having sent his goods to the plaintiff to sell for him. Therefore applying the test which has invariably been laid down, there was an independent obligation on each side such as has been held sufficient to satisfy Article 85 of the Schedule to the Limitation Act of 1877.

15. For the respondent it has been contended in reply that no case of agency was made in the plaint; that no such question was raised at the trial; that the letter of 17th January 1930 is no contract between the plaintiffs and the defendant; that there is no proof that the defendant ever agreed to pay the commission of 2 per cent or any other sum to the plaintiffs for selling their tea; that the case must be dealt with entirely upon the footing of the hypothecation deed of 3rd February 1920 on which footing the decisions which I have referred to become inapplicable. It was further contended on behalf of the defendant that even if Article 85 be applicable to the case, the account between the parties ceased to be mutual, open and current when in September 1920, the plaintiffs refused to make any further advances and demanded payment of the balance then due by their letter on the 18th September. So that the suit, not having been brought until 22nd February 1924 is not saved by Article 85.

16. As the result of certain observations made by this Bench upon the omission from the correspondence of the letter No. 573, dated 23rd January 1920, the plaintiffs, at the conclusion of the hearing of the appeal, produce their letter book with a copy thereof. Counsel for the defendant frankly stated that he could not and did not desire to dispute that the copy was a correct copy of the document sent to his client but that he objected to its being received in evidence at that stage. As this letter merely says that the proposal to finance the defendant's estate is "on our usual terms" and as there is no evidence of what the plaintiffs' usual terms may have been, the letter itself does not take us any further. Mr. Gupta for the plaintiffs asked leave to put in a copy of the letter and further asked leave to adduce additional evidence for the purpose of showing that one of the terms arranged between the parties was that the sale of the defendant's tea should be made by the plaintiffs as his agents and for a commission. In reserving judgment, we stated that we would receive the letter in evidence but chat we would consider upon what terms it should be received and whether or not either party should be given an opportunity to adduce additional evidence.

17. It appears to me upon consideration that the plaintiffs' case must stand or fall by the deed of

hypothecation, dated 3rd February 1920. We are not for the present purpose concerned with the terms upon which the plaintiffs were willing to grant accommodation other than advances to the defendant. The deed itself shows that the plaintiffs were to make advance; it further shows that the defendant was to have an account in the books of the plaintiffs; the advances were to be made from time to time and the account was to be made up with half-yearly rests: prima facie therefore there was to be a current account which was to consist, as regards one side of entries which represented advances made from time to time by the plaintiffs to the defendant. The applicability of Article 85 of the Schedule to the Limitation Act depends upon the character of the items brought to defendant's credit on the other side of the account. These items are only two in number and represent the sale price received from the brokers of the tea sent to the plaintiffs by the defendant. In ascertaining the character of these items, it is impossible to go behind or beyond the deed of the 3rd February. This deed shows that its object was to give security to the plaintiffs. The defendant engages to transmit the tea because otherwise the mere arrangement that the defendant would employ the plaintiffs for the purpose of selling his tea might leave in the defendant or perhaps on creditors of the defendant an option whether or not the plaintiffs had any real security. The agreement that the defendant would hold the tea in trust for the plaintiffs until it should be sent has the same obvious purpose. The arrangement insisted upon by the defendant that the tea should be sold by public auction shows that the tea is not to be the plaintiff's' tea but is to be tea sold on defendant's account. The transaction is certainly a transaction of mortgage but it is a transaction of mortgage to be worked out by the plaintiffs being ensured that all the tea would be sent to them, that they would act as consignees for sale and would from time to time credit the price thereof to the defendant in their books. In these circumstances I have some difficulty in seeing that it matters for the present purpose whether the plaintiffs are agents for sale and entitled as such to charge the defendant with commission. They are clearly persons to whom the tea was sent in order that it might be sold by them from time time in the ordinary course of business and in order that the price thereof when received by them might be credited to the defendant. I find it difficult to think that the applicability of Article 85 depends upon the question whether the relationship between the defendant and the plaintiffs for this purpose should be described as that of principal and agent or must be described as that of consignee and consignor.

