Mrs. Margaret Lalita Samuel

Vs

The Indo Commercial Bank Ltd.

Civil Appeal No. 2133 of 1968

(CJI Y. V. Chandrachud, R. S. Sarkaria, O. Chinnappa Reddy JJ)

25.09.1978

JUDGMENT

CHINNAPPA REDDY, J. -

1. The defendant in the action is the appellant in this appeal by special leave. The respondent-plaintiff is the Indo Commercial Bank Ltd., Madras, now taken over and represented by the Punjab National Bank. We will hereafter refer to the plaintiff as the bank. In 1943 Kawasji Karanjia and Jal Karanjia and C.B. Samuel, husband of the defendant, floated a company known as the Modern Hindustan Food Products Ltd. at Poona. Jal Karanjia, C.B. Samuel and the defendant were directors of the company. The Company opened a current account with the plaintiff Bank in 1943 which was later converted into an overdraft account with the maximum limit of Rs. 25,000. By a subsequent arrangement dated 19th June, 1944, the limit of the overdraft was raised to Rs. 10 lakhs. C.B. Samuel, as Managing Director of the Company, executed a promissory note for Rs. 10 lakhs and he and his wife Margaret Samuel (defendant) executed a guarantee Bond (Ex. 57) by with they jointly and severally guaranteed to the Bank the repayment of all money which shall at any time be due to the Bank from the Company on the general balance of their accounts with the bank, or on any account whatever. The guarantee was to be a continuing guarantee to the extent of Rs. 10 lakhs at any one time. We will have occasion to refer to the terms of the bond in detail later. The overdraft facility was utilised by the company and amounts were drawn from the Bank at various times. The Company ceased business on 30th June, 1946, and thereafter the Company entered into an arrangement with the plaintiff bank by which the plaintiff bank was authorised to receive all amounts due from the Director-General of Food Supplies, Government of India, or from any other person or department and appropriate the sums collected towards the money due to the Bank from the Company. An irrevocable power of attorney authorising the Bank to do so was executed by C.B. Samuel as Managing Director of the Company. All bills and documents were accordingly handed over to the plaintiff Bank for realisation of the amount due to the company. C.B. Samuel died on 27th April, 1951. By her letter, Ex. 55, dated 2nd February, 1952, the defendant acknowledged her personal guarantee to repay to the plaintiff the sum of Rs. 2,71,531-8-6 which was stated to be the balance due to the plaintiff from the Company as on December 31, 1951. Adding a sum of Rs. 21,886-6-0 by way of interest from January 1, 1952 till September 30, 1953, and deducting a sum of Rs. 57,964-14-6 said to be the amount recovered between those dates, the balance due on November 8, 1954, was stated to be Rs. 2,35,453-1-0. On 8th November, 1954, the present suit was filed by the Bank to enforce the guarantee bond against the defendant, Margaret Samuel and to recover a sum of Rs. 1,50,000 from her. It was stated in the plaint that a sum of Rs. 85,453-1-0 was remitted and the suit was laid to recover the sum of Rs. 1,50,000 only. Along with the plaint an extract of the account subsequent to 1946 was filed.

2. The defence of Margaret Samuel, to the extent that is relevant for the purposes of the present appeal, was that the suit was barred by limitation, that the letter dated 2nd February, 1952, was obtained from her by fraud and that she was, in any case, not liable to pay amounts disputed by her in paragraph 15 of her written statement. She also pleaded that the plaintiff had deliberately withheld production of the accounts between 1943 to 1946, during which period most of the transactions took place and that if those accounts were produced she would be in a position to challenge other items as well.

3. Soon after filing the written statement the defendant filed an application in the trial court to direct the plaintiff to produce, among other documents, the accounts from 1943 onwards. The trial judge by his order dated 10th March, 1955, directed the plaintiff to produce the documents within 2 weeks from that date. The plaintiff did not produce the documents within the time allowed. Subsequently, however, an extract of the accounts from 1943 to 1946 was produced on 1st September, 1955, the date of hearing of the suit. On 10th October, 1955, the defendant filed Ex. 85, an application seeking a direction from the Court

that the plaintiff be allowed to produce any documentary evidence which they might possess in support of the items mentioned in the schedules even till the time the evidence is finished and the defendant be allowed to deny, under the circumstances mentioned all the items mentioned in Schedule 'B', with her explanation for the items.

