PATNA HIGH COURT

Basanta Kumar Mitra

Vs

Chota Nagpur Banking Association, Ltd

(Reuben, J.)

11.03.1947

JUDGMENT

Reuben, J.

1. This appeal by the defendant arises out of a suit brought by the respondent bank to enforce two mortgage deeds executed in its favour by the appellant. One of these deeds was executed on 5-11-1928, to secure a sum of ₹ 15,000/- to be repaid by the end of December, 1931, and hypothecating a two storied building, and land measuring three bighas standing in Dhanbad Municipality and described in Schedule A on the plaint. The second bond was executed on 28-4-1933, to secure a sum of ₹ 20,000 and hypothecating in addition to the house and land already mentioned another plot of land in Hirpur Mouza measuring about one bigha, also situated in Dhanbad Municipality. The loan secured by this bond was repayable by the end of December, 1934. The Bank sued to recover under the earlier lord the sum of ₹ 33,485-13-1/- and, under the later bond, the sum of ₹ 20,600-14-2/- and asked for a preliminary mortgage decree with liberty to apply for a personal decree in the event of the plaintiffs dues not being fully realized by the execution of the mortgage decree. The defendant-appellant denied liability is under both the bonds. As regards the first bond, he pleaded that, under its terms, the liability could not, in any event, exceed ₹ 15,000/-, with interest, and that the bond had been satisfied by payments made by him from time to time to the Bank. With regard to the second bond, he denied the passing of the consideration alleged. There were also defences relating to the rate of interest payable and raising the plea of limitation. The learned Subordinate Judge held that, under the first bond, the plaintiff was entitled to recover only ₹ 15,000/- inclusive of interest, and that all items of overdrawal of the defendant's account with the Bank exceeding this amount were barred by limitation. With regard to the second bond, the Subordinate Judge allowed the claim of the Bank

in full. On these findings, he gave the Bank a preliminary mortgage decree with interest at six per cent per annum till the date of realisation. Hence the present appeal. A cross-objection has been filed by the Bank.

2. The suit arises out of transactions which the appellant had with the branch of the Bank at Dhanbad where, from at least the year 1922, he has had a current account. I may note that the defendant, who is a practicing lawyer, was a local director of the Bank at Dhanbad from its inception in the year 1919 till the beginning of the year 1941. He was also one of the legal advisers of the Bank. From the beginning, he seems to have been allowed to overdraw according to his needs, and the account was a fluctuating one the outstanding balance being sometimes in his favour and sometimes against him. This state of things continued till the end of July, 1927, after which the account remained steadily overdrawn till the execution of the first bond, the amount of the overdraft varying between ₹ 9000/- to ₹ 15,000/-.

3. On the date, when the first bond was executed, the overdraft stood at ₹ 15025-2-9/-. The bond was executed to secure the overdraft, and the defendant covenanted therein to repay by the end of December, 1931. Transactions between the defendant and the Bank continued as before, and the account remained overdrawn with a fluctuating over-draft very seldom below ₹ 15,000/- and for a considerable period, very much exceeding this limit. By January, 1931, it had swelled to nearly 30,000. On 21-8-1931, the overdraft, which stood at ₹ 28,068/-, -2-9 was wiped out by a cash deposit of ₹ 35,005-11-3/- and for the first time since July 1927, there was a balance of the account in favour of the defendant. The defendant made a further deposit of ₹ 270/- on 22nd August but, by the 25th, the account was again overdrawn to the extent of ₹ 12,742-7-6/-. The overdraft rose rapidly and by the end of year, it stood at ₹ 27,149-9-3/-. Throughout the year 1932; and the early portion of 1933, the account was in deficit against the defendant, the balance due varying from about ₹ 25,000/- to ₹ 32,000/-.

