

(1959) 11 CAL CK 0015
In the Calcutta High Court
Case No : A.F.O.D. No. 88 of 1957

Kalipada Banerjee

APPELLANT

Vs

Sree Bank Ltd. (In Liquidation)

RESPONDENT

Date of Decision : 27-11-1959

Acts Referred:

Banking Companies Act, 1949 — Section 45F
Limitation Act, 1908 — Article 85

Citation : AIR 1960 Cal 258a : (1960) 30 CompCas 234 : 64 CWN 207

Hon'ble Judges : P.B. Mukharji, J; H.K. Bose, J

Bench : Division Bench

Advocate : Samaran Sen, for the Appellant; Subrata Roy Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Mukharji, J.—This is an appeal from the judgment of the learned trial Judge, Mr. Justice S.R. Das Gupta decreeing the plaintiffs suit for a sum of Rs. 20,925/13/8 with interest thereon at 6 per cent per annum & costs. The suit was filed by Sree Bank Limited (in liquidation) through its Official Liquidator against the defendant on a mutual, open and current account which the defendant had with the Bank.

2. The defendant on 9-1-1946 by letter Ex. 1 addressed to the Managing Director of the plaintiff Bank opened "a current deposit account" with a cash deposit of Rs. 201/-. The evidence of the Managing Director, Sudhansu Kumar Biswas is that subsequently the defendant asked and was granted a temporary overdraft on this account. The account, therefore, was both a current deposit account as well as an overdraft account.

3. Two witnesses Gopal Chandra Roy, an accountant of the bank and Sudhansu Kumar Biswas, one of the Managing Directors, gave evidence on behalf of the plaintiff bank. The defendant himself was the only witness who gave evidence on his own behalf. The defendant's evidence was not accepted by the learned trial

Judge.

4. The learned Counsel on behalf of the appellant has submitted before us that he does not challenge the finding of facts by the learned Judge and he has not contended that the defendant's evidence should have been accepted or that the plaintiff's evidence should be rejected. This fact must be recorded.

5. The only argument advanced on behalf of the appellant is a point of limitation. The appellant contends that the claim of the plaintiff bank is barred by limitation. It also contends that Article 85 of the Limitation Act which was used in this case to save limitation does not apply to the kind of account that the defendant had with the plaintiff-bank. In other words, the submission is that the account was not a mutual, open and current account. The point requires careful examination.

6. The basis of this argument is that a bank which has gone into liquidation at the time of the institution of the proceedings cannot be said to have a mutual, open and current account. Liquidation of a bank means that the bank cannot keep the account of the depositor mutual, or open or current. The legal effect of a liquidation is that such accounts are closed by the order of liquidation and the account cannot be operated either by the customer or by the Liquidator. The second part of this argument is that Section 45F of the Banking Companies Act as amended in 1950 giving an additional period of one year cannot be availed in the facts of this case.

7. To appreciate this point of limitation it is necessary to state a few short dates and make a short analysis of the nature of account in this case. The record shows that the petition for winding up of this bank was made on 11-5-1948. The order for winding up of the bank was made on 3-8-1948. The proceeding was originally instituted as an application on 19-6-1950 and was subsequently converted into a plaint by amendment on 18-1-1952. The account as I have stated before, was opened by cash deposit on 9-1-1946. Since that date no further deposit by cash or by cheque or otherwise was made by the defendant, and therefore, there are no credit entries in that account after 9-1-1946. Withdrawals were made from this account from time to time by the defendant. The last withdrawal was made on 16-4-1946. Since then the only entries are which the bank made debit interest on this account from time to time. The Banking Companies Act, 1949 came into force on 16-3-1949 preceded by an Ordinance, being Ordinance 23 of 1949 on 19-9-1949 which inter alia introduced provisions of Section 45F later incorporated in the Act of 1949.

8. Dealing with the first submission of the appellant that the account in this case was not mutual, current and open, it is necessary to clear the ground by saying that the numerous decisions on the point do not actually decide the exact effect of liquidation on such account. No case has been cited to us which is a direct authority on the point saying that liquidation closes mutual, open and current account. Reliance was placed on the decision of the Court of Appeal in *Monotosb Kumar v. Central Calcutta Bank Ltd.* 91 Cal LJ 16 where the learned Chief Justice

observed:

"An open account is one which is not closed whether by settlement or otherwise and which is open for further transaction."