18. The observations of Vice-Chancellor Turner in Phillips v. Phillips (supra) upon which the learned Judge has proceeded have not seldom been quoted in Indian cases with reference to the construction of Article 85. But the Vice-Chancellor was dealing with no such question but with the question whether the plaintiff in that case should be left' to prosecute his action at law or should be allowed to come to a Court of equity with his suit for an account. The decision itself appears to have been considered doubtful; but in any case the phrase " mutual account " was used by the Vice Chancellor in a sense appropriate to distinguish cases in which the plaintiff had an

effective remedy at law from cases which would be difficult to be dealt with at law. This is clear from his language- I take the reason of that distinction to be. " If English cases are to be relied upon for the construction of Article 85, it seems desirable that we should refer to cases which are more directly connected with the present subject-matter. In the leading case in India Hirada's case Hollo way, Ag. C. J., considered that the meaning of; Clause 8 of the Act of 1859 was in accordance with the construction which Lord Hardwicke in 1751- Webber v. Lidded [1751] 2 Ves. 400 - had put upon the exception as regards merchants' accounts in the Statute of James.' He adds:

The provision had been found so mischievous in England that it was abolished by Section 9, Mercantile Amendment Act. A singht consideration of the circumstances of this country would have effectually prevented its introduction here even without the lessons of that , experience.

19. Now, the exception in the Statute of James was for long the subject of much difference of opinion and it would be profitless to discuss it here. The view ultimately adopted was that the exception referred only to Common law actions of account and perhaps to actions on the case for not accounting, and had no application to actions for goods sold and delivered or for money lent, which by their form were really inconsistent with a claim that what was due from the -. defendants to " the plaintiff was a balance only: Inglis v. Haigh [1841] 8 M. & W. 777 and Cottam v. Partridge [1842] 4 M. & W. 271. The Statute of James was long before the Statutes of Set-off (George 2 Gaps. 2 and 8). On the other hand it was ultimately held, contrary to Lord Hard wicke's view, that if the case came within the exception, time did not run at all against the plaintiff. This must be taken to have been settled by the case of Robinson v. Alexander [1834] 2 Clause & F. 717 in the House of Lords.

20. This line of cases may be put upon one side. But before Lord Tenterden's Act of 1828, requiring acknowledgments to be in writing, the Courts had by judicial interpretation of the Statute of James, given to acknowledgments and part payment, the effect of a new starting point for the period of limitation. Some light upon the principle which the Indian Act of 1859 applied to merchant's accounts and which later statutes of limitation applied quite generally, is to be found in the following cases which the Indian legislature in 1859 and later may be taken to have had well in mind. I refer firstly to the case of Catling v. Skoulding [1795] 6 T.R. 189. The plaintiffs were executors of an attorney and the defendants were tallow chandlers. The attorney was the landlord of their house or shop and their rent was £22 a year. For some nine years before the attorney's death the defendants had not paid rent, but had been supplying the attorney with various articles by way of set-off. The balance due to the attorney at his death was about £170. When the suit was brought only the last half-year's arrears of rent and only one or two of the last articles of the defendants' bills were within six years. The suit was not a suit for an account and

had no connexion with the exception to the Statute of James, being a suit for use and occupation of the house. The argument of Le Blance Sergeant was accepted by Lord Kenyon and cannot be bettered as a statement of principle:

It has long been decided that a promise, either express or implied, within six years from the issuing of the writ, will avoid the limitation of the statute although the original cause of action would otherwise have been barred. Now, -where there is an open unliquidated account between the parties, there is evidence of such a promise because the credit is given on either side on the faith of such account, and every new transaction amounts to an implied acknowledgment of the prior existing debt, each article on the account on one side being equivalent to a part payment of the bill on the other and promise to pay the balance.

21. And Lord Kenyon said:

Here are mutual items of account and I take it to have been clearly settled as long as I have any memory of the practice of the Courts that every new item and credit in an account given by one party to the other is an admission of their being some unsettled account between them, the amount of which is afterwards to be ascertained : and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute.

22. This doctrine was never doubted in the later cases but the passing of Lord Tenterden's Act in 1828, by which acknowledgments to exclude the statute were required to be in writing, cut away the ground from underneath this decision. In Williams v. Griffiths [1835] 2 Cr. M. &R. 45 the plaintiff occupied a house under the defendant on a rent of £16 a year. In 1821 the defendant proposed that the plaintiff should become his farming bailiff which the plaintiff agreed to do. The plaintiff continued in such service until a short time before the action but no wages were ever paid on the one hand nor any rent on the other. The plaintiff urged that the account was an open and running account and that on the principle of Catling v. Skoulding he could recover the whole balance. It was held that he could recover only for its items within six years of action, because, since Lord Tenterden's Act, the earlier items in the account would be drawn down by the later items unless it could be shown that the later items were equivalent to part payments. Baron Park said:

I think it was incumbent on the plaintiff to show a part payment in cash or what is equivalent to it, to take the case out of the statute since Lord Tenterden's Act. There might have been an agreement between the parties to this effect, that the one should not call upon the other for payment of money due to him because he owed him money on the other hand. Before Lord Tenterden's Act that would have been a sufficient acknowledgment to take the case out of the

statute of Limitation on the ground that the conduct of the parties was equivalent to an acknowledgment and a promise to pay the debt but it appears to me that since the new statute there must be something equivalent to part payment.

23. In Inglis v. Haigh, (supra) the same great authority put the matter thus:

These later items, recognized as part of an agreement, would have been taken in any case as amounting to an admission, as the whole amount is open, of something due and this before Lord Tenterden's Act was sufficient to take the case out of statute not on the exception as to merchants' accounts but because the adoption of the later items was held to be a new promise to pay the whole balance due of the account over whatever period of time it might have extended.

24. In Cotiam v. Partridge already mentioned, where there was an open account bet wean two tradesmen for goods sold by each to the other. Tindal, C. J., said:

I do not deny that the present case would, previous to 9 George IV, Cap. 14 have fallen within the principle of Catling v. Skoulding or that the decision there was not perfectly good law at the time it was given, but as I read that statute Catling v. Skoulding is now no longer applicable.

25. In this case the common plea followed the Exchequer in holding that unless the delivery of goods was a delivery by way of payment, it could not be regarded as an acknowledgment to avoid the statute.

26. When in 1857 the exception as regards actions of account between merchants was abolished by the Mercantile Law Amending Act, running accounts of mutual dealings were given no special treatment by the law in England. On the other hand there were no technicalities of form required in the case of payment before it could be utilized as the starting point of a new period of limitation.

27. This being the state of English law when in 1859 the Indian legislature passed Act 14 of that year, it is very intelligible that it should ' have thought it necessary by S. 8 to enact the principle of Catling v. Skoulding as between merchants and traders, particularly in view of the fact (1) that from that statute Sir Barnes Peacock had succeeded in excluding any provision under which part payment could operate as a new starting point; and (2) that by Clause 4 an acknowledgment to have that effect had to be in writing and signed by the party liable to pay. Act 9 of 1871 followed the English Act of 1856 in giving effect to an acknowledgment if in writing and signed by the party's agent and it further followed English law in giving effect to a payment of interest by the party liable or his agent though in the case of part payment of principal, it required the debt to have arisen from a contract in writing and it required the fact of the payment to appear in the

handwriting of the person making the same on the instrument or in ids own books or in the books of the creditor. On the whole therefore the criticisms made by Holloway, Ag. C. J., in Hirada's case upon Clause 8 of the Act of 1859 were somewhat ill considered. Under the Limitation Act of 1908 acknowledgments or part payment to avoid the statute must still comply with certain formidable conditions and the object of Article 85 is in effect to apply to a certain type of cases the old common law of acknowledgment to exempt the plaintiff from the principle that limitation runs against each item from its date and to provide that if the last item is within time it will draw the previous items after it however old they may be although there has been no acknowledgment sufficient to comply with the conditions imposed by Section 19 of the Act.

28. It appears to me to be reasonably plain that the type of case suggested by Vice-Chancellor turned in Phillips v. Phillips, namely where each party has received and paid on account of the other, is by no means the only type of case coming within Article 85. Perhaps the simplest and commonest case of all is that of two merchants each supplying goods to the other. But the cases already referred to show that the cross claims may be rent and wages, rent and liquor supplied, money let and proceeds of sale of goods. The conditions of the applicability of Article 85 are not I think obscure. There must be cross claims arising out of a course of dealing which evidences or is referable to an intention of set-off. The phrase " reciprocal demands " does not import that either party has made an actual demand in fact : Satappa v. Annuppa A.I.R. 1923 Bom. 82. In the present case there is no difficulty in holding upon the face of the hypothecation dead of 3rd February 1920 that the parties embarked upon a course of dealing under which advances were to be made from time to time and tea was to be sent for sale from time to time when and so soon as it should be manufactured and in a fit state for transmission. Nor is there any difficulty in holding that the making of the advances and the consignment of the tea were to be brought together into one account as items which would produce a balance. The objection seems to be that there were to be no cross claims or, as the learned Judge has put it, there was never a time when the defendant was in a position to say to the plaintiffs 'I have an account against you'.