4. When the second bond was executed on the 28-4-1933, the balance due was ₹ 31,468-9-9/-. This bond, unlike the former bond, was executed to secure a definite loan of ₹ 20,000/-. The loan was admittedly not paid in cash but appears in the overdrawn current account by a credit made in favour of the defendant on 16-8-1933, by which date the overdraft stood at ₹ 36,173-11-3/- and was thus reduced to ₹ 16,173-11-3/- Hereafter, the account continued in deficit as before with a fluctuating balance which, when the account was closed at the end of January, 1940, stood at ₹ 33,485-13-1/-. The last deposit in cash was one of ₹ 156-11-6/- made on 5-8-1937. The last deposit seems to be on 19-12-1938, by a cheque for ₹ 1200/-. A further entry of a cheque deposit appears on 12-8-1939, but, from the corresponding entry in the withdrawal column, this would appear to be merely an instance of a cheque presented by the defendant to the Bank for encasement. The entries subsequent to this date are all of interest on the outstanding amount.

5. The first point urged by the learned Advocate General appearing for the appellant is that the

bond of 1928 was executed as security for an existing liability of ₹ 15,000/- and not for a floating balance of account, and in consequence was paid off on 21-8-1931, when the balance of the account stood in favour of the defendant. The bond is Ex. 1 at page 20 of the paper book. It recites that the defendant has been carrying on business from before with the bank by taking loans from its branch at Dhanbad, and that the bank has asked him to execute a simple mortgage bond "in respect of your dues from me"; and, therefore, he executes this bond and agrees to the terms "specified. It then proceeds to set out the terms. The very first of them is:

> The amount of my debt shall at no time exceed ₹ 15,000/-, rupees fifteen thousand. I shall not take the said amount in one lump. I shall take loan of the said amount in instalments according to (my) need. But the amount of my taking loan in the aforesaid...manner shall at no time be in excess of ₹ 15,000/- (rupees fifteen thousand) inclusive of interest

6. I have noted above that at that time there was already an out-standing overdraft of over ₹ 15,000/-. If the intention was merely to secure this amount, there would have been no need for the provision about taking loans in instalments and not in one lump. Then the bond goes on:

> Whenever and whatsoever amount I shall take shall receive the same by giving you a cheque....
>
> This provision is one which clearly contemplates future loans to be taken by the defendant. As there was already an existing liability of over ₹ 15,000/- the question of taking fresh loans under the contract would not have arisen unless, on part payment of the existing liability, further loans on the security of the 'mortgage were permissible.

7. In support of his contention the Advocate General referred us to In re, Medewe's Trust (1859) 53 E.R. 1025. In that case, Medewe executed a deed poll in favour of his bankers, with whom he had three accounts, charging his estate with the payment "of the three serveral sums of money which shall or may be found due on the balance of the said several accounts." When the deed poll was executed the balances then due under those accounts were uncertain, and the future tense used in the instrument was held to relate to this uncertainty, and not to the uncertainty always attaching is the amount of a floating balance of account, further, in a bond executed at the same time as the deed poll, to which bond made we and the bankers were parties, an express term was included covering a floating balance, "all such Hum or sums of money as now are or which shall from time to time be or become due and owing," The Master of the Bolls took this fact into account in holding that the deed poll was only for the then existing balances of the three accounts. That case is entirely distinguishable from the casa before us.

8. The Advocate-General further argues that the fixing of a time limit up to the end of December 1931, is inconsistent with the bond being for a floating balance of account. This contention is based on *In re Boys; Eedes v. Boys*[1] There the instrument in question was a promissory note executed by Boys for 500 payable eight months from date, and containing no express reference to the account. Hence, an inference had to be drawn from the circumstances, as to whether it was intended as security for advances then made or to be made or for floating balance of account. In

coming to the conclusion in favour of the former alternative, the Master of the Bolls pointed out that the promissory note was payable on a fixed date, and not when the account was closed or when the bank thought fit to say that it would not advance any more money. The Master of the Rolls, however, attached greater weight to another circumstances, namely that, on the day that the promissory note was executed and six days later, by two payments, the bank advanced the exact sum of 500 to Boys. Here, there is nothing in the date fixed for the repayment of the advance which is inconsistent with the security being for the day to day balance, and on the terms of the mortgage bond it is clear to me that it is intended to be a security of this kind.

