

(1971) 06 CAL CK 0015
In the Calcutta High Court
Case No : A.F.O.D. No. 247 of 1970

Bhattacharjee (Agency) and Co. Pvt. Ltd. APPELLANT
Vs
Tarak Nath Banerjee RESPONDENT

Date of Decision : 16-06-1971

Acts Referred:

Evidence Act, 1872 — Section 101
Limitation Act, 1963 — Article 22

Citation : AIR 1972 Cal 393 : (1972) 2 ILR (Cal) 104

Hon'ble Judges : M.M. Dutt, J;Arun K. Mukherjea, J

Bench : Division Bench

Advocate : Sudhir Kumar Bose and Hari Narayan Mukherjee, for the Appellant;
J.K. Sen Gupta and Biraj Mohan Roy, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This appeal is at the instance of the defendant and it arises Out of a suit for recovery of money.

2. The case or the plaintiff as made in the plaint is as follows:--

The plaintiff is the nephew (Sister's son) of one Paritosh Bhattacharjee. Paritosh Bhattacharjee and some of the members of his family had been, at the material time, the directors of the defendant company named Bhattacharjee (Agency) & Co. Pvt. Ltd, The plaintiff was an employee of the defendant company on a monthly salary of Rs. 300/- which was subsequently increased to Rs. 500/-. During the period of his employment in the defendant company, the plaintiff used to deposit moneys with the defendant company and he also used to keep in deposit with the defendant company his monthly salaries. The said deposits were used to be made by the plaintiff at the request of his maternal uncle Paritosh Bhattacharjee. It was agreed that the amount of deposit would be payable to the plaintiff on demand. The plaintiff discontinued his services under the defendant company since Baisakh 11, 1362 B.S. corresponding to April 25, 1955, and thereafter joined another company named Bhattacharjee (Tea Blenders) Private

Ltd. which was sponsored and incorporated at the instance of the said Paritosh Bhattacharjee and his brother Bankim. The plaintiff became a director of this Company.

3. The amounts deposited by the plaintiff with the defendant Company were shown in the annual balance sheets and the books of accounts of the Company under the head "Deposit of Staff". The defendant company by its letter dated July 4, 1960, admitted that a sum of Rupees 15,963.28 was lying with the defendant company to the credit of the plaintiff. The plaintiff resigned from the office of the director of Bhattacharjee (Tea Blenders) Private Ltd. on November 2, 1967, on account of differences with Paritosh Bhattacharjee relating to the management of the said company. As the defendant company failed and neglected to pay to the plaintiff the said amount lying in deposit with the defendant company, the plaintiff by his letter dated November 2, 1967, sent to the defendant company under registered post with acknowledgment due, demanded payment of the said amount, but although the defendant company received the said letter on November 6, 1967, it remained silent. The plaintiff sent a letter of reminder dated January 5, 1968. In reply to this letter, the defendant company by its letter dated January 16, 1968, for the first time denied that any sum was due to the plaintiff by the defendant company and made certain false allegations. The plaintiff through his Advocate's letter dated January 24, 1968, denied the said allegations. This letter was replied to by the defendant company whereby the defendant company reiterated the said false allegations.

4. On the aforesaid allegations, the plaintiff filed the suit for the recovery of Rs. 15,963.28 being the amount of deposit and Rs. 378.72 on account of interest in all Rs. 16,342/-.

5. The defendant company contested the suit by a written statement. The case of the defendant company was that the plaintiff used to draw against the deposit account, and his drawing in the year 1361 B.S. was Rs. 3000/- and in the year 1362 B.S. it was Rs. 15,940/- leaving a balance of Rs. 15,963.28 as on Chaitra 30, 1362 B.S. and that there being no deposit or drawing during the years between 1363 B.S. and 1370 B.S., the same amount of balance of Rs. 15,963.28 was shown in the books of accounts to the credit of the plaintiff as on Chaitra 30, 1370 B.S.

6. It was alleged by the defendant company that in the year 1371 B.S., the plaintiff withdrew from the deposit account a sum of Rs. 10,000/- in cash on Magh 19, 1371 B.S. (February 2, 1965) and after the said withdrawal the balance sum of Rs. 5,963.28 lay in deposit with the defendant company to the credit of the plaintiff. It was further alleged that the plaintiff withdrew the said balance sum of Rupees 5,963.28 on Jaistha 20, 1362 B.S. (June 3, 1965). The defendant company denied that the said sum of Rs. 15,963.28 or any part thereof was due by the defendant (continued on Col. 2) company to the plaintiff, as alleged. It was also contended by the defendant company that the suit was barred by limitation.