29. There can I think be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Holloway, Ag. C. J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea sent by the defendant to the plaintiff for sale was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold which credit when brought into the account, would operate by way of set-off to reduce the defendant's liability. In

my judgment the present case cannot rationally be distinguished in this respect from Watson's case where Messrs. Currie & Co. were empowered out of the money to be received of the proceeds of sale to take and pay themselves such sum and sums of money as might from time to time become due to them. The case is not taken out of Article 85 by reason that the mutual dealings are carefully arranged and designed so as to afford security to one party or the other. Whether the security is arranged for, as in the present case, by taking a charge upon all the tea in the garden or by the somewhat different machinery adopted in Watson's case can make no difference. In my opinion plaintiffs' liability to account to the defendant for the proceeds of the tea sold by them was an independent obligation and 'the circumstance that they were expected and intended to apply such sums as would be necessary in liquidation of their advances does not mean that this was an account in which the obligations were all on one side as distinct from an account in which there are cross claims or reciprocal demands. With great respect to the learned trial Judge and to the learned Judges who decided in Shivi Gowda v. Fernandes [1910] 34 Mad. 513 that the sales of coffee there gave rise to. no independent obligation. I think that Article 85 must be applied to the facts. of this case.

30. On this footing the question is whether any item admitted or proved was entered in the account in the year 1921. It may well be said that the plaintiffs could not extend the period of limitation by arbitrary delay in making entries in the account. But in the present case the consignment of the tea sent by the defendant from Assam in August did not reach Calcutta until December, and was sold in due course in February 1921, the sale proceeds being received by the plaintiffs on the 25th of that month. It was the right of the defendant to have credit for these sale proceeds on that date and he had no right to such credit on any prior date. In these circumstances the fact that the plaintiffs had in September 1920 refused to continue to make further advances does not seem to take the case out of Article 85. The account was open; because it was not stated, and in my' judgment it was running and currents until the sale of the defendent's tea was concluded in the ordinary course of business. The nature of the account remained the same and it was the right of the defendant to have the proceeds of' sale brought into the account. In this view the plaintiffs' suit succeeds.

31. At the trial the defendant disputed the correctness of the account but called no evidence. The plaintiffs have put in the correspondence and they have called the gentleman who acted as accountant to them at the time. They show also that when the account up to June 1920, was sent to the defendant on 10th September no objection was taken to it, save that the defendant intimated a claim for damages and proposed to repay the money advanced by instalments after deducting the loss. Judgment has been given by the learned Judge against the defendant for the sum of Rs. 18-7-10 under date 26th February 1921, for commission and postage on Invoice No.

1. There is a similar item of Rs. 16-12-0 under date 16th December 1920, and there is an item of Rs. 106 inspection expenses of Mr. Karim of the same date. These three items I propose to deduct from the plaintiff's suit which should be decreed in full with costs before the learned Judge. As regards the costs of this appeal, much time and trouble has been occasioned owing to the nondisclosure of the letter of 23rd January. This was entirely without excuse on the part of the plaintiffs and is exceedingly suspicious. The appellants should only get half the costs of appeal.

C.C. Ghose, J.

32. The facts involved in this appeal, shortly stated, are as follows. The defendant is the proprietor of a tea estate in Sibsagar in Assam called the Boloma Tea Estate. In the early part of 1920, he was in need of finance in connexion with the business in tea and he approached a company called the Indian Planters Agency Co., Ltd., for assistance. On 17th January 1920, the company in a letter addressed to the defendant stated the terms on which they were agreeable to advance the necessary finance and to take up the agency of the said tea estate. The letter of 17th January 1920, was as follows:

Re Boloma T.E. with reference to your letter of 10th instant we beg to say that we are agreeable to taking up the agency of your estate and financing it against the crop for the current year which is estimated at 1,600 maunds. you also desire us to pay up the debit balance of the last season to the present agent and this we shall do as soon as the crop is sold and your accounts are finally made up.

Following are our terms and we shall be pleased to know your approval of the same:

2 per cent commission on sale of tea, besides the charges of the brokers.

2 per cent commission on the purchase of stores.

9 per cent interest per annum with half-yearly rests on the advance to be made by us.

A draft form of the hypothecation bond is sent herewith for your approval. Please send us a copy of your estimate for the current year and indent for stores and a statement of actual crop for the last four years.