Along with the application the defendant filed two schedules, Schedule 'A' showing the items specifically denied by the defendant in her written statement and Schedule 'B' showing the items which were denied by her after the accounts from 1943 to 1946 were produced in court by the plaintiff. The application was opposed by the plaintiff. The trial Court dismissed the application on the ground that it was belated. The trial Court observed that if the defendant wanted to dispute any item from the accounts she should have got the accounts produced even before she filed the written statement. No doubt she had filed an application soon afterwards to direct the plaintiff to produce the accounts and other documents within two weeks, but when the plaintiff to failed to produce the accounts within two weeks, she did not take any further action in the matter. Having failed to take steps to compel the plaintiff to produce the accounts earlier, the court said, she could not seek to dispute the items after the plaintiffs had closed the evidence on their side. Thereafter the trial of the suit concluded.

4. At the trial the plaintiff relied primarily upon Ex. 55, the letter of acknowledgment dated February 2, 1952. This letter of acknowledgment, as already mentioned by us, was alleged by the defendant to have been obtained from her by fraud. The learned Civil Judge found that the letter was not proved to have been obtained by fraud. He held that the defendant, who was a highly educated lady, had subscribed her signature to Ex. 55 fully knowing its contents. He, however, held that the suit was barred by limitation. The learned civil judge also held that there was no proper proof of the several debit items and that they were suspicious. The suit was, therefore, dismissed.

5. The plaintiff filed an appeal to the High Court of Bombay. The High Court held that the suit was not barred by limitation. The High Court observed that on the material placed before the Court, it was impossible to pass a decree in favour of the plaintiff-bank for any amount alleged to be due by the defendant. The High Court also observed that the trial judge was wrong in dismissing the application (Ex. 85). The High Court, however, thought that in order to do justice between the parties it was necessary to give the plaintiff Bank an opportunity to prove the various items which were challenged by the defendant in her written statement and in her application (Ex. 85) and

further to give the defendant an opportunity to lead evidence in support of her contention that the entries were in respect of amounts which she was not liable to pay. The High Court remanded the suit to the trial Court for fresh disposal in the light of the observations made by it, after raising additional issues if necessary.

6. After remand the trial Judge amended original issue 9 and added issue 9-A. He allowed the parties to lead evidence. The two issues which were tried by him were issues 9 and 9-A, which were as follows :

> 9. Does plaintiff prove the items in dispute as given in the written statement and in Ex. 85 ?
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> 9-A. Does defendant prove that the debit entries are in respect of amounts which she is not liable to pay ?
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> On an elaborate consideration of the evidence, the trial judge answered issue No. 9 in the affirmative and issue No. 9-A in the negative, basing his conclusion primarily on Ex. 99, a latter dated 30th June, 1950, passed by the Company in favour of the bank acknowledging that the balance due at the foot of the overdraft account as on 30th June, 1950, was Rs. 4,90,523-5-7. The trial Judge held that the letter of acknowledgment was binding on the defendant. The suit was decreed for a sum of Rs. 1,50,000 with further interest and costs.

7. The defendant preferred an appeal to the High Court of Bombay. The High Court considered the evidence relating to each item of debit in great detail and found that debit items amounting to Rs. 68,761-7-0 were not proved to be binding on the defendant. As this amount with interest was less than the amount of Rs. 85,453-1-0 which had been given up by the plaintiff in the plaint, the High Court affirmed the decree passed by the trial Court. The finding of the High Court in regard to the various debit items were greatly influenced by a group of three letters, Ex. 104, dated 30th June, 1945, Ex. 105, dated 27th November, 1945 and Ex. 106 dated 6th December, 1945, signed by the defendant herself as director of the company. On the basis of these three letters the High Court took the view that, substantially, all the entries of debit made prior to 1st December, 1945, must be held to have been proved.

