

(1926) 07 BOM CK 0051
In the Bombay High Court
Case No : O.C.J. Suit No. 359 of 1926

Hirabai Gopaldas

APPELLANT

Vs

Dhanjibhai B. Kavarana

RESPONDENT

Date of Decision : 15-07-1926

Acts Referred:

Evidence Act, 1872 — Section 32

Citation : (1927) 29 BOMLR 427

Hon'ble Judges : Kemp, J

Bench : Single Bench

Judgement

Kemp, J.—The plaintiff, who is twenty years old, sues three of the partners of her late father Gopaldas for the amount standing to her credit in an account in her name in the books of the firm. The three defendants and the deceased Gopaldas, who died on June 12, 1925, were carrying on business as silk merchants at Bombay and at Canton in China under the name of B.F. Kavarana &Co. It had been the practice apparently of the partners to open accounts in the names of their wives or children in the books of the firm and I want to say at once that each of these accounts has to be considered separately. Defendant No. 2 says that the moneys in the plaintiff's account belonged to her father, the deceased Gopaldas, and that as such they are liable to be taken into account between the partners. It appears that on the dissolution of the partnership Gopaldas and defendant No. 3 Jivandas, who were brothers, were considerably indebted to the firm. Defendant No. 2 contends that the various accounts which have been opened in the names of the wives and children of the partners should be taken into the partnership account as the moneys of the respective partners and were never intended, when these accounts were opened, to be treated as the moneys of the persons in whose names those accounts were. In short, so far as this suit is concerned, defendant No. 2 contends that there was what might be called a resulting trust of the moneys in the plaintiff's account to her father the deceased Gopaldas. A second point is raised by defendant No. 2 as to whether the suit is barred by limitation. He contends that it comes within Article 59 of the Indian

Limitation Act, whilst the plaintiff purports to save her suit from the bar of limitation on the ground that these were moneys of a customer in the hands of his banker payable on demand under Article 60 of the Indian Limitation Act.

2. The first point which I have to consider is whether this suit is barred by limitation. It is pointed out in the case of *Bhimanna v. Venichand* (1925) 28 Bom. L.R. 73 that it will be sufficient to bring the case within Article 60 although the defendant is not by trade a banker, if he was with reference to this particular customer in the position of a banker. It appears from the account, which has been put in and marked as Exhibit B in the case, that it begins in the books of the firm with a (Ex. D) showing this and the entry Ex. E where Rs. 5 is shown in the plaintiff's name as a present. There is a withdrawal of Rs. 100 by Gopaldas from the account of which the plaintiff can remember nothing, but if any moneys had to be withdrawn on account of the plaintiff who was then a minor or at any rate very young, the withdrawal would naturally be made by her father and the moneys would be paid into his hands for her. The point to note is that Gopaldas himself never seems to have treated the money in this account as his own and that the account is made up of small sums of money paid in from time to time by items of Rs. 50 and the like. Nor is it shown that the defendants, until the partnership accounts were made up and they found there was a large amount owing by Gopaldas and his brother Jivandas, ever claimed or treated the moneys standing in the plaintiff's account as belonging to her deceased father. Defendant No. 2 admits that he attended the firm daily-for an hour or two every day at any rate. He says that he did not look at the books of account but that he relied on the answer given to him as to the progress of the business by Jivandas and Gopaldas. I find it difficult to believe that defendant No. 2 was not aware of the existence of this Khata. He admits that the Mehta wrote up the books correctly and that the books must be correct and I feel certain that he must from time to time have looked into the books to see how the business was progressing and in the course of doing so must have observed this Khata. I think the evidence shows that the firm accepted this Khata as of moneys received for the plaintiff. The plaintiff sent a notice of demand on January 2, 1926, asking for both her "palla" money and the balance due on this Khata. To that no written reply was sent by defendant No. 2. He says he was negotiating as to payment of the "palla" and obtaining first the consent of the plaintiff's father-in-law; and although the "palla" was subsequently paid by defendant No. 2 he does not appear to have anywhere repudiated in writing the demand for the balance due at the foot of the Khata. There is a suggestion in defendant No. 2's case that the deceased Gopaldas and Jivandas were putting moneys into these different names apparently in order to remove them from the partnership account. However, no allegation of fraud is raised and there is no issue on that point. It is for this reason that I have said that each account must be considered separately, If the deceased Gopaldas had intended that the moneys in this account in suit should really have been his own moneys disguised under the name of the plaintiff one would not have seen an balance of Rs. 163 carried over from the old firm in

1911. The account has been made up every year and interest added to it and the balance carried forward to the new year. The account further shows payments in of small sums of money from time to time and one Havala entry of a credit to the account from the account of the deceased Gopaldas and a withdrawal of Rs. 100 by Gopaldas. It appears to me that if these moneys were treated as a loan you would not have any withdrawal, nor would you expect the account to show for many years small sums of money paid in from time to time. No time has been stated as the period for repayment of any loan and the moneys seem to have been left in the firm. Interest has been drawn every year and the balance carried forward and the account has been operated on by the withdrawal of Rs. 100. On these facts coupled with the fact that at the time when this account was opened in the firm's books the plaintiff was a minor and it would be likely that money paid in for her would be intended to accumulate with interest which the account shows has occurred. I have come to the conclusion that this was not merely a loan to the firm but comes within the definition of a deposit under Article 60 being moneys of a customer in the hands of his banker payable on demand. Really there is no distinction between a deposit and a loan because they are both moneys lent by the customer to the bank, but it is necessary for the purpose of considering whether Article 60 applies to see whether the relationship of customer and banker arose between these parties, and for that purpose to see whether the moneys were left with the defendant firm. I, therefore, hold that Article 60 applies to the case and that the period of limitation commences from the time when the demand is made. The suit is, therefore, within time.