We shall feel much obliged if you will kindly make time to call at our office at your early convenience, any time between 2 and 3 p. m , and personally discuss about the estimate.

33. It does not appear that the defendant accepted the terms immediately; but there were communications between the parties between 17th January 1920 and 28th January 1920. On the

last mentioned date the defendant wrote to the said company the following letter:

In reply to your letter No. 573, dated 93rd instant, I have the pleasure to inform you that your offer to undertake the work of Financing my Boloma T.E. under usual terms for season 1920, has been accepted with thanks. Please therefore send me the letter of hypothecation for ray signature. I have gone through the draft of hypothecation bond which was sent by you for my approval, and I shall be glad if addition of three words "at public auction" is made in the tenth line from the beginning.

34. The letter No. 573 of 23rd January referred to in the lastmentioned letter was not produced in evidence in the trial Court; but for the purpose of understanding the letter of 28th January and finding out what were the exact terms arranged between the parties, we required the plaintiff company to produce the said letter No. 573 and they have accordingly done so. The letter of 23rd January 1920 was as follows:

Re Boloma T. E., with reference to the conversation you have with our Mr. Kar on 21st instant, we accept the proposal of financing the above estate against its crop for the current year on our usual terms. It is however, understood that, whatever be the debit balance with Messrs. National Agency Company, will be settled by you after the season's crop sold and the account finally made up. Kindly confirm the above.

35. On 3rd February 1920 the parties entered into an agreement whereby the said company agreed to advance to the defendant sums of money as might be required to the extent of and not exceeding Rs. 80,000 on the security of the entire crop of the said tea estate for the year 1920. The advances would be made for so long and to such extent only as the company in their discretion should think fit, and it was agreed further that the company might discontinue the said advances and when they considered it expedient, with one month's notice to the defendant. The defendant hypothecated the entire tea crop for the season 1920 and agreed to transmit the manufactured tea to the company in Calcutta for sale by them in Calcutta by public auction and for such price as the company might consider reasonable, and it was arranged that the sale proceeds thereof should be credited by the company to the defendant in his account current, the defendant agreeing to repay to the company the amount to be advanced to him with interest at the rate of 9 per cent per annum with six-monthly rests in account. It appears that, pursuant to the agreement between the parties, the said company advanced various sums of money from time to time and also spent on account of the defendant various sums of money. The defendant from time to time consigned his tea to the company for sale by public auction in Calcutta. The proceeds were credited to the defendant as soon as the sales were effected. This agreement was in writing and is evidenced by Ex. 1.

36. On the date of the institution of this suit, which was 22nd February 1924, the defendant owed to the said company a sum of Rs. 69,942-15-9 which the defendant had failed and neglected to pay. On 1st June 1928, by a deed of assignment between the said company and the Tea Financing Syndicate Ltd., all the right, title and interest in and to the moneys due by the defendant under the said seed of hypothecation being the claim in this suit, were assigned and transferred by the Indian Planters' Agency Company Ltd. to the Tea Financing Syndicate Ltd. and the present claim is now pressed therefore by the latter company for the said sum of Rs. 69,942-15-9.

37. Various defences were taken by the defendant in his written statement, but it does not appear that any of these defences was ever pressed in the trial Court except the defence that the claim was barred by limitation. The plaintiff company alleged that the advances had been made to the defendant on a mutual, open and current account and that the account showed that there had been reciprocal demands by and between the parties. According to the plaintiff company therefore the present case was covered by Article 85, Schedule 1, 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.

38. The defendant's contention was that the plaintiff company's suit was governed either by Article 59 or Article 115, Lim. Act, and that there was no mutual, open and current account as alleged by the plaintiffs.

39. The trial Judge, Page, J., has held that the account between the parties is not a mutual, open and current one and that accordingly Article 85, Lim. Act. does not govern the present suit. He has there -fore held that the plaintiff company are entitled to recover only so much of the moneys appearing in the account between the parties as is within a period of three years of the date of the institution of the suit. On appeal by the Tea Financing Syndicate Ltd. before us, it has been contended that it is apparent from the account annexed to the plaint that the transactions between the parties can be divided into two groups: (1) lender and borrower and (2) principal and agent and that on a proper scrutiny of the account it should be held that each of the said two parties has received and paid on the other's account; in other words, there is a mutual, open and current account and that what would be recoverable would be the balance of the two accounts. On the other hand it has been contended on behalf of the defendant that there is only one account between the parties and that is of lender and borrower and that there is no agency account whatsoever, the transactions according to the plaintiff company themselves being in accordance with what was agreed upon between the parties and recorded in the deed of hypothecation being Ex. 1.