7. The learned Subordinate Judge by his judgment dated December 24, 1969, held that the defendant Company failed to prove its plea of payment or the said sum of Rs. 15,963.28 to the plaintiff and that the suit was not barred by limitation. In view of the said findings, the learned Subordinate Judge by his said judgment de-created the suit in full. Hence this appeal by the defendant Company.

8. Mr. Sudhir Kumar Bose, learned Advocate for the appellant strenuously urged before us that the suit was barred by limitation. It was contended that on the facts alleged in the plaint, it should be held that it was a case of loan and not a deposit and as such Article 21 and not Article 22 of the Limitation Act, 1963, would apply. It was submitted that as the suit was instituted more than three years from the date of the loan, the suit was barred. Articles 21 and 22 are as follows:--

21.

For money lent under an agreement that it shall be payable on demand

Three years When the loan is made.

22.

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

Three years When the demand is made.

9. The distinction between a "loan" and a "deposit" is to some extent difficult to ascertain. The Limitation Act does not define either of the expressions "loan" or "deposit", but judicial decisions have laid down certain tests for distinguishing a loan from a deposit. Both the articles require that there shall be an agreement that the money lent or money deposited shall be payable on demand. It is therefore clear that the agreement that the money shall be payable on demand is not a relevant fact to be considered in determining whether a particular transaction is a loan or a deposit. The only fact which has to be ascertained is whether by the advance of the money, a relationship of debtor and creditor has been created between the parties. Apparently it may seem that there is no distinction between the two terms, and a deposit is also a loan, but really a deposit is something more than a loan.

10. In *Mahomed Akbar Khan v. Attar Singh* AIR 1936 PC 171, it has been laid down by the Privy Council that the distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the deposittee to seek out the depositor and repay him, that he is to keep the money till asked for it and that a demand by the depositor would therefore seem to be a normal condition of the obligation of the deposittee to repay. In a later decision in AIR 1940 132 (Privy Council), the Privy Council has reiterated the same principle as laid down in *Mohammad Akbar Khan's* case.

11. From the aforesaid Privy Council decisions it follows that in order to

determine whether a particular transaction is a deposit or a loan, it has to be ascertained whether the depositee is obliged to seek out the depositor for repayment or whether the depositee is to keep the money with him till payment of it is demanded by the depositor. In the former case it will be a loan and in the latter case it will be a deposit.

12. In the instant case, there is no evidence that the defendant Company ever tried to seek out the plaintiff to repay. It was the plaintiff who from time to time approached the defendant Company for the purpose of withdrawing money out of the amounts deposited by him. Mr. Bose drew our attention to paragraph 3 of the plaint wherein it was pleaded that the agreement was that the amount of deposit would be payable on demand. Mr. Bose submitted that an agreement to pay on demand would attract the provisions of Article 21 and not Article 22. We are unable to accept this contention of Mr. Bose. It has been already pointed out that both the Articles require an agreement that the money advanced shall be payable on demand and accordingly that cannot be a point of distinction between a deposit and a loan. To quote the language of the Privy Council in Mohammad Akbar Khan's case referred to above, "a demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay." Whether it is a case of deposit or a loan, there shall be an agreement for repayment on demand. There is therefore no force in the contention of Mr. Bose that as the amount advanced was payable on demand, it was a loan and not a deposit.

13. The plaintiff alleged in the plaint that he used to keep in deposit with the defendant Company the amounts of his monthly salaries. The defendant Company did not in its written statement specifically deny the said allegation nor did the defendant Company allege that the money deposited by the plaintiff was by way of loan. D.W. 3 Paritosh Bhattacharjee, a director of the defendant Company in the examination-in-chief of his evidence says as follows:-- The plaintiff's salary used to be kept in deposit in our Company. Sometimes, he also used to make additional deposits of money in our Company." Throughout his evidence he did not allege that the defendant Company used to take loan from the plaintiff or that the plaintiff used to lend money to the defendant Company out of his salary. Instead, D.W. 3 characterised the transactions as deposit.

