

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

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NARRANDAS HEMRAJ AND OTHERS, PLAINTIFFS, v. VISSANDA3

HEMRAJ, DEFENDANT.*

November 26.

Limitation—Act IX of 1871, Sch. II, Cl. 87—Mutual accounts—Reciprocal demands.

From the month of September, 1873, until the month of May, 1874, the plaintiffs at Bombay and the defendant at Karachi had dealings with one another. It was the practice for the defendant at Karachi to draw *hundis* upon the plaintiffs at Bombay, which the plaintiffs duly accepted and paid at Bombay; and, in order to put the plaintiffs in funds, the defendant was in the habit of drawing *hundis* upon other firms in Bombay in favour of the plaintiffs, the amount of which *hundis* the plaintiffs realised from time to time at Bombay. Until the 8th January, 1874, the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendants. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances up to the 10th May, 1874. The last payment made by the defendant was on the 27th April, 1874. The last advance made by the plaintiffs was on the 10th May, 1874. On the 10th May, 1874, the total balance due by the defendant was Rs. 8,514-12-2. The plaintiffs calculated interest on this sum up to the 9th April, 1877, and on the 19th April, 1877, filed the plaint in this suit to recover the said amount. The defendant pleaded limitation. The plaintiffs contended that the account between them and the defendant was a mutual account, and that, under clause 87 of Schedule II of the Limitation Act XV of 1877, the period of limitation dated from the day of the last advance made by them to the defendant, viz., 10th May 1874.

Held on the authority of *Ghaseram v. Manohar Doss* (1) that the account between the plaintiffs and the defendant was a mutual, current and open account within the meaning of clause 87, and that the suit was not barred.

Literally construed, clause 87 would apply only to those cases in which both parties have in the course of their dealings made *actual* demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties; in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other.

Suit to recover Rs. 10,999-11-5, the balance of an account.

The plaintiffs were merchants, and carried on business in Bombay. The defendant resided and carried on business at Karachi. The plaint stated that "the plaintiffs and the defendant commenced to have dealings with each other in or about the month of September, 1873. In the course of such dealings it was the

* Suit No. 382 of 1877.

practice of the defendant an Karachi to draw *hundis* upon the plaintiffs at Bombay which the plaintiffs duly accepted and paid at Bombay; and, in order to repay the plaintiffs the money so advanced by them as paid upon such *hundis*, the defendant was in the habit of drawing *hundis* upon other firms in Bombay in favour of the plaintiffs, the amount of which *hundis* the plaintiffs realized from time to time at Bombay. The said mutual dealings between the plaintiffs and the defendant continued up to the 10th May, 1874, at which date there was a balance due from the defendant in respect of the said dealings amounting to Rs. 8,514-12-2. The plaintiffs have calculated interest upon the said sum from the said 10th May, 1874, to the 9th April, 1877, and have ascertained that at the last-mentioned date the total amount due by defendant to the plaintiffs in respect of the said dealings was Rs. 10,999-11-5, the amount sued for in this action."

The plaint was filed on the 19th April, 1877.

The defendant (*inter alia*) pleaded that the suit was barred by limitation. At the hearing an issue was raised upon this plea, and was determined without going into the merits of the case. The evidence for the plaintiffs proved that money was received by the plaintiffs from the defendant, and payments made by the plaintiffs on the defendant's account at the dates and of the amounts stated in the following list:—

<i>Receipts by plaintiffs.</i>		<i>Payments by plaintiffs.</i>	
1873, 15th September ...	Rs. 600	1873, 20th September ...	Rs. 600
„ 27th „ ...	„ 610	„ 25th „ ...	„ 600
„ 6th October ...	„ 1,200	„ 7th October ...	„ 1,200
„ 30th „ ...	„ 1,200	„ 4th November ...	„ 600
„ 3rd November ...	„ 1,000	„ 4th „ ...	„ 600
„ 13th „ ...	„ 2,000	„ 12th „ ...	„ 1,200
„ 11th December ...	„ 1,200	„ 12th „ ...	„ 1,200
1874, 8th January ...	„ 3,400	„ 15th „ ...	„ 600
„ 16th February ...	„ 1,200	„ 3rd December ...	„ 1,200
„ 16th March ...	„ 1,000	„ 4th „ ...	„ 600
„ 27th April ...	„ 1,200	„ 27th „ ...	„ 1,000
	-----	„ 28th „ ...	„ 600
	14,600	1874, 10th January ...	„ 1,800
	-----	„ 10th „ ...	„ 1,200
		„ 14th „ ...	„ 600

