Privy Council Appeal No. 116 *of* 1924.

Patna Appeal No. 31 *of* 1923.

Radha Kishun and others - - - - - - *Appellants*

v.

Hira Lal Sah and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH NOVEMBER, 1926.

Present at the Hearing:

LORD PHILLIMORE.
LORD SINHA.
LORD BLANESBURGH.
LORD SALVESEN.

[*Delivered by* LORD PHILLIMORE.]

The plaintiffs and defendants are respectively firms of Indian bankers who are close neighbours. They had business relations for a considerable period, the business beginning on the 5th Chait in the Fasli year 1309 and the relations ending on the 27th Katik in the Fasli year 1324.

The account is sometimes described as a mutual current account, but as far as their Lordships have been permitted to see the papers, it was a one-sided account of loans made from time to time by the plaintiffs' firm and payments from time to time in whole or partial discharge of the advances. But the question of mutuality is not a material one.

Plaintiffs sued for the balance of the account with compound interest at the rate of 8 annas per cent. per mensem. The defendants claimed to reduce the rate of interest by one pie and disputed the claim of compound interest, and further pleaded that all the earlier items were barred by the Indian Limitation Act. The way in which they put their case as to limitation was this:

they said that in the Fasli year 1321 they were in money difficulties, and that the plaintiffs refused to make them further advances; that there was an interval of about 16 months, and then a new arrangement was come to by which the plaintiffs agreed to make advances provided that the sums advanced never exceeded Rs. 5000 and provided that each advance was repaid before another was made; and the defendants claimed to appropriate their payments made, since the new arrangement began, to the new advances.

The plaintiffs, on the other hand, contended that there was no such specific appropriation, and that they might, as the creditors, appropriate the payments made by the debtors to the earlier items, which would otherwise be statute-barred. They denied that there was any change in the mode of transacting business from the start to the finish or any new arrangement made as suggested in the Fasli year 1323.

The accounts were sent to a Commissioner, whose report, except in respect of one item, was not questioned, and the matter then came before the Subordinate Judge for trial. The principal plaintiff and his gumasta gave evidence on the one side, and the principal defendant and his gumasta gave evidence on the other. Some other witnesses were examined, but their evidence is unimportant; and except the accounts, there were no documents to consider.

Laying aside one disputed item, the books of both parties were in substantial agreement. They showed a number of entries at various intervals; loans and payments in discharge very frequently made, with a gap of approximately 16 months, and then during the later period advances of round sums never exceeding Rs. 5000, always, except in one case which could be explained, paid off (but not necessarily in one payment) before another advance was made, and paid off so speedily that simple interest on all the advances during this period came to a smaller sum than Rs. 100. Defendants' evidence was, as already stated, that in the Fasli year 1321 they had got into financial straits, and the plaintiffs' firm refused to make them further advances, but that towards the end of 1323 their position had improved, and they then induced the plaintiffs to agree to finance them to the extent of Rs. 5000, on the terms that each advance was specifically repaid before another was made.

The plaintiffs' case was that they never knew that the defendants were in financial straits, that they never refused credit, that it did just so happen for no particular reason that they knew that the defendants had not come for advances during the 16 months, but that they never made any stipulation as to Rs. 5000.

The Subordinate Judge came to the conclusion that the defendants' story was the true one. He came to this conclusion not so much because he thought the defendants' oral evidence more trustworthy, but because he thought that the circumstances of the various payments clearly implied that they were to be

appropriated, and were in fact appropriated, each distinct debt being satisfied as shortly as possible after the date of the loan, and before a subsequent debt was incurred. No doubt the fact that the particularity with which these repayments were made is not only remarkable in itself, but in strong contrast with the accounts in the previous years. In his view, it was unnecessary to decide whether there was a previous agreement. He thought that the circumstances indicated that each time the defendants made a payment, they appropriated it to discharge a particular advance. Accordingly, he made a decree for Rs. 52.12.8, being simple interest on the several advances in the later period.