9. That observation appears to support this proposition that liquidation would come within the meaning of the word "otherwise" used in that dictum. It is plain that when a bank is ordered to be wound up or liquidated the account is not open for further transaction by the depositor. He can neither deposit nor withdraw from that account. It is true that if the account is an overdraft account he can pay the money to the liquidator to clear his debt but that does not make the account open. The word "open" in Article 85 of the Limitation Act in the context of "Mutual" and "current" must mean that it is open to both and not to one. It must be open to both the depositor as well as the bank as an account which can be operated and not merely open for special purpose of the bank to debit interest only or the depositor to pay his debt. The legal effect of liquidation must mean that openness, mutuality and currency of the account are all disrupted.

10. But this view does not help the appellant in this case. Article 85 of the Limitation Act speaks of a suit for the balance due on mutual, open and current account. It does not say that the account must remain mutual, open and current at the time of the institution of the suit. The requirement of this Article of the Limitation Act is met so long as the nature of account while it was alive a mutual, open and current account. A Division Bench decision of this Court in *Gonesh Lal v. Sheo Golam Singh* 5 Cal LR 211 held that even assuming that on the date of adjustment the account ceased to be mutual, open and current, Article 85 of the Limitation Act was applicable. In that case the account was adjusted and closed by private agreement and not closed by operation of law as in the present case by an order of liquidation. At this point it is necessary to refer to the decision of the Bombay High Court in *Karsondas Dhunjibhoy Vs. Surajbhan Ramrijpal*, where Beaumont CJ. at page 452 dissented from the Calcutta decision and observed :

"The nature of the cause of action must be determined at the date when the action is brought. In order to bring himself within Article 85 a plaintiff must show that he is suing for the balance due on a mutual, open and current account. If, in fact, at the date when he starts the suit, there is no open account, then he cannot say that he is suing for the balance due on such an account. And it seems to be irrelevant to observe that if the suit had been brought somewhat earlier in the year it would then have been for the balance due on an open account."

11. On the basis of this Bombay decision a possible argument in favour of the appellant is that when the liquidation of a Bank closes all mutual, open and current accounts between the Bank and its customer, the Liquidator can no longer file a suit on such account and come within Article 85 of the Limitation Act. The answer to that argument is that the Bombay decision is only an authority where the mutual, open and current account changes by private

agreement or contract between parties before the suit is filed and not by operation of law such as by liquidation. Naturally, if at the time of filing the suit, the parties have substituted by agreement one cause of action for another, such as, in the Bombay case one on mutual, open and current account for another of adjusted account, suit lies not on the previous cause of action but on the substituted subsequent cause of action valid and operative at the time of the institution of the suit. But when as in this appeal, there is a mutual, open and current (account?) between a Bank and a Customer and the Bank goes into liquidation, the liquidator succeeds to the rights of the Bank on the mutual, open and current account. No doubt liquidation closes the mutual open and current account, but the cause of action does not change thereby. It is only the administration which changes and the liquidator's right as legal successor to the Bank to sue as such account remains. To hold otherwise will be disastrous for Banks in liquidation.

12. The real point therefore in this case is to find out whether the account on which the liquidator has brought this suit was, when alive, a mutual, open and current account. The learned Counsel for the appellant has contended on this point that the account in this case should not be treated as mutual, open and current account even when the bank was alive. His submission on this point is two-fold. In the first place, the argument is that except the solitary credit entry of cash deposit on 9-1-1946. there has been no other credit at all and. therefore, this, does not satisfy the requirement of the word "mutual" and reference has been made to the case of Hajee Syed Mahomed v. Mt. Ashrafoonnissa ILR 5 Cal 759. His second submission is that the limit of the overdraft in this case was expressly stated to be Rs. 7,000/-, while in fact the actual overdraft by withdrawal rose above Rs. 10,000/- which was beyond the limit.

13. It therefore falls to be examined how far these submissions prevent this particular account from being mutual, open and current.