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Payments by plaintiffs—continued.

1874, 26th January	...	Rs. 1,200
" 27th "	...	" 600
" 4th February	...	" 600
" 6th "	...	" 600
" 6th "	...	" 600
" 7th "	...	" 600
" 27th "	...	" 600
" 2nd March	...	" 1,200
" 2nd "	...	" 1,200
" 12th April	...	" 600
" 10th May	...	" 900

From the above account it will be seen that up to the 8th January, 1874, the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendant. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances on the defendant's account up to May, 1874. The last payment made by the defendant was on the 27th April, 1874.

Kirkpatrick (with him *Jardine*) for the plaintiffs.

Inverarity (with *Lang*) for the defendant.

The following authorities were cited in argument:—*Ghaseeram v. Manohar Doss*⁽¹⁾; *Hirada Basappa v. Gadigi Muddappa*⁽²⁾; *Watson v. Aga Mchadee Sherazee*⁽³⁾; *Navroji v. Chartered Bank of India*⁽⁴⁾; *Astley v. Gurney*⁽⁵⁾; *Thompson on Limitation*, p. 215.

SARGENT, J.—This is a suit to recover the balance of an account of certain dealings in *hundis* between the parties carrying on business as merchants at Bombay and Karachi respectively; and the question I have now to decide is, whether the plaintiff's present claim is, as defendant contends, barred, except so far as it consists of the last item of account.

The plaintiff's contention is that the balance is due on a mutual and open and current account, and that the case falls under article 87 of Schedule II of Act IX of 1871, the statute of limitations in force when this plaint was filed; that the time, therefore, when the statute began to run, as regards the balance, was the date of the last item.

(1) 2 Ind. Jur. N. S. 241.

(4) L. R. 1 Ind. Ap. 346—451.

(2) *Ibid.*

(5) L. R. 3 C. P. 444.

(3) 6 M.S. H. C. R. p. 142.

(6) L. R. 4 C. P. 714.

The nature of the business between the parties is stated thus in the second paragraph of the plaint. [His Lordship read the paragraph above set forth.] In his cross-examination, Narranji Mathuradas, one of the plaintiffs, says: "He (meaning the defendant) used to draw on us, and in order to keep us in funds used to remit *hundis* drawn in our favour on firms in Bombay. We used to collect the proceeds, and credit him with them in account." It was urged for the defendant that this course of dealing did not give rise to a mutual account, the *hundis* which were sent by defendant in favour of the plaintiffs being nothing more than payment on account of the *hundis* accepted and paid by the plaintiffs. Now, clause 87 of Schedule II of the Limitation Act IX of 1871 provides for the case of suits brought "for the balance due on mutual open and current account where there have been reciprocal demands between the parties". In the case of *Ghaseeram v. Manohar Doss*⁽¹⁾—which fell under the earlier Act of Limitation, viz., Act XIV of 1859, the corresponding clause of which is confined to "suits for balances of accounts current between merchants"—the plaintiff used to send *hundis* and treasury drafts from Putealla to the defendant at Calcutta to put him in funds to meet the purchase of goods on plaintiff's behalf, and *hundis* drawn by the plaintiff on the defendant—Phear, J., held that this did not constitute an act of trading on the part of plaintiff as against the defendant, and that he was only supplying the defendant with money to meet his own liability, and that there was, therefore, no trading with the defendant so as to constitute, relatively to the defendant's trading, a "mutual dealing". The Court of appeal, however, consisting of Peacock, C.J., and Narman, J., were of a different opinion. The Chief Justice in delivering Judgment said that he did "not think it necessary that there should have been such a buying and selling by each of the parties as to constitute him a trader within the strict sense of the term"; 2nd, that the fact of the defendant's advancing money for the plaintiff, and the plaintiff sending money to the defendant, constituted a mutual dealing, and that, "if there were such dealings between the plaintiff and the other firm in the course of business that sometimes the balance was in favour of one party and sometimes of