From this view, the High Court differed. The learned Judges thought that there had indeed been a fresh agreement made in the Fasli year 1323 ; but it was an arrangement according to which the defendants were to be allowed a further credit of Rs. 5000 in addition to their old debt, whatever it was. They laid stress on the fact that only on 6 of the 23 occasions was the sum advanced repaid in one repayment. But they seem not to have noticed, or if they noticed, they failed to appreciate, the fact that in all the remaining 17 cases but one, the whole previous advance was repaid before a fresh advance was sought for. It is to be noted that there are expressions in the judgment of Das J. which would lead their Lordships to suppose that if he had appreciated this fact, he might have come to a different conclusion.

Moreover, it is to be observed that to support his decision, Das J. assumes in favour of the plaintiffs that an agreement was made to which the principal plaintiff never deposed, and which is indeed inconsistent with his story.

The burden is upon the defendants to prove the appropriation for which they seek. Indeed, in their Lordships' opinion, it is a heavy burden, and one which must be completely discharged. If all allowance for this is made, still the inference to be drawn from the accounts may be such as to justify the Subordinate Judge in accepting the defendants' evidence, while the reasoning by which the High Court supports a different conclusion is not satisfactory.

Still, however, their Lordships would be in doubt if it were not for another consideration. Strangely enough, both sides say that they were quite unaware how much was due in respect of the old debt incurred before the interval. This is probably because the interest columns had not been worked out in the books of either side.

Now there were two disputes about interest, one of slight importance, though it bulks rather largely in the judgment of the Subordinate Judge, whether the rate was 8 annas or 7 annas 9 pice as the defendants said.

Plaintiffs agreed to this extent that they were ready to allow one pie as a deduction when the compound interest for which they contended was reckoned up.

The Subordinate Judge took the view that the rate must be 7 annas 9 pice, and the objection to his finding has not been pressed.

Compound interest is another matter. The burden is on the plaintiffs of proving an agreement to pay compound interest. They say that it is arrived at by taking yearly rests. The defendants say that it is only chargeable if and when an account has been stated; and in the present case no account was stated till the plaintiffs brought their suit.

Here again the Subordinate Judge was in favour of the defendants, and the High Court was in favour of the plaintiffs.

Now, as already observed, no entries or calculations as to interest were made in the books of either side, and no balance was struck at the end of any year. In itself, with so moderate a rate of interest, compound interest would not be unnatural or unusual; but it is difficult to see how it could be intended to be charged if no balance were struck and no intimation given; and there is a passage in the evidence of the plaintiffs' gumasta that certainly looks as if he took the same view as the defendants take as to the general practice; though in this case he deposed to there being a special agreement to pay compound interest.

Their Lordships do not think that this special agreement is made out, and in their view the Subordinate Judge was right upon this point, and his decision should not have been reversed.

There remains the one disputed item. This, as found by the Commissioner, is a principal sum of Rs. 6910. The Subordinate Judge found in favour of the defendants on this item, but the Judges of the High Court thought that his decision was uncertain, and as they were remitting the case back to him, desired him to reconsider this point. It does not appear that, as things stood, the High Court would have taken upon itself to reverse his finding.

If the question of appropriation is decided against the plaintiffs, neither the point of compound interest nor the point of this item becomes material. But in determining the question of appropriation it is not without importance to consider how the balance stood before the 16 months' interval.

If it is not a large figure, it is more likely to have been left out of consideration when dealings were renewed between the parties; and as their Lordships read the Commissioner's findings, if both these matters were decided against the plaintiffs, their share would only be Rs. 1761, with some simple interest due to the plaintiffs before the 16 months' interval. Moreover, as already stated, neither side apparently cared what it was. These facts assist their Lordships in coming to the conclusion that the Subordinate Judge was right in his finding on the question of appropriation. His decision should not have been reversed, and their Lordships will humbly recommend His Majesty that the appeal should be allowed, and that the decision of the Subordinate Judge should be restored with costs here and below.

In the Privy Council.

RADHA KISHUN AND OTHERS

v.

HIRA LAL SAH AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

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