9. Finally, the Advocate-General argues that in the second bond the first bond is described as a bond for a fixed amount," for (repayment) of ₹ 15,000/- due to you by me in respect of the said overdraft account." Conceding, for the sake of argument, that these words are admissible for the purpose of interpreting the first bond, it seems to me that they are merely a loose description of the purpose of the first bond and are not inconsistent with its being for the floating balance of the account. On the other hand, from the conduct of the parties it would appear that they regarded the first bond as still effective security for ₹ 15,000/- for, if the bond was intended as security for the existing debt, it was satisfied on 21-8-1931, and should not have remained with the bank. Also as the total 'debt of the defendant' on the date of the execution of the second bond was more than ₹ 30,000/-, the second bond for ₹ 20,000/- would have been inadequate security. Evidently, the parties thought that the first bond was still good security for a part of the debt. This seems to be the manner in which the defendant regarded the bond even at the time of filing the written statement. I say this because, in the written statement, I do not find any suggestion that the bond was for an existing debt, and it is not alleged that the bond was discharged debt and it is not alleged that the bond was discharged by the lump payment of 21-8-1931, but on the contrary that it was satisfied by "payments made from time to time."

10. The next question which arises is the extent and the period for which plaintiff bank can avail itself of the security under the first bond. Mr. De for the bank contends that the limit of ₹ 15,000/- is only a limit in favour of the bank, entitling it to refuse to grant advances beyond this limit, and that the security covers the entire loan granted by the bank. On the terms of the bond I find myself unable to take this view. It is true that the bond recites at the beginning that the bank wanted security in respect of "Your dues from me", an expression which may cover the entire loan granted, but this is merely the reason stated for the execution of the loan. The operative portion of the bond is contained in the numbered "terms and conditions." The very first clause provides:

> The amount of my debt shall at no time exceed ₹ 15,000/- rupees fifteen thousands. But the amount of my taking loan in the aforsaid manner shall at no time be in excess of ₹ 15,000/- (rupees fifteen thousand) inclusive of interest.

Clause 6 then provides:

> Three years' time, that is till December 1931, is fixed for the repayment of the amount. If the entire amount is not repaid, that at any time after the expiry of the said period of time,

you shall be competent to institute a suit for the realisation of your entire principal amount together with interest, (thereon) on account of this Sthitabadha mortgage bond, and you shall be competent to realise your money according to the stipulations made in para. 5 of this deed.

I cannot read these provisions as intended only for the protection of the bank. The intention of the parties seems rather to have been that the defendant should reduce his indebtedness, that his total indebtedness should be confined to ₹ 15,000/- and that he should clear off his debts within the time specified. The drafting may be inartistic but the meaning is plain, namely that the security was being given for an indebtedness of ₹ 15.000/- which limit was also to include the interest on the money lent.

11. In view of the terms of the bond limiting the transactions to the end of December 1931, I am unable to hold that it authorised loans by the bank after that date, and that such loans are secured by it. This seems to have been the view which the bank itself held at that time, because we find from the accounts that from the beginning of 1952 the bank adopted a new mode of charging interest. Throughout the period of the bond interest on the outstanding loans for the past year is brought into the account and debited as principal at the beginning of the next year. This is in accordance with the bond, which provides

2. ...The amount of interest will be treated as principal, should it fall due at the end of the year and the interest on the same will accrue at the following rate.

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4. ...I shall pay interest at the rate of 12 annas (annas twelve) per hundred per month from the date I shall take the amount. You shall be competent to debit the amount of interest for every month to my account on the first of the not month.

From February 1932, however, the interest, due for one month is brought into account at the beginning of the next month, i.e. it is compounded monthly, a practice which was followed before the execution of the bond. It is the common practice that interest is charged at a higher rate on unsecured than on secured loans.