8. In this appeal by special leave Shri B. D. Bal, learned counsel for the defendant-appellant, argued that there was no justification for the order of remand passed in the first instance by the Bombay High Court. He submitted that on the finding arrived at by the Bombay High Court that the plaintiff had failed to prove any of the debit items, the original decree of the trial Court dismissing the suit should have been affirmed. He said that when the defendant filed Ex. 85, proposing that the plaintiff should be given an opportunity to adduce evidence to prove the debit items, the plaintiff opposed the application. The Appellate Court was, therefore, unjustified in giving a further opportunity to the plaintiff to prove the debit items. Shri Bal further urged that the suit was barred by limitation. His contention was that each of the debit items constituted a distinct loan and gave rise to a separate cause of action, everyone of which was barred by limitation. In regard to Exs. 104, 105 and 106 Shri Bal urged that the defendant had merely signed the letters which were put up for her signature, without personally verifying the correctness of the statements made in the letters. His argument was that it was most unlikely that the defendant would have personally verified the accounts and satisfied herself about the correctness of the several debit items, before signing the letters put up before her. Shri Bal also argued that in any case a sum of Rs. 50,000 which was in deposit with the

Government and which the Bank was entitled to receive under the tripartite arrangement made between the Company, the bank and the Government should have been deducted from the amount of decree. He also urged that two items of debit which related to the transfer of funds to the personal account of C.B. Samuel should also be excluded.

9. Shri Vikram Mahajan, learned Counsel for the plaintiff, argued that the initial order of remand made by the Bombay High Court was justified in the special circumstances of the case. He further argued that even if the order of remand could not be fully justified, it was not a fit case for interference under Article 136 of the Constitution, having regard to the justice of the matter as disclosed by the subsequent findings of the trial Court and the appellate Court. On the question of limitation, he submitted that the suit was really one to enforce the guarantee bond, that the guarantee was a continuing guarantee and, therefore, the suit could not be said to be barred by limitation. He urged that the defendant was an educated person well versed in business affairs and the High Court was right in attaching importance to the three letters, Exs. 104, 105 and 106.

10. We may first consider the question of limitation. As already mentioned by us, the submission of Shri Bal was that every item of an overdraft account was an independent loan, limitation for the recovery of which was determined by Article 57 of the Schedule to the Limitation Act, 1908. Limitation, according to the learned counsel, started to run from the date of each loan. He relied on Basanta Kumar Mitra v. Chota Nagpur Banking Association Ltd. (AIR 1948 Pat 18 : 18 Com Cas 127); Brojendro Kishore Roy Chowdhury v. Hindustan Co-operative Insurance Society Ltd. (ILR 44 Cal 979 : AIR 1918 Cal 707 : 39 IC 705); National and Grindlays Bank Ltd. v. Tikam Chand Daga (AIR 1964 Cal 358) and Uma Shanker Prasad v. Bank of Bihar Ltd. (AIR 1942 Pat 201 : 12 Com Cas 35) In our view, it is unnecessary for the purposes of the present case to go into the question of the nature of an overdraft account. The present suit is in substance and truth one to enforce the guarantee bond executed by the defendant. In order to ascertain the nature of the liability of the defendant it is necessary to refer to the precise terms of the guarantee bond rather than embark into an enquiry as to the nature of an overdraft account. Exhibit 57 is the guarantee bond executed by the defendant and her husband on 23rd October, 1944. It is addressed to the Indo Commercial Bank Ltd., Madras, and is in the following terms :

Dear Sirs,

In consideration of your having agreed to allow overdraft accommodation up to Rs. 10,00,000 (Rupees Ten Lakhs only) to the Modern Hindustan Food Products Ltd., Poona, we, C. B. Samuel and M. L. Samuel, the undersigned do hereby jointly and severally guarantee to you, Indo Commercial Bank Limited the repayment of all money, which shall at any time be due to you from the said Modern Hindustan Food Products Ltd., on the general balance of their accounts with you or on any account whatever such balances to include all interest, charges, commission and other expenses which you may charges as bankers and also the due payment at maturity of any promissory note or other negotiable instrument on the security or in respect of which any credit or advance shall be made.

And we hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time for Rs. 10,00,000 (Rupees Ten Lakhs only) and shall not be considered wholly or partially satisfied by the payment at any one time or at different times of any sums of money due on such general balance of account but shall extend and cover and be a security for every and all further sums at any time due to you thereon. And we further declare that you may grant to the Modern Hindustan Food Products Ltd., any indulgence without discharging our liability.