14. In paragraph 5 of the plaint the plaintiff states that the amount of Rs. 15,963,28 has all along been shown as deposit under the head "Deposit of staff in the annual balance sheets and the account books of the defendant Company. This statement in paragraph 3 of the plaint has been admitted by the defendant Company in paragraph 3 of the written statement. There is no explanation by or on behalf of the defendant Company why the amount has been shown under the item "Deposit of staff", if it was really a loan as contended on behalf of the Company. It is unthinkable that a limited Company will describe a loan as a deposit in its books of accounts and in the annual balance sheets.

15. In *Kashinath v. New Akot Cotton Ginning and Pressing Co. Ltd.*, AIR 1951

Nag 255 a Division Bench of the Nagpur High Court consisting of Vivian Bose, C. J. and Mangalmurti, J. has held that if the parties deliberately chose to consider their transaction a deposit and not a loan, then it is difficult to hold that it was not intended to be a deposit. It has been further held in that case, that although the mere use of the term "deposit" cannot alter the substance of the transaction, but as the dividing line between a "deposit" and a "loan" is so fine, and as the difference must to a large extent depend upon the intention of the parties, the fact that they agree to regard their act as "deposit" is of importance.

16. In Jagannath Prasad and Others Vs. Mst. Ram Dularey and Others, it appears that the parties at the time of making the payment used the word "Amanat" or "Jama" and it has been held that prima facie the intention of the parties would appear to be that the payment was made by way of a "deposit". The Madras High Court in Abdul Hamid Sahib and Others Vs. Rahmat Bi, has expressed the view that the use of the term "loan" or "deposit" may not in itself be conclusive though, of course, it is a circumstance which would be taken into account and that what should be regarded is the cumulative effect of the evidence which bears on the character of the debt as a loan or a deposit.

17. In V.E.A. Annamalai Chettiar and Another Vs. S.V.V.S. Veerappa Chettiar and Others, the Supreme Court has laid down that whether a transaction is a transaction of loan or deposit does not depend merely on the terms of the document but has got to be judged from the intention of the parties and all the circumstances of the case.

18. The decisions referred to above have laid down the same principle, namely, that in ascertaining whether a debt is a loan or a deposit the intention of the parties and all the circumstances of the case have to be considered.

19. In the instant case, it has been already stated that the debt appears in the balance sheets and the audited books of accounts of the defendant Company as "deposit of staff". D.W. 3 Paritosh Bhattacharjee in his evidence refers to the amount in question as deposit. There is no evidence that the defendant Company ever tried to seek out the plaintiff to repay and further, it has not been alleged on behalf of the defendant Company either in its written statement or in the evidence of its witnesses that the transaction was a loan transaction and not a deposit. From the circumstances stated above, it cannot but be held that the intention of the parties was that [he amount should be regarded as a deposit and not a loan. The suit having been instituted within three years when the demand for payment was made by the plaintiff, it is not barred by limitation.

20. Now coming to the merits of the case, it has been stated already that the defendant Company admitted that the sum of Rs. 15,963.28 had been shown in the books of account of the defendant Company as lying to the credit of the plaintiff as on Chaitra 30, 1370 B.S. It is, however, alleged by the defendant Company that the said amount was paid to the plaintiff in two instalments, namely, Rs. 10,000/- on February 2, 1965, and the balance sum of Rs. 5,963.28

on June 3, 1965. There can be no doubt that the defendant Company having alleged payment of the amount, the onus is on the defendant Company to prove the same.

21. In support of the plea of payment, strong reliance was placed on the books of accounts of the defendant Company. Exhibit A (17) is the entry dated February 2, 1965, in the Jabeda Khata of the defendant Company. That entry no doubt records payment of the sum of Rs. 10,000/- to the plaintiff, but it is not supported by any voucher or receipt. D.W. 3 Paritosh Bhattacharjee says in his evidence that vouchers were not demanded from the plaintiff as he was a close relative of Paritosh. The plaintiff in his evidence denies that he never granted receipts for the money which he withdrew from the defendant Company. Further, the plaintiff says that whenever he took money from the defendant Company receipts were demanded from him and that he also granted receipts therefore. The amount of Rupees 10,000/- has alleged to have been paid to the plaintiff by D.W. 1 Ganesh Chandra Bhattacharjee, the Accountant of the defendant Company. Ganesh was appointed in the year 1369 B.S. i.e. long after the plaintiff left the defendant Company. It is hardly believable that Ganesh would pay Rs. 10,000/- to the plaintiff without any receipt. No reason has been given by Ganesh why he made payment of such a considerable amount to the plaintiff without any receipt instead, it has been simply said by him that the plaintiff did not sign any receipt or voucher. There is no evidence that Ganesh requested the plaintiff to give a receipt for the payment. It appears from another entry of the same date i.e., February 2, 1965 (Exhibit 1/b) that Rs. 1,500/- was paid to the Director Paritosh Bhattacharjee against voucher No. 1392. It is curious that while the plaintiff who had no connection with the defendant Company would be paid Rupees 10,000/- without any voucher, the Director of the defendant Company would be paid much lesser amount i.e. Rs. 1,500/- against voucher.