12. Through a mistake, it is alleged in the plaint that under this bond interest is payable at twelve annas per hundred rupees compound-able with monthly rests. There is a clear provision in the bond for bringing the interest into the principal only at the end of every year and this was the practice followed by the bank throughout the period of the bond. There is a further point regarding interest. I have held above that the maximum amount secured by the bond was ₹ 15,000/- inclusive of interest. Is this also the case after the due date of payment? In other words, is the bank entitled to interest after December, 1931, and is it subject to the limit of ₹ 15,000/- I would answer this question in the favour of the bank. The relevant provision is Clause 6 of the bond which is set out above. This entitles the bank to interest on the entire principal due at the expiry of the above period. This amount is correctly described as "principal", because under the

provisions of Clause 2 cited above such interest as might have remained due at the end of December'1931, would be carried into the principal. The provision regarding the realisation of interest on the amount due after the stipulated period is not limited as regards the amount. Various dates have been suggested to us as the dates from which this interest should run. The proper date, it seems to me, should be 1-1-1932, from which date fresh transactions under the bond cease to be entered into.

13. The next question for consideration is that of Imitation. This has two aspects. There is first the portion of the debt covered by the security of the first bond. Limitation for this purpose is governed by Article 182 of the Schedule to the Limitation Act, and began to run from 1-1-1932. The suit was, therefore, within time when it was filed on 2-1-1941. As regards the unsecured portion of the bank's dues as appearing in the defendant's current account, the contention of Mr. De, for the bank, is two-fold, firstly, that this is a mutual, open and current account, governed by Article 85 of the Schedule to the Limitation Act, and, secondly, that limitation is saved by certain payments made by the defendant.

14. It is not contested that this is a current and open account, but is it mutual? The Subordinate Judge has answered this question in the negative. In contesting the correctness of this finding, Mr. De draws our attention to the fact found by the Subordinate Judge himself that between March 1922, and July 1927, there were credit balances in favour of the defendant on thirty-three occasions. The fact that there were oscillating balances in favour of the two parties is however not decisive. Thus, in *Gopal rai v. Harichand Ram Anant Ram*[2] balances were found to have been in favour of the defendant on seventeen different occasions, and yet the account was held not to be a mutual one, the reason being that the credits were found to be small ones lasting for a few days at a time and created by small payments in the nature of repayments of indebtedness. On the other hand, in *Tea Financing Syndicate Ltd. v. Chandra Kamal*[3], the account was held to be a mutual one though there was never a balance in favour of the defendant. The principle is explained by Rankin C.J. at page 668:

> ...whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set off to reduce the defendant's liability.

15. The arrangement between the parties was that on the one side the plaintiff gave advance of money to the defendant, and on the other side the defendant sent consignments of tea from his tea estate to the plaintiff for selling it by public auction and crediting the sale proceeds, after deduction of commission and other charges, in the common account in which the advances were entered. The above was the point which his Lordship set himself to investigate, and, having found the latter alternative to be true, he held the account to be a mutual one. In *Fyzabad Bank v. Ramdayal*[4] it was laid down that although a shifting balance is a test of mutuality, its absence is not conclusive proof against mutuality. According to their Lordships the test is, not that there must be a shifting balance, but that such was a possible and likely incident of mutual transactions in regard to which the account was kept.

16. If, we examine the transactions between the parties in the light of the above decisions, I have

no doubt that this account cannot be regarded as a mutual one. For short periods from March 1922 to July 1927, there were small balances to the credit of the defendant, but from July 1927, to the filing of the suit, the account has been overdrawn throughout except for a short period of four days in August 1931, when the defendant suddenly deposited a total amount of ₹ 35,275,11-3/-. The whole of this deposit was withdrawn by 7th September. Apparently, the defendant had somehow come by the money and kept it in the bank until he could apply it to the purpose for which he got it. This is hardly a transaction forming part of a mutual dealing between the bank and the defendant.

17. This solitary instance on which the defendant had a balance to his credit is more than eight years before the closing of the account, and during this time the position of the defendant continued to grow worse; and, the original security for ₹ 15,000/- proving insufficient, the bank took a further security for ₹ 20,000/-. Can we reasonably say, in these circumstances, that there was a possibility of a shifting balance in favour of the defendant? I would answer the question definitely in the negative. It is possible that at one time the defendant was a depositor of the bank, but for years the position had entirely, changed and the defendant was purely and simply a debtor of the bank. I would, therefore, hold that the account was not a mutual one, and that Article 85 of the Schedule to the Limitation Act has no application.