The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach under Article 115 of the Schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J. C. Shah J., speaking for the Court, said :

> On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the company at the foot of the general balance of its account or any other account whatever . . . . We are not concerned in this case with the period of limitation for the amount repayable by the company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond . . . . We hold that the suit to enforce the liability is governed by Article 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case, we are of the view that so long as the account remained live account, and there was no refusal on the part of defendant to carry out here obligation, the period of limitation did not commence to run.

11. We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in Wright v. New Zealand Farmers Co-operative Association of Canterbury Ltd. ((1939) AC 439 : (1939) 2 All ER 701 (PC). The second clause of the guarantee bond in that case was in the following terms :

> This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the said William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid.

A contention was raised in that case that the liability of the guarantor was barred in respect of each advance made to the Nosworthy on the expiration of six years from the date of advance. The Judicial Committee of the Privy Council expressed the opinion that the matter had to be determined by the true construction of the guarantee. Proceeding to do so, the Judicial Committee observed (at p. 449) :

It is no doubt a guarantee that the Association will be repaid by the Nosworthys advances made and to be made to them by the association, together with interest and charges, but it specifies in column 2 how that guarantee will operate - namely, that it will apply to (i.e. the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be the true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted.

Later it was again observed (at p. 450) :

> That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continuance of the guarantee, by the surplus of the total debits over the total credits, and, accordingly, at the date of the counterclaim, the association's claim against the plaintiff wright for payment of the unpaid balance due from the Nosworthys with interest was not statute-barred.

12. This was precisely the view which J. C. Shah J. expressed in the passage already extracted by us, with which we expressed our agreement. We may add here that in Wright's case the Privy Council appeared not to approve of the decision in Parr's Banking Company Ltd. v. Yates ((1898) 2 KB 460 (CA) where it had been observed that the statute would run from the date of each advance. As noticed in Paget's Law of Banking, (8th edition) at pp. 82-83, the authority of Parr's has been overruled so far as the guarantor is concerned by the judgment of the Court of Appeal in Bradford Old Bank Ltd. v. Sutcliffe ((1918) 2 KB 833 : 119 LT 727 (CA).

13. Now, the overdraft account which was guaranteed by the defendant by the execution of the guarantee bond dated 23rd October, 1944, continued to be a live account even after the company ceased its business on 30th June, 1946. A power of Attorney was executed by the company in favour of the plaintiff Bank and amounts due to the bank were realised and credited in the overdraft account. A sum of Rs. 2,19,784-4-0 was received from the Director-General of Food Supplies on 27th June, 1950. On 6th September, 1950, another sum of Rs. 1,15,229-15-0 was received from the Director-General of Food Supplies and credited to the account of the company. Again on 27th January, 1951, 14th March, 1951, and 29th September, 1952, several amounts received by way of refund of income-tax were credited to the Company in its account. The amount credited on 29th September, 1952, was Rs. 24,022-0-10. The overdraft account was thus a live account at least till 29th September, 1952. The Company executed various promissory notes and letters of acknowledgment. The defendant herself as guarantor executed on 2nd February, 1952, Ex. 55, acknowledging her liability in respect of the guarantee given by her. Paragraph (a) of the letter is as follows :

> In respect of the personal guarantee which myself and my husband have given to the bank, the amount due to the bank as on 31st December, 1951, is Rs. 2,71,531-8-6.

Thus far from repudiating her liability and breaking the contract of continuing guarantee, the defendant accepted her obligation under the guarantee bond in respect of the overdraft account which continued to be live at least up to 29th September, 1952. The suit which was filed on 8th November, 1954, was, therefore, clearly within time under Article 115 of the Schedule to the Limitation Act, 1908.

13A. We may mention here that it was the contention of Shri Bal that the letter dated 2nd February, 1952, was obtained from the defendant by fraud. Both the trial Court and the High Court have found that there was no fraud and that the letter was written by the defendant voluntarily and with full knowledge of its contents. We accept the finding of the trial Court and the High Court that the letter was not obtained by any fraud practiced upon the defendant.