22. It appears from the cash book of the defendant Company that the cash balance at the close of February 1, 1965, i.e., the day previous to the day on which payment of Rs. 10,000/- has been alleged to have been made to the plaintiff, was Rs. 1,256.13. Ganesh says that on the following day, i.e., on February 2, 1965, Paritosh Bhattacharjee gave him Rupees 10,000/- in cash and asked him to enter the amount in his name in the Jabeda Khata. The entry Ex. 1/ c shows receipt of Rs. 10,000/- from Paritosh. It appears from the evidence of Paritosh that he withdrew a sum of Rs. 10,000/- from the Bhattacharjee (Tea Blenders) Private Ltd. by encashing a cheque on Hong Kong Bank. The counterpart of the cheque (Ext. E) shows that the cheque was issued by the Bhattacharjee (Tea Blender) Private Limited in favour of Paritosh Bhattacharjee in his personal capacity on January 21, 1965. It appears from the Bank's statement of accounts that the cheque was encashed on the same date. Paritosh says that he gave the amount to Ganesh about 8/10 days after the encashment of the cheque and that he advised him to pay the amount to the plaintiff. There is no evidence on record that the plaintiff demanded payment so as to justify withdrawal of the said amount from the said Company. There is also no

explanation why the cheque was issued to Paritosh Bhattacharjee in his personal capacity and also why he kept the money for 8/10 days after encashment of the cheque.

23. The defendant Company has examined its auditor Nripendra Nath Sanyal (D.W. 2) of the firm of M/s. Sarkar & Co. D.W. 2 audited the accounts of the defendant Company for the relevant year, Regarding the disputed amount of Rupees 10,000/-, this witness admitted that he did not make any comment in his report, that he did not consider it to issue confirmation letter to the plaintiff nor did he ask for any confirmation letter from the plaintiff. We get from P.W. 1 Manash Kumar Bandopadhyay, a qualified Chartered Accountant that when a Company makes any payment not supported by any voucher the auditor requires written confirmation from the recipient before passing it. D. W. 2 in his evidence admitted that some auditors would issue confirmation letters but he did not consider it necessary. D.W. 2, however, alleged that he had a talk with the plaintiff regarding the payment shown under the entry (Ext. A17) at the latter's residence at No. 5, Hyde Road, Kidder-pore. It is clear from the evidence of D.W, 2 that he departed from the established practice and procedure of auditing by not issuing a letter of confirmation to the plaintiff regarding the alleged payment to him of Rs. 10,000/- without any receipt It may be that he was known to the plaintiff from before and that he frequently went to the plaintiff's house as alleged by him, but that is no reason why he should make a departure from the usual practice and procedure of auditing. In this state of facts it is difficult to place reliance on his evidence that he had talks with the plaintiff at his residence and that the plaintiff admitted receipt of the said sum.

24. Regarding the disputed amount of Rs. 5,963.28 the entry dated June 3, 1965, in the Jabeda Khata (Ext. A18) shows payment of the said amount to the plaintiff. It also refers to a receipt. D.W. 3 Paritosh says in his evidence that a sum of Rs. 15,000/- was given by Bhattacharjee (Tea Blenders) Private Ltd. to the defendant company. It appears that a cheque for Rs. 15,00/- was issued by the said Company in favour of the defendant Company on June 3, 1965. The cheque was encashed on the same day. D.W. 2 alleged that out of the said amount, he paid Rs. 5,963.28 to the plaintiff at the latter's residence in full and final settlement of his dues and that the plaintiff gave him a receipt. It was further alleged by Paritosh that he sent a slip to Ganesh advising him to make necessary entries in the account books. The receipt alleged to have been granted by the plaintiff is not forthcoming. Ganesh alleged in his evidence that the letter of Paritosh Bhattacharjee and the receipt were both kept in a flat file, but the same could not be traced when he searched for the same in April, 1968. Ganesh, however, admitted that all other vouchers were available.