18. The payments relied on by Mr. De as saving limitation are as follows:

> 13-8-34 ₹ 1000/- Ex. 4. 15-8-34 ₹ 1000/- Ex. 4A. 29-7-35 ₹ 1150/- Ex. 4D. 14-9-36 ₹ 3000/- Ex. 4G. 19-12-38 ₹ 1200/- Ex. 4H.

The pay-in-slips by which these amounts were deposited in the account are all signed by the defendant himself. Section 20, Limitation Act, as it stood at the time of the filing of the suit, required payment as such of "interest on a debt" or of part of "the principal of a debt." The payments were not made towards interest as such. If we take it that the payments were towards principal, the question arises, what is the "debt" the limitation for the recovery of which is thereby extended. If we could regard the balance of the account as a consolidated sum towards the payment of which the payment was made, it would be the debt of which the limitation was extended. But, as explained by my learned brother in *Uma Shankar v. Bank of Bihar Ltd.*[5] *A*an overdrawn current account cannot be regarded in this way. When the customer of a bank draws a cheque on it, knowing that the funds at his credit are insufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or a loan. Each such transaction is an independent loan, limitation for the recovery of which is determined by Article 57 of the Schedule to the Limitation Act. Regarded in this light, each payment made by the customer over his signature goes to extend limitation in regard to the particular overdraft which it goes to repay, and which, in accordance with the rule in Clayton's Case 1816) 1 Mer. 572, would be the earliest item outstanding on the debit side. The payment would therefore be of no avail to save limitation in respect of the general balance of account. The fact that in this case part of the floating balance was secured would not make a difference in this respect. Such security does not by itself exclude the application of the rule. The rule continues to apply, the earlier advances being satisfied in chronological order, and the security covers the balance from day to day. The principle is explained by Buckley, L.J. in *Deeley v. Lloyds Bank*[6]

A security in favour of a bank to secure a sum and further advances operates in the case of each further advance as a further disposition of the property made at the date of the further advance which takes effect by force of the antecedent deed of security.

Here, the position is somewhat complicated by the fact that at the time when these loans were given, the security no longer operated to cover new loans, but if during its operation the security did not affect the applicability of the rule in Clayton's Case (1816) 1 Mer. 572 it would not do so after it ceased to operate. The last overdrawal in the account was made in 1936. For the above reasons, therefore, recovery of the unsecured overdrawals was barred when the suit was instituted. This was the conclusion arrived at in *Uma Shankeer v. Bank of Bihar Ltd. A.I.R. 1942 Pat. 201(Supra)* where it was held that the bank could recover only ₹ 30,000/- covered by the security and that the recovery of ₹ 5,000/- advanced in excess of this amount was barred, being governed by Article 57 of the Schedule to the Limitation Act. There was a similar result in *Chota Nagpur Banking Association Ltd. Purubia v. Lal Mohan*[7] in which case the bank got a decree only for the amount actually secured and nothing at all for a considerable overdraft in excess of that amount.

19. This brings me to the question, how much if any of the amount due under the first bond has been satisfied? There was no break in the account after the, expiry of the period of that bond, and it has boon argued that applying the rule in Clayton's Case (1816) 1 Mer. 572 the amount secured by the loan must be taken to have been satisfied as soon as the entries on the deposit side became enough to pay off the items on the debit side covered by the bond, a condition which was certainly reached when the credit of ₹ 20,000/- was made in August 1933. We must remember in this connection that the rule in Clayton's Case (1816) 1 Mer. 572 is not a rigid rule of law. It is merely a rule of evidence founded on a presumption of the creditor's intention; it will not be applied in a case where there are circumstances showing that the creditor had no such intention. In *Deeley v. Lloyds Bank*[8] Cozons-Hardy, M.R., who differed from the other members of the Court in his finding as to whether such circumstances existed, said:

Now it is plain law that if you know nothing more than that the bank has kept an ordinary banking account and communicated it to the customer, the bank must be considered to have appropriated the earliest credits to the earnest debits, but it is equally clear that your are entitled, and indeed bound, to see whether there are any circumstances, including the conduct of the parties, sufficient to justify you in arriving at a different conclusion:

20. Fletcher Moulton, L.J. while deciding the case on the finding that such circumstances existed, went further and expressed his opinion that in the case of a secured account with subsequent paying in and paying out, a modified rule would apply and the presumed intention should be to apply the payments into the unsecured items in order of date in priority to the secured items. He expresses his reason for this opinion in words, which I will repeat with respectful agreement:

Although I base my judgment on the special facts of the case, I wish to add a word on what I think should be the result of the application of the law laid down in *Hopkinson v.*

Rolt[9] to the ordinary case of a mortgage to a banker to secure the balance of a customer's account. When the bank receives notice of a second mortgage by the customer to a third person it does not in my opinion affect the nature of the security. It remains a security for the balance of the account from moment to moment. But it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced and once reduced cannot again be raised. This fully satisfies the broad principle of justice referred to by Lord Blackburn and does not unnecessarily interfere with the position of the prior incumbrancer, All this is altered if the rule in Clayton's Case (1816) 1 Mer 572 is to be applied in the manner contended for by the plaintiff. The security is no longer for the balance of an account, but for certain items on the debit side In all their subsequent transactions the bank are presumed to have the intention of applying all payments into the destruction of their own security in favour of the subsequent mortgagee, although no sane man or sane jury, could doubt that they meant to do exactly the contrary. And this is not by virtue of any rule of law. It purports to be the consequence of a rule of evidence--a conclusion of common sense to the effect that where there is nothing to indicate actual appropriation it is natural and proper to suppose that the eldest debit items are intended to be wiped out first. This is good common-sense where the items are on an equality, but not otherwise. Where some are secured by virtue of their being antecedent to the second mortgage no sane man would dream of extinguishing them in preference to the subsequent unsecured ones when it was a matter left to his choice. How, then can we impute to him such an intention? What is the consequence of our so doing? If the bank are not aware of the pit dug by the law for them they find their security gone. The second mortgage is put before the first mortgage because the law presumes in them an intention the very suggestion of which is ridiculous. If, however, they know of the pitfall they go through the simple formality of drawing two horizontal lines in their books and make believe to commence a new account and they are safe. I say "make believe", for it is not in truth a new account. That can only be started by arrangement with the customer. If the payments into this so-called new account show a balance to credit the subsequent mortgagee can claim the benefit of them, because in truth it forms part of the account for which the security was given. The whole result of the formality is that the bank are placed in precisely the position which I have first described/ The security remains a security for the balance of an account, but the amount of that security cannot be arised, but may be automatically reduced. Why should it be necessary to go through such a formality to effect this? The law has refused to apply the rule in Clayton's Case (1816) 1 Mer. 572 so as to work a wrong. Why should it apply it to cases where it would be to presume on the part of the prior encumbrancer an act of suicidal folly? No good is done thereby it only entraps those who are unaware of the danger.

21. In this view of the matter, it seems hardly necessary to investigate if there is evidence of an intention on the part of the bank not to appropriate payments in to the satisfaction of the secured

debt. There first is the conduct of the parties, who seem to have treated the mortgage bond as existing security to the extent of ₹ 15,000/-. This is indicated by the bond being left, with the bank, and the taking of the subsequent mortgage for only ₹ 20,000/- though the thru existing overdraft was over ₹ 30,000/-. The other circumstance is the delay in the crediting of the ₹ 20,000/- in this account. The loan was taken on the second mortgage bond in April 1983. The balance of the account was then ₹ 31,468-9-9/-. Had the money been credited then, the balance would have been reducted to less than ₹ 15,000/- and the security of the first bond would have been lessened to that extent as explained in the passage cited above from the judgment of Fletcher-Moulton, L.J. Evidently, to avoid this, the credit into the current account was delayed till August 1983, when the overdraft had reached the figure of ₹ 186,178-11-3/-. The loss suffered by the defendant by this delay was subsequently made good by crediting him with interest on this amount of ₹ 537-9-3/-. I would, therefore, hold that the secured account was not satisfied by the application of the rule in Clayton's Case (1816) l Mer. 572.