40. It is therefore necessary to scrutinize the account between the parties and to find out for ourselves as to what the nature thereof is, it being observed that the present suit is based on the agreement between the parties contained in the deed of 3rd February 1920 and that no further or other agreement is pleaded. The advances began in February 1920 and by 30th June 1920 it appears that the Indian Planter's Agency Company Ltd. had advanced to the defendant a sum of Rs. 39,256-0-6 pies altogether. No payments had been made by the defendant during this period. By 8th July 1920 the defendant appears to have drawn altogether a sum of Rs. 40,404-10-9 The state of the market for tea was at; this time very unsatisfactory and the defendant was asked to curtail his expenditure, and he was informed that against the crop of tea in. the Boloma Tea Estate for 1920 the defendant could only draw a further sum of Rs. 7,595-5-3 and no more. In August 1920 the Indian Planters' Agency Company Ltd. informed the defendant that they had fixed the limit of overdraft at Rs. 48,000 having regard to the outturn. To this however the defendant would not agree and he drew attention to the fact that under the deed of hypothecation the company were under an obligation to advance him a sum of Rs. 80,000 against the crop for the then current year.

41. In this connexiou the Indian Planters' Agency Company Limited drew attention to the words in the deed of hypothecation running as follows:

It is understood that advances will be mad) for so long and to such extent only as you (the company) 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.

42. There was some further correspondence and it appears that the advances up to 15th September 1920 amounted to Rs. 50,137. The defendant was given notice that he could have a further sum of Rs. 4,500 to enable him to carry on for the next three months. On 18th September the company gave notice to the defendant requiring him to pay the advances made up to that date together with interest thereon within 'seven days therefrom. No further advances were made thereafter but it appears that the company paid thereafter on divers dates various sums on account of bills against the defendant and also supplied certain stores on the requisition of the defendant. Meanwhile the defendant had sent several consignments of tea to the Indian Planters Agency Company Limited, and in accordance with the terms agreed between the parties the said consignments of tea were sold in Calcutta by public auction by Messrs. A. W. Figgis and Co, It appears that the company received from Messrs. A. W. Figgis and Co., on 20th December 1920, a sum of Rs. 995-11-11 on account of the proceeds of the sale of certain of the said consignments of tea and they 'received also on the like account a further sum of Rs. 1,103-11-5 from Messrs. A. W. Figgis and Co., on 25th February 1921. These two sums were credited to the defendant in

his account and ultimately, as stated above, there was found due and owing to the company a sum of Rs. 69,942-15-9. In the account, certain sums of money by way of commission have been charged to the defendant but it is by no means clear on the evidence available before us as to what these commissions represented and what was the rate chargeable for commission.

43. Now in England, the exception of merchants' accounts in the Limitation Act 1623 (21 Jae. I.c. 16) enabled an action for accounts to be brought at any time, although there had been no item entered lot more than six years : see Robinson v. Alexander provided there had been no settlement. If there had been a settlement, the lapse of six years was a bar to any proceeding upon the account just as the case of an ordinary account. Actions for an account, not within the exception of merchants' accounts, were barred if there had been no entry in the accounts within six years; but whore there had been an entry within that time this was held to imply an acknowledgment of the whole account being open and a promise to pay the balance when ascertained. It was said that the statute in these instances was "retarded." An instructive case on this point is to be found in Catling v. Skoulding (12). It was a suit for rent but the defendant had supplied his landlord with various articles by way of set-off. Lord Kenyon, C. J. observed as follows:

Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the Courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the Statute.

44. The rule about an acknowledgment being implied was abolished by the Statutes of Frauds Amendment Act 1828 (9 Geo. IV. c. 14) which required an acknowledgment (save where implied from payment for principal and interest) to be in writing and duly signed. By the Mercantile Law Amendment Act 1856 (19 and 20 Vict. c. 97) it was provided that no claim in respect of a matter which arose more than six years before the commencement of the action (being an action for an account as between merchants and merchants) shall be recoverable by reason only of some other matter or claim comprised in the same account-having arisen within six years next before the commencement of the action; in other words, the exception as regards , merchants' 'accounts has now been repealed by the Mercantile Law Amendment Act of 1856 and merchants' accounts now stand upon the same footing as other accounts : see Banning on Limitation, Edn. 3, pp. 214-215; Light wood on Time Limit of Actions pp. 214-15; Carson's Real Property Statutes, Edn. 3, pp. 256-257).