14. On mutual, open and current account there are many decisions which it will be unnecessary for us here to notice individually. It is well settled today by a series of authorities that the main feature of such an account is that the transactions must be both on the debit and credit sides creating independent obligations. No dogmatic test can be uniformly or invariably applied. This much however is settled that payment shown on one side should not merely be offset by entries of repayment of a debt due to the other side, but payment in the course of independent transactions. A mutual accountability between the parties is a test based on the existence of reciprocity of demands. While the balance may be a shifting balance it is now held that even the absence of a shifting balance is not conclusive on the question. The essence of a mutual, open and current account is that there must be independent dealings between the parties which can be duly off-set against each other. All these principles appear to be recognised also in the recent decision of the Court of Appeal in 91 Cal LJ 16 where many other authorities were also reviewed. The Court of Appeal in The Tea

Financing Syndicate Ltd. Vs. Chandra Kamal Bez Barua, discusses Article 85 of the Limitation Act and Ranldn CJ. lays down there that the conditions of the applicability of Article 85 are that there must be cross claims arising out of a course of dealings which evidences or is referable to an intention to set-off.

15. In this case on the facts there appears to be no doubt, the account began as "a current deposit account" as will appear expressly stated in the letter opening the account and marked Ex. 1 dated 19-1-1946. The first two withdrawals on 16th and 19th February of Rs. 150/- and Rs. 25/- respectively show that these withdrawals were well-covered by the credits. Then begins the overdraft; the debit balance increases on the account. It is in evidence that subsequently there was the agreement for an overdraft. In other words, there was the current account in which the defendant was the creditor of the bank and then the overdraft account where plaintiff bank was the creditor of the defendant. The account, therefore, in my view, answers the essential tests of a mutual, open and current account, with independent obligations. In R.N. Kapur, partner of Wright and Co. Vs. The Travancore National and Quilon Bank, Limited (in liquidation) by Official Liquidator and Others, the Court of Appeal of the Madras High Court comes to the same conclusion that Article 85 of the Limitation Act governs a suit for the recovery of the balance due on a current account maintained by a customer at a bank, which account is sometimes in credit and sometimes in debit with facility to the customer to overdraw, as in the present appeal.

16. The last submission on the point of limitation on behalf of the appellant is that Section 45F of the Banking Companies Act does not apply to this account at all. The basis of this argument is fundamental. It is contended that this bank was, wound up in 1948 before the Banking Companies Act, 1949 came into operation. It is therefore, argued that the Banking Companies Act, 1949 and its provisions and subsequent amendments do not have any retrospective effect and do not include the Banking Companies ordered to be liquidated prior to the coming into operation of this Act. Hence, it is submitted that Section 45F has no application at all.

17. This argument is advanced on three broad lines. The first line is that Section 45F speaks of a Banking Company and provides for the period of limitations for a suit by a Banking Company. The extended time given u/s 45F is a period of one year immediately preceding the date of the order for winding up of the Banking Company. In fact, it will be appropriate to quote Section 45F here :

"Section 45F. Special period of limitation. Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (IX of 1908), or any other law for the time being in force, in computing the period of limitation prescribed for any suit or application by a Banking Company, the period of one year immediately preceding the date of the order for winding up of the Banking Company shall be excluded."

18. Mr. Sen for the appellant contends that this only means the Banking Company within the meaning of Banking Companies Act and as defined by Section 5(c) of the Banking Companies Act. That definition provides T

"Banking Company means any company which transacts the business of banking in India."

19. It is, therefore, argued that the present tense or the word "transacts" indicates that a Banking Company which was transacting business at the time of coming into operation of the Act and thereafter went into liquidation and not this Banking Company which went into liquidation before the Act, because such Banking Company could never come within the definition of a Banking Company under this Act. The answer to this argument is that the word "Banking Company" in Section 45F is used in connection with the expression "in computing period of limitation prescribed for any suit or application by the Banking Companies." Now Banking Company as such is not mentioned in the Limitation Act except under Article 60 and even then the expression there is not "Banking Company" but "Banker". The word Banking Company was not for the first time used in the Banking Companies Act. It appeared also in the old Companies Act in its series of Sections 277F to 277N. Therefore, the expression "period of limitation prescribed for any suit or application by a Banking Company" should not be limited only to such Banking Companies which were working when Banking Companies Act came into operation and which went into liquidation thereafter. To exclude Banking Companies liquidated prior to the operation of the Banking Companies Act but whose liquidation continued after the Banking Companies Act, from the operation of Section 45F would create a class of Banking Companies with different periods of limitation for which I find no rational justification. Nor do I find any reason for making such a discrimination between Banking Companies prior and subsequent to the Banking Companies Act for the purpose of limitation.