22. A further point, however, remains for investigation in this connection. It relates to the bank's right to charge interest. On the secured amount it had the right to do so under the bond, but incorrectly charged it at twelve annas per hundred rupees per month compoundable monthly instead of per year. As regards the unsecured amount, it is strenuously argued that they had not the right to charge any interest. It was laid down in *B.N. Rly. Co. Ltd. v. Ruttanji Ramji*[10], that interest prior to the filing of the suit may be granted only under the terms of a contract, or under usage of trade having the force of law or under the provision of a substantive law. Here, it is urged, there is no subsantive provision of law, and neither a contract nor usage of trade is proved. The pass book however, shows that interest at this rate is being charged ever since February 1932, and there is no suggestion of any objection having, been made by the defendant. It has been argued that the defendant did not know, and our attention has been drawn to his letter (Ex. D) asking for the return of his pass book. This letter is dated 5-8-1940, and says that the pass book "was left at the bank few years back and I did not get it back." I am not prepared to accept this letter as proof that ever since February 1932, a person of the defendant's standing and experience did not see his pass book. The defendant was paying interest on overdrafts ever since the commencement of the account, and could not have expected to get loans from the bank free of interest. In the circumstances from the absence of any objection on his behalf it is fair inference that he agreed to the interest charged in the pass book. It follows that the only mistake in the accounts is the compounding of the interest on the secured amount monthly instead of yearly.

23. This brings us to the last point relative to the first bond, how much if any of the amount due under this bond has been satisfied? In the view which I have taken of the applicability of the rule in Clayton's Case (1816), 1 Mer. 572, no question arises of a portion of this amount being satisfied by any of the deposits made prior to the credit of ₹ 20,000/- on 16-8-1983. On that day the opening debit balance of the account as shown in bank book was ₹ 36/-, 178-11-3. This includes an excess charge arising out of the mistake in calculating the interest which I have pointed out above. The interest on ₹ 15,000/- from 1-1-1932 to 15-8-1933, at twelve annas per

hundred rupees compoundable with monthly rests comes to ₹ 2352,14-0/-. Compoundable with yearly-rests it is ₹ 2269-11-0/-. The difference between the two sums ₹ 83-8-0/- is the overcharge. The correct opening balance on the 16-8-1933, was therefore ₹ 36,173-11-8/- minus ₹ 83-3-0/- i.e. ₹ 56,090-8-8/-. Out of this the amount secured by the first bond was ₹ 16,350/-, the amount of principal as compounded on 1st January 1933, and ₹ 919-11-0/-, the interest for the current year, making a total of ₹ 17,269-11-0/-. The credit of ₹ 20,000/- would go first to satisfy the unsecured debt, which on that day was rupees 86,090-8-8 minus ₹ 17,269-li-0 i.e. ₹ 18,820-13-8/-. The balance of the ₹ 20,000/- would go to satisfy the secured debt, being applied first, to satisfy the interest and then the principal as provided in the bond. The result would be to wipe out the interest altogether and to reduce the principal to ₹ 16,090-8-8/-. From then onward the plaintiff bank would be entitled to get interest at the bond rate on this sum, applying fresh deposits to the satisfaction of unsecured and then of secured debt in the manner indicated above.

24. I turn now to the bond of 1933 (Ex. 1(a)). The first contention regarding it is that there was no consideration for it. This contention is based on the assumption that the case of the plaintiffs bank is that the consideration for the bond was paid in cash. Although an issue was framed as to whether any portion of the consideration was paid in cash, I do not find anything in the plaint or in the plaintiff's evidence to justify the assumption. The plaint merely mentions ₹ 20,000/- as being the amount secured by the bond. It does not say whether the amount was paid in cash or only by a credit in the accounts. In the oral evidence the witnesses are definite that no actual payment in cash was made and that the consideration passed by way of a book transaction. This, however, makes no difference to the actual passing of consideration, for, as we have seen in the discussion relative to the first bond, the money secured by the second bond was actually applied to the reduction by ₹ 20,000/- of the debt owing from the defendant to the bank.