45. Let us now turn to the provisions in the Indian statutes. By Section 8, Act 14 of 1859, it was

provided that in suits for balance of accounts current between merchants and traders who have had mutual dealings, the cause of action should be deemed to have arisen at, and the period of limitation should be computed from, the close of year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings, such year to be reckoned as the same is reckoned in the accounts. Although this provision was coufined to mutual accounts between merchants and traders the term merchants and traders " was not however construed very strictly [per Sir Barnes Peacock, C. J., in Ghaseeram v. Monohar [1867] 2 Ind. Jur. (n.s.) 241] Under Act 9 of 1871 limitation commenced to run from the date of the last item admitted or proved in the account. Article 85, Act 15 of 1877, is in the same terms as is Article 85 of the present Limitation Act of 1908. It is clear therefore that at any rate from 1871 this or the corresponding article has applied to mutual accounts between any two persons whether merchants or not. The last item draws after it those of longer standing.

46. I do not propose to go through the numerous cases to be found in the books for the purpose of explaining what are mutual accounts. As I understand the matter there must be a mutual credit founded on a subsisting debt on the other side or an express or an implied agreement for a set-off of mutual debts. Where for instance the dealings on either side are so independent of each other that neither party in giving credit to the other relies on the debt which he has? against him there are no mutual dealings; in other words, each party must be able to say to the other at some time or other during the period of account: ' I have an account against you" i.e. not merely a shifting balance but reciprocity of dealing and the right to mutual demand which form the essential ingredients of a mutual open and current account.

47. An account is open when the balance is not struck or though struck is not accepted or acknowledged to be correct by (the parties concerned and an account is Current when it has been going on as a continuous account between the parties. A running or continued account between two or more parties is an account current. A shifting balance may be a test of mutuality but its absence is not a conclusive proof against mutuality: see in this connexion Hirada v. Gadigi.

48. Now bearing these principles in mind, I have examined the account between the parties in this case on the footing of the agreement of 3rd February 1920 with some degree of care and I am unable to come to the conclusion that it is not a mutual, open and current account within the meaning of Article 85, Lim. Act. There is as far as I can see no want of mutuality. I have referred to the details in the account in a previous portion of this judgment and in my opinion there is no doubt that it is an open account nor is it open to question that it is a continuous and current account. I do not propose therefore to go through the English or Indian cases referred to in the judgment of Page, J. No useful purpose will be served by. attempting to write a treatise on the existing case law on the subject. Each case must depend upon its own facts and various cases on

scrutiny will be found really to be cases on the border line. But be that as it may in my opinion the facts of the present case are indistinguishable from the facts in the case of Watson v. Ago, Mehedee Sherazee. In that case there was an agreement between a principal and his agent commencing with an admitted balance which contemplated the existence of an account current consisting of mutual items of debit and credit. The agreement contained a stipulation that on the adjustment of the account the principal should be bound to pay such balance as might be found due from him. The account was kept merely as a continuous account which contained several items which brought down the mutual dealings to March 1868. It was held that the case fell within S. 8, Act 14 of 1859 and was not barred by limitation even as to the items which were dated more than three years before the institution of the suit.

49. Now in the present case having regard to the fact that there were consignments of tea to the Indian Planters-Agency Company Limited from time to time by the defendants that these consignments were sold by public auction and the ultimate proceeds of the sales of tea ware not received till 25th February 1921 and that on the account based on exhibit there did arise cross claims there can be no doubt in my ¦ opinion having regard to the nature of the account between the parties that the present suit does come within the ambit of Article 85, Lim. Act. The defendant's claim to defeat this suit on the ground of limitation should not in my opinion be acceded to. In view of the conclusion to which I have come it is unnecessary to refer to Article 59 or Article 115, Lim. Act, nor is it necessary in my opinion to find out whether in addition to the ac-count arising on the footing on the agreement Ex. 1 there is an agency account between the parties or not. It is sufficient to observe that taking one's stand upon the deed of hypothecation and looking into the nature of the account as it stood between the parties the case is one which attracts Article 85, Lim. Act. I therefore agree with the learned Chief Justice in the order he proposes to make.