20. Many decisions have been given in this Court and elsewhere which however tacitly proceeded on the view I have just expressed although it must be said that none expressly or directly decided the point. An example of that can be found in the case the Pioneer Co. Ltd. v. Bamandeb Banerjee, 54 Cal WN 710. It may also be noticed here that certain sections of the Banking Companies Act have been held to be retrospective while others are held not to be so". Reference may be made to the decision of Bachawat. J. in Suburban Bank Ltd. (in liqdn.) Vs. Nistaran Chakrabarti, where although the order of winding up of the Bank there was made on 30-6-1948 and the suit was instituted on 3-12-1948, Section 45F was applied read with Article 59 of the Limitation Act. But the Punjab High Court in Punjab Commerce Bank Ltd. Vs. Brij Lal Mahandi Ratta, held that Section 450 was not retrospective and it maintained the view that the Amending Act was not retrospective in a subsequent decision on Section 35F in Federal Bank of India (Punjab) Ltd. v. Sorn Dev Grover. AIR 1958 P&h 21. Again a section like 45G has been held by my learned Brother in Sree Bank Ltd. (Matter No. 280 of 1957) on 25-2-1958 (Cal) that it was not intended to apply to cases of Banking Companies

where the winding up order was made prior to the amendment introduced by the amended Banking Companies Act, 1953. Naturally, each section and its language must ultimately determine whether that particular section has any retrospective operation or was so intended by the Legislature or not. There is no general rule of construction that because one particular section of a statute is retrospective the whole Statute should be regarded as retrospective nor is there any general opposite rule that because one section, is not retrospective no other section of that Statute can be construed as having retrospective operation.

21. Examining the language of Section 45F there appears no restriction or qualification to suggest that a Banking Company ordered to be wound up before coming into operation of the Banking Companies Act 1949 as amended in 1950 but whose winding up had not concluded after coming into operation of the Act, would not get the benefit of the additional year granted by that section. It will, therefore, be not right to import such restriction or qualification. I see also no compelling or necessary implication to introduce such a restriction.

22. The second line of argument is based on the context of the statute where Section 45F is placed. No doubt. Section 45F occurs in Part III (A) of the Bankina Companies Act which has for its title "special provisions for speedy disposal of winding up proceedings." To extend to the period of limitation there appears incongruous under a chapter heading for speedy disposal of winding up proceedings, because such a course does not speed but slows down winding up proceedings. But chapter heading in a Statute cannot control clear and unambiguous language of a section. See *Mt. Savitri Devi Vs. Dwarka Prasad Bhatya and Another* and *Maxwell's Interpretation of Statutes* 9th Edn. p. 54 citing *In re Carlton* (1945) Ch. 372 and *Toronto Corporation v. Toronto Railway*. (1907) AC 315. In the last case Lord Collins in 1907 AC 324 observed "a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it unless the wording is inconsistent with such interpretation."

23. But the most persuasive argument advanced by Mr. Sen on behalf of the appellant on this branch of case is based on the subsequent amendment of Section 45F which is replaced by the present Section 45O of the Banking Companies Amendment Act 1953. By Sub-section (3) of Section 45O it is now provided :

"The provisions of this section, in so far as it relates to Banking Companies being wound up, shall also apply to a Banking Company in respect of which a petition for the winding up has been presented before the commencement of the Banking Companies Amendment Act, 1953."