25. Another contention regarding this bond is that the consideration for this bond was the amount due on the first bond, and so the bank cannot ask for a decree in respect of both the bonda In support of this contention, our attention is drawn to the statement of the bank manager, P.W. 1. "That document (the second bond) was executed in payment of dues of the first bond." This is merely the interpretation put on the transaction by the witness, but the question has to be decided by the Court on a construction of the instrument itself and by an examination of the manner in which the advance made on the bond was actually applied. The mortgage bond refers to the first mortgage bond but, beyond mentioning it, says nothing to connect the taking of the fresh loan with the satisfaction of the amount due under the first bond. As the accounts disclose, there was money due to the bank in excess of that secured by the first bond, and in accordance with the rule in Clayton's Case (1816) 1 Mer. 572 we must take this advance to have been applied first to the satisfaction of the unsecured amount. To some extent as I have shown the money went to pay off money due under that bond. To that extent, there will necessarily be no decree on the first bond. Apart from this, there is nothing to prevent the bank from getting a decree based on both the bonds.

26. Thirdly, it is contended that the amount borrowed on the second bond must be applied to the

satisfaction of the debts of the defendant as they stood on that date. On that day, the opening debit balance of the overdraft amount was about ₹ 35,500/-. It is argued that deducting ₹ 5787-9-9/-, on account of interest charged to the account from January 1932 onwards, and ₹ 15,000/- (inclusive of interest) due on the first bond, the consideration for the second bond should be taken at the utmost to be about ₹ 10,600/-. I have held above that die bank was entitled to charge interest as shown in the accounts, except on the secured amount, and for that mistake I have made due allowance in arriving at my result. As for the necessity for applying the loan to the satisfaction of the existing debts on that very day, we have been shown no authority for it. The bond itself gives no directions to this effect, and it is not suggested that any instructions for the immediate application of the loan for this purpose were given by the defendant. The bank was, therefore, entitled to apply the money according to its convenience and so as to safeguard its own interests. I have shown above how it did this, and how by delaying credit in the overdraft account it avoided the reduction of the security under the first bond to a greater extent than has taken place--an act which seems to have been in accordance with the intention of the parties. Any loss that the defendant might have suffered by this procedure has been compensated for by crediting him with interest at the bond rate for this period of delay, although there was no provision in the agreement for such interest. When the bank gave credit to the defendant in its loan account, the money was at the disposal of the defendant, and the consideration for the bond must be taken to have passed in full on the day of its execution.

27. Finally, a prayer is made on behalf of the appellant that the amount found due from him be made payable in instalments under the provisions of Order 20, Rule 11, Civil Procedure Code This prayer cannot be granted as it is clear from the terms of this rule that it applies to a money decree and not to a mortgage decree.

28. This disposes of the appeal and I turn to the cross-objection. The bank has already got a decree for its full claim on the second bond from the Subordinate Judge. It seeks a similar decree in respect of the first bond. I have indicated above the extent to which it can get a decree on this bond.

29. In the result, I would uphold the decree of the Subordinate Judge so far as it relates to the bond of 1933. I would modify the decree relative to the bond of 1928 by allowing interest at the bond rate from 1-1-1932 up to the date of the suit and at six per cent, simple per annum pendente lite. The amount due on the bond will be calculated in the manner indicated by me at pages 15-16 above. The appeal will be dismissed with costs and the cross-objection allowed in part with proportionate costs.

Shearer J.

30. I agree.

Cases Referred.

1(1870) 10 E.Q. 467
2A.I.R. 1922 Pat. 364
3AIR 1931 Cal 359 : (1931) ILR 58 Cal 649

4A.I.R. 1924 Pat. 107
5.I.R 1942 Pat. 201
6 (1910) 1 Ch. 648
7A.I.R. 1943 Pat. 301
8(1910) 1 CH 648
9(1865) 9 H.L.C. 514
10AIR 1938 PC 38 : 1938-47-LW 241