

PATNA HIGH COURT

Uma Shankar Prasad

Vs

Bank of Bihar Ltd

(Shearer, J.)

04.04.1941

JUDGMENT

Shearer, J.

1. This appeal arises out of a decree passed by the First Subordinate Judge of Patna in a suit instituted on the basis of a mortgage bond. The bond in question was executed on 22nd December 1929, by the late Rai Bahadur Radha Krishna and his nephew, Babu Uma Shankar Prasad. These two gentlemen were merchants in a considerable way of business at various places in the province and were then anxious to extend and enlarge the premises at Patna which were their headquarters. For this purpose they were in need of money and they, therefore, approached the Bank of Bihar with whom apparently they had dealt for several years, and asked for an overdraft. The agent of the bank consented to their overdrawing j their current account to the extent of ₹ 30,000 on condition of their mortgaging the land on which their business premises stood together with the existing buildings and any other buildings which they might subsequently construct on it. The bond stipulated for the payment of interest at 9 per cent., per annum to be compounded at the end of every six months. It further stipulated that payments were to be made in instalments, and that the whole of the amount should be repaid on or before 31st December 1931. The suit was instituted on 16th November 1937, that is very shortly before the statutory period of six years limitation for a suit on the basis of a mortgage bond was about to expire. The plaintiff asserted that the amount then due under the mortgage bond was ₹ 65,334-11-6, and asked for a preliminary mortgage decree for that sum together with costs and interest pendente lite. Immediately before the trial commenced, a petition was put in by the defendants pointing out that the sums actually advanced to them amounted to ₹ 35,025-15-9 or Rupees 5025-15-9 in excess of the overdraft for which they had asked. The mortgage bond was not so precisely worded, as it might have been and very possibly the effect of it was not that desired or contemplated by the bank. However, that may be, it was conceded in the Court below, and has been conceded here, that ₹ 30,000 was a secured debt and that the balance of ₹ 5025-15-9 was an

unsecured debt. The learned Subordinate Judge gave the plaintiffs a preliminary mortgage decree for the former amount, and a money decree for the latter amount. The question that arises in this appeal is whether or not a money decree for the smaller amount should have been passed at all.

2. It appears that the defendants drew cheques from time to time on the bank, and that these cheques were honoured even after the defendants had overdrawn their account by more than Rupees 30,000. When a customer of a bank draws a cheque on it knowing that the funds to his credit are not sufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or a loan. If the suit had been instituted within a period of three years from, the date on which the earliest of the various sums amounting in all to this ₹ 5025-15-9 had been paid out by the bank, the suit would undoubtedly have had to be decreed. The suit, however, as I have already said, was not instituted until 17th November 1937, and the last of the advances made to the defendants had been made as far back as 26th January 1931. The question, therefore, that arises is whether or not the suit, so far as this part of the claim was concerned, was or was not barred by limitation. The lower Court took the view that Article 96, and not Article 57, Limitation Act, was applicable. In doing so, it relied on what was said by Mr. R.C. Pandit, the manager of the bank, who gave evidence at the trial. Mr. Pandit said this:

I got a copy of the petition filed by defendant 1 that the bank had advanced more money than is stipulated in the bond. The accounts were scrutinised after this, and it was found that something more than ₹ 30,000 had been advanced. This has been done by mistake. As defendant 1 was an old client of the bank and a very respectable man, so the clerks in charge were not very careful in advancing the amounts from time to time, and so this mistake.

3. It will be useful to quote certain observations by Parke, B. in *Kelly v. Solari*¹ the nature of an action for the recovery of money paid by mistake. The learned Judge there said:

I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it, though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.

4. Now, all that Mr. Pandit said was that some clerk or officer of the bank was careless in honouring cheques, drawn by the defendants, when they were presented for payment. He did not say categorically that either he himself, or the other officer or servant of the bank who passed the cheques for payment, was under the impression that the defendants had given security for a sum in excess of ₹ 30,000 and that if he had not been under that impression he would not have

honoured the cheques. It is difficult to believe that the manager was or could have been under any misapprehension as to the nature or extent of the security which the defendants had furnished. They had been customers of the bank for a very considerable time and were men in a large way of business. It is in evidence that some time before this