24. On the basis of this express language. Mr. Sen advances his third line of argument that previous to the amendment, Parliament did not intend that the previous counterpart of this section would have or should have retrospective operation, because if it were so then this express statutory amendment in Section 45O would not then have been subsequently called for. This argument is

interesting but not conclusive. A legislative Judgment in a subsequent statute making a section retrospective does not necessarily or conclusively mean that its previous counterpart before the amendment was not intended to be retrospective. Parliament may amend to make a doubtful point clear or it may do so for many other reasons germane to the particular amendment. In this case Section 45O(3) of the Banking Companies Amendment Act, 1953 is a radical departure from the previous Section 45F. In Section 45F the benefit of an additional one year was given for limitation. But after the amendment in Section 45-O(1) what is provided is that any suit or application by a Banking Company which is being wound up, limitation should cease to run from the date of presentation of the petition for winding up. Indeed, the expression "which is being wound up" in Section 45-O(1) of the Act appears to include all Banking Companies in the process of winding up whether they be banks ordered to be wound up before or after the Act, so long as the winding up is proceeding. In that view of the matter Parliament would seem to follow the principle of making no difference between a Banking Company ordered to be wound up before the Act and a Banking Company Ordered to be wound up after the Act.

25. One confusion I think should be avoided on this point. The appellant contends that according to settled rules of construction of a Statute a pending proceeding is not intended to be affected by a Statute unless it says so by express language or by necessary implication. That proposition is well settled. But no question of pending proceeding arises in the present appeal. Nothing was pending at the time when this application or suit in the present appeal was instituted. To say that winding up of the bank was continuing at that time does not make the subsequent suit or application pending. The observation of Jessel M.R. in *re, Joseph Suche and Co. Ltd.* (1875) 1 Ch. D. 48 does not help the appellant. There the learned Master of the Rolls in considering the effect of Section 10 of the Judicature Act directing that the same rules as in bankruptcy in paying debts shall apply where in winding up of any company the assets prove insufficient, held that this law did not make Section 10 retrospective. But Jessel M.R. based his view on the "ground that the alteration in that case was not merely procedural but in the substantive law in bankruptcy to prove for a debt. See Jessel M.R. at p. 50 of that Report. Here limitation for a suit unless the Statute otherwise provides, must be determined by the law of limitation prevailing at the time when the suit is instituted and that question should not be confused with the larger controversial problem of how far substantial legal rights and procedural rights in appending proceeding can be affected by Statute. The decision in *Surendra Nath Dutta Vs. Mohini Mohan Chakravarty*, while discussing Section 45F was more concerned with execution of a decree and its revival read with Section 151 CPC and does not decide the point before us in this appeal.

26. The view that I am taking appears to be in consonance with the decision of the Division Bench in *Sree Bank, Ltd. Vs. P.C Mukherjee and Another*, where the Appeal Court lays down the principle that limitation in such cases should be governed by the appropriate article of the Limitation Act read with Section 45F. I

must however observe that specific Article 85 of the Limitation Act was not considered by that decision. It is further necessary to add that the Supreme Court in *Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation)*, disagreed with the main decision of the Court of Appeal in *Sree Bank, Ltd. Vs. P.C Mukherjee and Another*, but expressly left the question of limitation open.

27. For these reasons I hold that on the facts here that the account between the Bank and the appellant was a mutual, open and current account. Secondly, I hold that the liquidator succeeded to the rights of the Bank to sue on such mutual, open and current account. Thirdly, I hold that such suit having been filed on the 19th June, 1950 was governed by the prevailing Law of Limitation at the time of the institution of such suit as contained in Section 45F of the Banking Companies Act, 1949 as amended by the Ordinance and subsequently, by the amending Act of 1950 read with Article 85 of the Limitation Act. It must be recalled that the last transaction for withdrawal was on 16-4-1946 and therefore under Art 85 of the Limitation Act the period of three years has to be calculated from the end of 1946. The time therefore to file the suit was available until the end of 1950 and the suit was filed before the expiry of such period on 19-6-1950,

28. As the only point argued was on limitation and as this point fails, the appeal must fail and is dismissed with costs.

29. The Liquidator will retain the costs out of the assets.

Bose, J.

30. The question raised in this appeal is one of limitation and involves determination of the true nature and scope of Article 85 of the Limitation Act.