3. The next point to consider is whether there was what I may call a resulting trust in favour of the deceased Gopaldas or whether the moneys paid into the plaintiff's account were intended to be for the benefit of and belonging to the plaintiff. In the first place, the account is in the name of the plaintiff. In the second place, the sums which eventually amounted after many years with interest to the small amount claimed by the plaintiff in the suit were all small sums paid in from time to time. This corroborates the plaintiff's testimony that she received small presents on ceremonial occasions and the moneys paid into the bank represent these presents. There is also the evidence of defendant No 2 himself who admits that at Divali money presents were made to the wives and children of the partners and there are four chits (Ex. D) showing this and the entry Ex. E where Rs. 5 is shown in the plaintiff's name as a present. There is a withdrawal of Rs. 100 by Gopaldas from the account of which the plaintiff can remember nothing, but if any moneys had to be withdrawn on account of the plaintiff who was then a minor or at any rate very young, the withdrawal would naturally be made by her father and the moneys would be paid into his hands for her. The point to note is that Gopaldas himself never seems to have treated the money in this account as his own and that the account is made up of small sums of money paid in from time to time by items of Rs. 50 and the like. Nor is it shown that the defendants, until the partnership accounts were made up and they found there was a large amount owing by Gopaldas and his brother

Jivandas, ever claimed or treated the moneys standing in the plaintiff's account as belonging to her deceased father. Defendant No. 2 admits that he attended the firm daily-for an hour or two every day at any rate. He says that he did not look at the books of account but that he relied on the answer given to him as to the progress of the business by Jivandas and Gopaldas. I find it difficult to believe that defendant No. 2 was not aware of the existence of this Khata. He admits that the Mehta wrote up the books correctly and that the books must be correct and I feel certain that he must from time to time have looked into the books to see how the business was progressing and in the course of doing so must have observed this Khata. I think the evidence shows that the firm accepted this Khata as of moneys received for the plaintiff. The plaintiff sent a notice of demand on January 2, 1926, asking for both her "palla" money and the balance due on this Khata. To that no written reply was sent by defendant No. 2. He says he was negotiating as to payment of the "palla" and obtaining first the consent of the plaintiff's father-in-law; and although the "palla" was subsequently paid by defendant No. 2 he does not appear to have anywhere repudiated in writing the demand for the balance due at the foot of the Khata. There is a suggestion in defendant No. 2's case that the deceased Gopaldas and Jivandas were putting moneys into these different names apparently in order to remove them from the partnership account. However, no allegation of fraud is raised and there is no issue on that point. It is for this reason that I have said that each account must be considered separately, If the deceased Gopaldas had intended that the moneys in this account in suit should really have been his own moneys disguised under the name of the plaintiff one would not have seen an account of the character which is disclosed in this account, viz., small sums of money paid in from time to time throughout so many years. I feel sure that the object with which the moneys were paid in was that they should belong to the plaintiff.

4. Defendant No. 2 has given oral evidence as to an arrangement between the partners that these moneys should be taken into the account of the partnership. That arrangement is put forward as occurring at any rate some time after April 1925. It is said that Gopaldas admitted these moneys belonged to him and that a "havala" was proposed with reference to these accounts. I admitted that evidence as no objection was taken at the time, but on considering the question since I am very doubtful whether that evidence is admissible. In the first place, any admission by Gopaldas made so late as April 1925 would be only admissible u/s 32 of the Indian Evidence Act as a statement against his interest. Clearly here the alleged admission that the moneys belonged to him would not be an admission against his interest In the next place, where a resulting trust is sought to be proved acts and declarations made long after the transaction are not admissible in favour of the person seeking to show such a trust and I question whether, therefore, they would be admissible in favour of that person's creditor against the person in whose name the property stands. Nevertheless, I did record the evidence but I am of opinion that the oral testimony of defendant No.

2 is insufficient to prove that Gopaldas ever did make such an admission. As I have pointed out the facts appear to show that the moneys really were the moneys of the plaintiff, the account is a small one, it has extended throughout many years, payments in have been small and it would not have been worth Gopaldas" while to conceal any moneys of his in an account of such small dimensions. The fact that the same interest was allowed on plaintiff's account as on the accounts of the partners, in my opinion, points to nothing for it is likely that the best interest would be given to the child of a partner. I am aware that in deciding this case there is no presumption of advancement intended as there is in England where property is purchased by a father in the name of his child.

Decree as prayed.