14. The next question is about the legality and the consequences of the illegality, if any, of the original order of remand. It cannot be disputed, and indeed it was not disputed before us, by Shri Mahajan, that the correctness of an order of remand passed by the High Court which could not then

be questioned by filing an appeal in the Supreme Court against that order because such an appeal was not competent, could none the less be challenged later in the appeal before the Supreme Court arising out of the final judgment pronounced in the action (vide Satyadhan Ghoshal v. Smt. Deorajin Debi ((1960) 3 SCR 590 : AIR 1960 SC 941), Lonankutty v. Thomman ((1976) 3 SCC 528 : 1976 Supp SCR 74); Jasraj Inder Singh v. Hem Raj Multan Chand ((1977) 2 SCC 155 : (1977) 2 SCR 973). It does not, however, mean that the Supreme Court will, every time, exercise its discretionary power under Article 136 of the Constitution merely because it finds that the High Court had wrongly passed an order of remand at an earlier stage of the case. If the Supreme Court is satisfied that as a result of the order of remand substantial justice has been done to the parties in the consequential proceedings, the Supreme Court may decline to exercise its discretionary power to interfere. The jurisdiction under Article 136 is not meant to correct any illegality brought to the notice of the Supreme Court, nor to undo, merely on account of such illegality, an adjudication which has done substantial justice to the parties. On the other hand, Article 142 of the Constitution expressly confers power upon the Supreme Court, in the exercise of its jurisdiction, to pass such decree or make such order as is necessary for doing complete justice in any case or matter pending before it. In the case before us, the Bombay High Court no doubt found that on the materials placed before it there was no option except to non-suit the plaintiff. The High Court, however, appears to have felt that the plaintiff-bank which had rested its case in the trial Court almost entirely on the acknowledgment dated 2nd February, 1952, was perhaps misled into doing so because of the order passed by the trial Judge on the application, Ex. 85, filed by the defendant. In the order dated 11th October, 1955, passed on the application, Ex. 85, the trial Judge had observed that the defendant should have taken proper steps earlier if she wanted to dispute the debit times and that having failed to take proper steps she had to pay the penalty for her laches. That order might have made the plaintiff believe that it was unnecessary to adduce any more evidence. Though the High Court did not expressly state that the plaintiff was misled by the order of the trial Judge, it is clear from a perusal of the remand order of the remand order of the High Court that the High Court felt that the order made on the application, Ex. 85, was responsible for the failure of both the plaintiff and defendant to adduce appropriate evidence in regard to the several debit items. It was in those circumstances that the High Court, in the interests of justice, remanded the suit to the trial Court in order to enable both parties to adduce necessary evidence regarding the items of debit. Whether or not the order of remand is capable of being justified under the provisions of the Code of Civil Procedure, we are of the view that the interests of justice have not suffered but on the other hand substantial justice has been done between the parties as a result of the subsequent proceedings. The trial Court and the High Court have in their judgments fully and exhaustively discussed the liability of the defendant in regard to each of the debit items. In the special circumstances of this case, we do not think that we will be justified in interfering with the decrees of the lower courts merely because the earlier order of remand passed by the High Court may not be capable of being justified.

15. As mentioned by us earlier the High Court placed great reliance on the three letters dated 30th June, 1945, 27th November, 1945 and 6th December, 1945, and it was because of those letters the High Court upheld all the items of debit made prior to 1st December, 1945. We think that the High Court was right in doing so. The first of the letters, Ex. 104, is a letter addressed by the bank to the company informing the latter that the balance due at the foot of the account as on 30th June, 1945, was Rs. 6,81,242-9-5. The letter contains an endorsement by the defendant as a director of the company confirming the correctness of the statement. The second letter dated 27th November, 1945 (Ex. 105) is a letter addressed by the company to the bank. It is signed by the defendant on behalf of the company. By this letter, the company complained about the dishonour of two cheques for Rs. 20,000 each, despite the fact that the company had not exceeded the overdraft limit. In the letter, it