31. The facts which have given rise to this appeal are briefly as follows :

32. On 9-1-1946 the defendant appellant opened a current deposit account with the respondent bank and deposited a sum of Rs. 201/- in the said account. Thereafter on 16-2-1946 the appellant withdrew a sum of Rs. 150/- and on 19-2-1946 a further sum of Rs. 25/- was withdrawn by him; leaving a balance of Rs. 26/- to his credit. On 20-2-1946 the appellant pursuant to an overdraft arrangement entered into with the respondent bank withdrew a sum of Rs. 4,000/- from the plaintiff bank and on 22-2-1946, 19-3-1946 and 16-4-1946 the defendant withdrew further sums of Rs. 3,000/-, Rs. 2,200/- and Rs. 800/- respectively by virtue of the overdraft arrangement. There were no other withdrawal or deposit by the appellant after the last mentioned date but interest accruing was calculated and added in the account from time to time up to 29-6-1946. On 10-5-1948 a petition for winding up of the respondent bank was presented before this court and on 3-8-1948 an order was made for winding up of the bank. On 19-6-1950 the official liquidator instituted proceedings for recovery of Rs. 15,477/10/- being the principal and interest due in respect of the said account. The plaintiff bank's case as pleaded was that the said account was

at all material times a mutual, Open and current account and so the claim of the bank was not barred by limitation. S.R. Das Gupta J., before whom the case came up for trial passed a decree in favour of the plaintiff bank for Rs. 20,925/13/8 pies with interest and costs. The defendant has appealed against this decree.

33. The first contention raised on behalf of the appellant in support of the plea of limitation, is that the account maintained between the parties is not a mutual, open and current account. It is submitted that it is not a mutual account inasmuch as there is no reciprocal obligation created between the parties as a result of the transactions had between them but the account is one-sided the defendant being always in debit since the date of the withdrawal of the sum of Rs. 4,000/- from the plaintiff bank and the plaintiff bank was all alone a creditor since that date. It appears to me that there is no substance in this contention. The real test in finding out whether the case is governed by Article 85 of the Limitation Act is to see whether each party can say at any time that he or it has a claim against the other. If that is the case the account is mutual, open and current account, and once a mutual, open and current account is started and there are reciprocal demands or there is a probability of such reciprocal demands being made that account continues to be mutual so long the account remains open and current. The fact that after a certain date the account became one sided cannot turn the account into a non-mutual open and current account. The leading case where the nature of a mutual account was explained is the case of *Hirada Basappa v. Gadigi Muddappa* 6 Mad 142 where Holloway A.C.J. observes as follows :

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

34. In a subsequent decision of the Madras High Court reported in *R.N. Kapur, partner of Wright and Co. Vs. The Travancore National and Quilon Bank, Limited (in liquidation) by Official Liquidator and Others*, it was held by Leach C. J. and Lakshmana Rao J., that where a customer of a bank has a current account which at times is in credit and at other times is in debit, the bank having granted to the customer the right to overdraw, the Article of the Limitation Act applicable is Article 85 and not Article 57. The learned Chief Justice made the following observations in the course of his judgment:

"When a person opens a current account with a bank and pays money into it the money goes into the general funds of the bank which uses it for the purposes of its business. While the account is in credit the bank is a debtor to the customer. The customer can demand payment in whole or in part by drawing on the account. If the bank allows the customer to overdraw the account and he does so, he becomes a debtor to the bank and the bank in its turn is entitled to demand repayment of the overdraft without closing the account. Where the

balance is a shifting one, the bank is under an obligation to the customer when the account is in credit and must meet his demand for payment; likewise when the account is overdrawn the customer is under an obligation to the bank and in law is bound to comply with the bank's demand for payment, when made. It seems to us that in these circumstances the account can only be regarded as a mutual account fulfilling the test laid down in 6 Mad H.C.R. 142."

35. In this Madras case the observations made to the contrary by Pontifex, J. in ILR 5 Cal 759 were dissented from. In a case of this court reported in 91 Cal LJ 16 Chakravarti C. J. referred to most of the relevant cases on the point, and approved of the principles laid down in the Madras cases to which I have made reference.

36. In the present case, from 9-1-1946 to 19-2-1946 the defendant appellant was a creditor of the plaintiff bank and since that date the bank became a creditor. So there were two sets of transactions creating independent obligations. It is not a case of advance by one party only and partial or complete discharge by the other. There is thus no doubt that applying the tests laid down in the cases already cited the account in question was a mutual account within the meaning of Article 85 of the Limitation Act.