25. The D.W. 2 Nripendra Nath Sanyal says that he saw the voucher at the time of auditing the accounts of the defendant Company.

26. The case of the defendant Company is that no receipt was ever taken from the plaintiff. We fail to understand why this time Paritosh took a receipt from the

plaintiff for the said sum of Rupees 5,963.28. Be that as it may, the receipt has not been produced on the ground that it has been lost. It is significant that when all other vouchers are available, this particular voucher alleged to have been granted by the plaintiff for the first and the last time could not be traced out although it was the positive evidence of Ganesh that it was kept in a flat file. We are unable to rely on the evidence of D.W. 2 that he saw the receipt. The story alleged on behalf of the defendant Company that there was payment to the plaintiff of the said sum of Rs. 5,963.28, that the plaintiff granted a receipt for the said amount and that the said receipt could not be traced out, is difficult to believe. In view of the evidence of D.W. 2 which we are unable to believe and the manner in which the accounts were audited by him, we are of the opinion that the entries Exts. A17 and A18 are not true.

27. The plaintiff by his letter dated November 2, 1967 (Exhibit J) demanded from the defendant Company the sum of Rs. 15,963.28 as due to the plaintiff from the defendant Company. This letter of the plaintiff was not replied to by the defendant Company. Paritosh Bhattacharjee says that as he was seriously ill, he could not give any reply. Save and except the uncorroborated testimony of Paritosh, there is no evidence that he was seriously ill. He merely alleged that he was seriously ill and did not disclose the nature of the illness. Even Ganesh, the Accountant of the defendant Company does not say that the director Paritosh Bhattacharjee had been seriously ill at the time of the letter (Ext. J). We are unable to accept the evidence of Paritosh that as he was seriously ill, he could not reply to the letter of the plaintiff. Even assuming that Paritosh was what prevented Ganesh to give a simple reply to the letter that the plaintiff had been paid the amount claimed by him by two instalments, one on February 2, 1965, and the other on June 3, 1965, particularly when it has been alleged that the payment of Rs. 10,000/- was through Ganesh and the other payment of Rs. 5963.28 was against receipt granted by the plaintiff and alleged to have been kept by Ganesh in a flat file. In this context it may be pointed out that the disputed entries in the books of accounts recording payment to the plaintiff were made by Ganesh. In our opinion, the letter of the plaintiff was not deliberately replied to as the defendant Company was not in a position, to deny the plaintiffs claim.

28. The plaintiff not having received any reply from the defendant Company gave a letter of reminder on January 5, 1968. This letter was not replied to till January 16, 1968, when on that date Paritosh Bhattacharjee wrote to the plaintiff as follows:--

"With reference to your letter of the 5th instant we confirm that you came to our above office on the 12th instant and after personally inspecting the books satisfied yourself that nothing was due and owing to you by this company as wrongly alleged in your letter under reply".

Paritosh Bhattacharjee in his evidence alleged that on receipt of the demand letter from the plaintiff, he asked Ganesh to call the plaintiff and to show him the

accounts in his name. But this allegation does not find corroboration from the evidence of Ganesh. Ganesh alleged that in August 1967 and again in January, 1968, the plaintiff came to the office of the defendant Company, that on being asked by the plaintiff, Ganesh showed him the account books and that on seeing the accounts, the plaintiff stated that it was all right. It appears from the evidence of Ganesh that the plaintiff came to the office of the defendant Company and looked into the books of accounts out of his own. The evidence of Paritosh is contradictory to that of Ganesh and we disbelieve the evidence of both of them. From the facts stated above, there can be no doubt that the allegations made in the letter dated January 16, 1968, are untrue and the letter containing the said allegations was written as a result of afterthought.

29. In view of the facts and circumstances stated above and after considering the evidence on record, both oral and documentary, we hold that the defendant Company has failed to prove payment to the plaintiff of the said sum of Rupees 15,963.28 or any part thereof. The learned Subordinate Judge was perfectly justified in decreeing the plaintiff's suit.

30. In the result, the judgment and decree of the learned Subordinate Judge are hereby affirmed and the appeal is dismissed with costs.

31. There will be stay of operation of this Order for six weeks.

Arun K. Mukherjea, J.

32. I agree.