was pointed out that while the overdraft balance was Rs. 10,14,380-7-6, a bill for Rs. 89,789 had been sent by the company to the bank on 22nd November, 1945. The latter while taking the plaintiff to task for dishonouring the cheque requested the Bank to send a statement of account as on 30th November, 1945. This letter is of great importance since it shows that the company was aware of the correct balance of the overdraft account without reference to the bank. It is apparent from the letter that the company had kept an account of the debits and that any statement of account sent by the bank was being verified by the company with reference to the Company's books. It may be noticed her that by another letter dated 19th December, 1945, the Bank informed the Company that the balance due up to 30th November, 1945, was Rs. 10,60,913-8-11 and this was confirmed on behalf of the Company by C.B. Samuel himself. The third letter is Ex. 106 dated 6th December, 1945. This letter refers to the Bank's statement of account for the month of November, 1945, and draws the Bank's attention to the fact that the balance of Rs. 9,29,339-15-1 as on 12th November, 1945, had been shown as carried over as Rs. 9,29,540-5-4, on 14th November, 1945. There was a difference of Rs. 200-6-3. This letter was also signed by the defendant on behalf of the Company. The letter indicates that any statement sent by the bank to the Company was being carefully examined by the Company. In regard to these three letters the case of the defendant was that she had merely signed the letters which were put up to her by the office and that she had no personal knowledge of the statements made in the letters. We agree with the trail Court and the High Court that this case of the defendant cannot be accepted. A review of her deposition and the several transactions into which she has entered before and after her husband's death clearly indicate that she is an educated lady, an intelligent woman and 'a man of the world' if a woman may be so described. We do not have the slightest doubt that the defendant could not have signed those letters without satisfying herself about the correctness of their contents. Having regard to the circumstances that the defendant herself had signed the three letters, Exs. 104, 105 and 106, and having regard to the further circumstance that two of these letters contained positive indications that the statements of account submitted by the Bank had been verified with reference to the company's books, the High Court took the view that debit items up to 1st December, 1945, could be safely held to have been proved by the Bank. We see no reason to take a view different from that taken by the High Court.

16. Shri Bal urged that under the tripartite arrangement between the bank, the company and the Government, the Bank was entitled to receive the amount of security lying in deposit with the Government and, therefore, the item of debit of Rs. 50,000 made on 17th July, 1944, in the loan account of the Company should be deducted from the total of the debit items. We are unable to agree with the submission of Shri Bal. In the first place no dispute concerning this item was raised either in the written statement of the Company or in Ex. 85. In the second place this is also one of the items of debit made prior to 1st December, 1945, and it must have been duly verified before the letters, Exs. 104, 105 and 106, were written. Shri Bal also objected to two items of debit dated 30th September, 1944, and 30th June, 1945, representing amounts transferred from the Company's account to the personal account of C.B. Samuel. Both these debits were made prior to 1st December, 1945, and, therefore, we do not think we will be justified in excluding them.

17. As a result of the foregoing discussion we agree with the High Court that the plaintiff Bank filed to prove items of debit totalling Rs. 68,761-7-0. Allowing interest from the various dates of debit, the total amount which has to be deducted from the claim of the plaintiff bank is Rs. 80,894-8-4. The question now is whether this has to be deducted from the sum of Rs. 2,35,453-1-0 which the plaintiff mentioned in paragraph 8 of the plaint as the amount due to the Bank out of which the plaintiff was giving up the sum of Rs. 85,453-1-0 or from the sum of Rs. 1,50,000 for the recovery of which alone this suit was filed. The High Court thought that since the plaintiff had given up the sum of Rs. 85,453-1-0 as the plaintiff was doubtful about the recovery of the amount from the

defendant, the court would be justified in deducting the sum of Rs. 80,894-8-4 from the sum of Rs. 2,35,453-1-0 instead of from the sum of Rs. 1,50,000. We do not think there is any justification for the course adopted by the High Court. The plaintiff did not choose to mention in the plaint the particular items of debit which he was giving up. There is, therefore, no reason why the amount given up by the plaintiff should be treated as attributable to the items of debit which have now been found to be not proved. We are, therefore, of the view that the total of the unproved debit items together with interest, i.e., the sum of Rs. 80,894-8-4 should be deducted from the sum of Rs. 1,50,000 for which amount only the plaintiff filed the suit. The plaintiff is, therefore, entitled to a decree for Rs. 69,105-7-8 with interest at 4% from the date of suit till realisation. The appeal is allowed to the extent indicated. Having regard to the circumstances of the case, the parties will bear their own costs throughout.

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