37. The next point urged on behalf of the appellant is that as soon as the order for winding up was made the company became dead for all practical purposes, and the account ceased to be a mutual, open and current account by reason of the intervention of the liquidation inasmuch as the defendant could no longer operate on the account and no further transactions between the parties could take place on the basis of such account. Furthermore as soon as the overdraft limit was reached the defendant could not make any further withdrawals except by entering into a fresh arrangement increasing the limit of the overdraft, and so the account must be deemed to have been closed on the limit being reached. Thus there being no mutual, open and current account at the date of the institution of the suit, Article 85 of the Limitation Act is not available to the plaintiff bank in liquidation. In my view there is no substance in this contention. The intervention of the liquidation cannot by itself alter the nature or character of the account. A company in liquidation, though the administration of its affairs has passed to the liquidator, retains its complete existence. (*Employer's Liability Assurance Corporation v. Sedgwick Collins and Co.* 1927 AC 95 -- per Viscount Cave). Its legal death takes place when it is formally dissolved. From the time of the winding up order the powers of the directors to carry on the trade or to deal with the assets cease and nobody except the official liquidator can deal with the assets for the purpose of collecting the assets and dividing them among the creditors. In *re, Oriental Inland Steam Co.* (1873) 9 Ch. 557. The nature of the account or transaction is to be determined with reference to the state of affairs existing at the date of the liquidation. The winding up order does not destroy or alter the nature or character of the transactions entered into prior to the winding up order. An account which was once a mutual, open and current account

remains a running and open account so long as it is not closed by settlement or otherwise. Unless the parties evince an intention expressly or by their acts and conduct to close the account, the account retains its character of an open and current account. As pointed out by Ghose, J. in the case of *The Tea Financing Syndicate Ltd. Vs. Chandra Kamal Bez Barua*, "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." In the case of 91 Cal LJ 16 *Chakravarti C. J.* observed that "An open account is one which has not been closed whether by settlement or otherwise and which is open for further transactions," In the present case there is no suggestion that the account kept between the parties had been adjusted or stated at any time or that the parties intended to close this account, or they expressed their intention not to do further transactions.

38. Although the withdrawals made by the defendant had exceeded the agreed limit on 19-3-1946 it was quite open to the defendant to make deposits in the account at any time thereafter and thus reduce the amount of the overdraft below the agreed limit and thereafter make fresh withdrawals until the winding up order. It is true that the intervention of the liquidation had the effect of imposing a disability on the parties in the matter of entering into fresh transactions in respect of that account but there was no closing of the account by any voluntary act of the parties. Strong reliance was placed by the learned counsel for the appellant on the case of *Karsondas Dhunjibhoy Vs. Surajbhan Ramrijpal*, in support of the contention that unless the account remains at the date of the suit a mutual open and current account, Article 85 cannot be availed of by the plaintiff. But in this Bombay case it was found as a fact by *Beaumont C. T.* and *Rangnekar J.* that the account had been closed by the defendant before the date of the suit and the account ceased to be an open account at the date of the suit. At page 451 *Beaumont C. J.* observed :

"In my opinion the fact that all dealings between the parties ceased from April 1922. coupled with the fact that in the following July the defendants sent in account showing the amount due and made an unconditional offer to pay that amount, shows that it was the intention of the defendant to close the account and I hold as a matter of fact that the account was closed at any rate from 28th July 1922."

39. The other learned Judge *Rangnekar J.* at page 453 came to a similar finding that the account had ceased to be an open account at the time of the suit as the defendant had expressed the intention of closing the account long before the date of the suit. It was upon this fact, held, that Article 85 could not be called in aid of the plaintiff in getting over the bar of limitation.

40. It may be noted in this connection that this court in the case of 5 Cal LR 211 has held that Article 85 of the Limitation Act can be invoked even though a mutual open and current account had been adjusted before the date of the suit and had ceased to be such an account at the time the suit was filed. This case has been dissented from by the Bombay High Court in *Karsondas Dhunjibhoy Vs.*

Surajbhan Ramrijpal, but it is not necessary to express any opinion as to the correctness or otherwise of this Calcutta decision as it appears to me that for the reasons stated before, the plaintiff bank is entitled to the benefit of Article 85 and the suit of the bank is not barred by limitation.