¹(1841) 9 M. & W. 54

mortgage bond was executed, they had been permitted to overdraw their current account to the extent of between ₹ 7000 and ₹ 8000 apparently without having furnished any security at all. The probabilities, to my mind, are that the manager of the bank knew that the defendants had not mortgaged their property for more than ₹ 30,000 but, in spite of this, honoured their cheques when they had overdrawn to an amount in excess of ₹ 30,000. Mr. A.K. Mitra, for the appellants has pointed out that the plaint was not amended so as to convert the action into one, in part at least, for the recovery of money paid under a mistake. Mr. Mitra has also contended that if the mistake was not in fact discovered, as Mr. Pandit said, until the trial was about to commence, the suit was not maintainable, as the cause of action had not arisen when the plaint was put in. These arguments are, in my opinion, well grounded. It is, however, unnecessary to go into them at any length as, in my judgment, this sum of ₹ 5025-15-9 was not in fact paid by mistake to the defendants.

5. Mr. Netai Chandra Ghosh in resisting the appeal has invited our attention to Article 85, Limitation Act. That article provides for suits "for the balance due on a mutual, open and current account, where ' there have been reciprocal demands between the parties" and the period of limitation prescribed is three years from "the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account." Mr. Netai Chandra Ghosh points out that the account of the defendants was described in the books of the bank as a current account and that the pass-book, which has been produced in Court, was sent by the defendants regularly to the bank every six months until the latter part of 1937 when the suit was instituted. Even, however, if it could be assumed that the account between the defendants and the bank was an open and current account, it would still have to be shown that it was a mutual account. In Wood on Limitations, Edn. 4, Vol. II, p. 1434, it is said that mutual and open account current means a course of dealing where each party furnishes credit to the other on the reliance that on settlement the accounts will be allowed, so that one will reduce the balance due on the other.

6. A very similar definition of the expression "mutual account" had been given by Hollowway, J. in *Hirada Basappa v. Godigi Muddappa*². Hollowway J. there said:

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.

7. This dictum was quoted with approval by Mookerjee, J., in *Ram Pershad v. Harbans Singh*³ and has been referred to in other subsequent decisions also. From the statement of account (Ex. 1-A) it appears that various sums were paid by the Bank of Bihar to ' the defendants or to persons who presented cheques drawn on the bank by the defendants between 28th December 1929, and 26th January 1931. During that period only two payments were made by the defendants to the bank, one of ₹ 1500

²6 M.H.C.R. 142

³(07) 6 C.L.J. 158

and the other of 150, both of them being credited towards the amount due as interest on the overdraft. In these circumstances, it is impossible to say that there were in fact mutual dealings between the parties. In *Wood on Limitations*, Edn. 4, Vol. II, at p. 1433, it is said:

Where a depositor borrows money from a bank by means of overdrafts, and occasionally deposits money, which is applied to the overdrafts, the transaction is not a mutual account, and the statute of limitation runs from the date of each loan, notwithstanding the transaction opens with a credit to the depositor.

8. Mr. Netai Chandra Ghosh in attempting to support his argument referred to *Fyzabad Bank Ltd. Arrah Branch v. Ramdayal Marwari*⁴ It appears that in that case there had been dealings between the bank and the defendant over a period of several years and that whereas during the earlier part of this period the account of the defendant had always been in credit, during the latter part he was consistently in debt to the bank. It was contended that during the latter period the account between the bank and him could not be a mutual account.

9. Kulwant Sahay, J. declined to accede to the proposition mainly on the ground that even during that period the defendant had frequently made payments to the bank and had in fact paid in more than he had withdrawn. The decision is of no assistance to the respondent in this particular case. As I have just pointed out only two payments in all were made by the defendants to the plaintiff bank and these payments were made towards the reduction of the interest due on the overdraft. The facts of this case are far more akin to those in *Bank of Multan Ltd. v. Kamta Prasad*⁵, Piggott and Lindsay, JJ. there observed that an examination of the account from the beginning to the end appeared clearly to indicate that it was nothing more than the record of a loan transaction between the plaintiff bank and the defendant. That, in my judgment, is exactly the position here. Article 85, Limitation Act, has, therefore, no application, the article which is applicable being Article 57. In other words, so far as the sum of ₹ 5025-15-9 is concerned, the claim was already barred by limitation when the suit was instituted. That being so, this appeal must be allowed with costs, and the decree for a sum of ₹ 7174-8 6, which has been awarded to the plaintiff, must be set aside.

Meredith, J.

10. I agree.

⁴ A.I.R. 1924 Pat. 105

⁵ AIR 1917 All 465 : (1917) ILR 39 All 33