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the other, the dealings were mutual within the meaning of the section".

Norman, J., in his judgment said : "The plaintiff remits moneys to the defendants. He thus advances money, and has a right to sue as for money lent or received for his use. On the other hand, the defendants are shown to make advances by paying *hundis* drawn on them apparently without waiting to see whether they are in funds or not. The defendants, therefore, in like manner, are from time to time in a position to sue for moneys lent by them in the course of their business to the plaintiff. There is thus a course of mutual lending and dealing, apparently as between bankers."

The latter part of clause 87 of Act IX of 1871, which is intended to define more particularly the class of cases contemplated by the clause, is far from clear. Literally construed, it would confine the clause to those cases only in which both parties have, in the course of their dealing, made actual demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties—in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other.

As to the course of dealing in the present case, it is virtually the same as in the case of *Ghaşceram v. Manohar Doss*. The plaintiffs accepted bills, and the defendant transmitted *hundis* to them to keep them in funds. The account was one in which the balance might be sometimes on one side and sometimes on the other ; and, as a matter of fact, down to 8th January, 1874, the balance was sometimes on one side and sometimes on the other. After that it is true it would appear to have been always on the side of the plaintiffs, and it continued to be so until the 10th May, 1874, when the last *hundi* was accepted by them ; but there is nothing to show a change in the nature of the dealings,—the account being a continuous one from the time it was first opened, with the balance carried over at the end of 19th February, 1870.

I am, therefore, of opinion that the account falls within clause 87 of Schedule II of Act IX of 1871, and that the plaintiff's claim is not barred. I ought to mention that in the recent case of *Khushalo v. Behari Lal* (1), before the Allahabad High Court, the Court expressed an opinion that clause 85 of Act XV of 1877 (the Limitation Act now in force), which is similarly worded to clause 87 of Act IX of 1871, would apply to ordinary banking accounts.

The case must, therefore, be set down for hearing on the merits.

Judgment for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Hearn, Cleveland, and Little*

Attorneys for the defendant.—Messrs. *Craigie, Lynch, and Owen.*

(1) I. L. R., 3 All., 523.

APPELLATE CIVIL.

Before Sir M. E. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

KRISHNAJI RAVJI GODBOLE (ORIGINAL PLAINTIFF), APPELLANT, v. GANESH BAPUJI PATVARDHAN (DECEASED) AND ANOTHER.*

September 25.

Mortgage—Right to redeem—Vendor and purchaser—Good title at time of hearing of suit—certificate of sale.

The property in dispute was mortgaged by its owner to the defendant with possession on the 3rd October, 1847. On the 3rd December, 1861, A obtained a money-decree against the son and heirs of the mortgagor. In execution of that decree the property was sold subject to the mortgage, and purchased by B on the 12th August, 1861. Before confirmation of the sale, B, on the 1st September, 1864, sold it to C, who, on the 30th March, 1877, conveyed it by deed to the plaintiff. On the 27th September, 1877, the plaintiff brought a suit for redeeming the property, and at the hearing produced a certificate of sale, dated the 27th October, 1877. The certificate was applied for in May, 1877, and issued to C, reciting the sale to B, and the sale by B to C. The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge, in appeal, reversed the decree of the first Court on the ground that the certificate of sale was not in existence at the date of the institution of the suit, and that, therefore, the plaintiff had then no complete title. On appeal to the High Court,

* Second Appeal, No. 53 of 1881.