41. The other point which has been urged on behalf of the appellant is that even if Article 85 of the Limitation Act is applicable and is attracted to the facts of this case the claim is barred because three years from the close of the year 1946 expired on 31-12-1949 and as the suit was not filed by the Liquidator till 19-6-1950, and as the winding up order was made on 3-8-1948 the liquidator cannot take advantage of Section 45F of the Banking Companies Act which was introduced for the first time in the Statute Book by the Banking Companies Amendment Ordinance (XXIII of 1949) on 10th or 19th September 1949 as the amendment cannot be given a retrospective operation. In my opinion this contention is also without substance. The provisions of Section 45F came up for consideration before S.N. Banerji, J. in the case of 54 CWN 710. In this case Banerji, J. pointed out that the material words of the section "the period of one year immediately preceding the date of the order for the winding up of the banking company shall be excluded" indicate that the intention of the framers of the section was that during this period of one year which the learned Judge calls the "Liquidator's year" the running of limitation would remain suspended. It is further pointed out by the learned Judge that the proper construction of this Section 45F is that if time expired within or after the liquidator's year, that year should be excluded in computing the period of limitation but in suits or proceedings in which time has already run out before the liquidator's year there is no revival of the cause of action. Tested in the light of this proposition of Banerji, J. it is quite clear that as the winding up order was made on 3-8-1948 and 31-12-1949 falls within the period of "liquidator's year" which commenced to run after Section 45F came into force, the present suit cannot be said to be barred by limitation.

41A. In the case before Banerji, J. the order of winding up was made on 12-7-1949, that is before the Ordinance introducing Section 45F came into force, and the Suit was filed on 23-11-1949 and Banerji, J., held that Section 45F was attracted. The learned Judge construed this section as a section which deals with procedure and as applicable to past events.

42. I respectfully agree with the proposition laid down by Banerji, J.

43. In the case of Sree Bank, Ltd. Vs. P.C Mukherjee and Another, Harries C. J. and Banerjee, J. held that in a suit by a liquidator to recover a debt due from a customer on an overdraft account at the time the bank went into liquidation will be governed by the appropriate Article of the Limitation Act read with Sec, 45F of the Banking Companies Act. Although the case was in respect of this very bank with which we are concerned in the present case and we know that this bank went into liquidation on 3-8-1948, Section 45F was held applicable. In fact no point appears to have been made about Section 45F not being applicable before

that court which decided the case.

44. The Supreme Court in the case of (S) Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation), has kept the question of limitation applicable to a proceeding u/s 45B of the Banking Companies Act 1949 open, and the Supreme Court made it clear that they were not to be supposed to have expressed any opinion on the question of limitation which was raised before the High Court in the Sree Bank, Ltd. Vs. P.C Mukherjee and Another, .

45. A good deal of argument was addressed on Section 45O of the Banking Companies Act which has been introduced into the Act by the Amending Act of 1953 but as this section has no application to this case it is not necessary to enter into a discussion of that section for the purpose of the decision of this case. There is a detailed discussion of this section in the unreported decision of a Division Bench of this court in Appeal No. 119 of 1954, Suburban Bank Ltd. v. Nistaran Chakravarti where the question of retrospective operation of the section has been dealt with by Das Gupta, C. J. and myself.

46. Reliance was also placed on an unreported decision of this court in the case of Inre, Sree Bank Ltd., Matter No. 280 of 1957 D/- 25-2-1958 (Cal) where it was held by me that Section 45G of the Banking Companies Act is not retrospective in operation, in the sense, that it did not apply to a case where a winding up order was made before the coming into force of this section. But as the language, character and purpose of Section 45G is different, this decision is of no assistance to the appellant. The learned counsel for the appellant also cited in support of his argument the case of (1875) 1 Ch D 48 to which I made reference in my judgment dated 25-2-1958 in the Sree Bank case, Matter No. 280 of 1957, D/- 25-2-1958 (Cal), Section 10 of the Judicature Act 1875 which was construed but found in that case is materially different in its nature and object from the section which is the subject-matter of consideration before us now, and so this decision is also of no avail to the appellant. It may also be noted that the general proposition laid down by Lord Macmillan, M.R. in this case of (1875) 1 Ch. D 48 has been criticised and modified by Sir Raymond Evershed in the case of Hutchinson v. Jauncey (1950) 1 All ER 165.

47. In my view this last contention of the learned counsel for the appellant must fail.

48. I agree that this appeal should be dismissed with costs.