

Privy Council Appeal No. 73 of 1937

Bengal Appeal No. 77 of 1935.

The Benares Bank Limited - - - - - *Appellant*

v.

S. C. H. Meyer and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN
BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 30TH JANUARY, 1939.

Present at the Hearing :

LORD THANKERTON.

LORD ROMER.

SIR GEORGE RANKIN.

[*Delivered by* LORD THANKERTON]

This is an appeal against a judgment and order of the High Court of Judicature at Fort William in Bengal dated the 7th April, 1936, which affirmed on appeal a judgment of the said Court in its original insolvency jurisdiction dated the 18th June, 1935, whereby *inter alia* the present appellant's exceptions to the findings and report of the Registrar in insolvency, dated respectively the 15th December, 1934, and the 26th February, 1935, in insolvency cases nos. 137 and 166 of 1911, were discharged.

Five persons, who were carrying on business in Calcutta as merchants and agents under the name and style of M. L. Laik and Banerjee, were adjudicated insolvents by the High Court, three of them on the 15th June, 1911, and the other two on the 14th July, 1911. On the 4th June, 1913, the creditors of the insolvents, including the appellant, approved a scheme of composition, and the two insolvency cases having been consolidated, the Court approved the composition on the 15th September, 1913, and both adjudication orders were annulled on the 15th March, 1916, after the necessary transfers contemplated by the scheme had been completed. It may be stated that the scheme provided for the ultimate payment in full of the secured creditors and for the payment of eight annas in the rupee to the unsecured creditors, with the exception of some relatives of the insolvents who gave up their claims. The scheme was guaranteed by certain persons, who agreed to transfer and convey certain properties to the Official Assignee to be used in satisfaction of the creditors' claims; the appellant was to be finally paid off last, but was to receive interest meantime at 6 per cent. per annum.

This appeal raises a question of construction of the appellant's rights under the scheme of composition. The respondents are the Official Assignee, the insolvents or their representatives and the guarantors or their representatives.

The material parts of the scheme are paragraph XII and part of schedule III, which are as follows:—

“ XII. The Benares Bank Ltd., are agreeable to accept payment of their secured debts as follows:—

“ (1) Rama Ranjan Roy and Ashutosh Roy will transfer their respective half shares in the Benehir Bhalgora and Khas Jherriah properties and the income and profits thereof to the Official Assignee out of such income the Official Assignee will pay to the Benares Bank the sum of Rs.5,000/- per annum towards satisfaction of this debt, should such income not suffice to pay Rs.5,000/- then Babu Kalidas Laik will make up the deficiency.

“ (2) The debts due to the Insolvents so far as the same shall be realised by the Official Assignee as also the sale proceeds of Simapore and Benedhi properties (which are to be sold by the Official Assignee) will also be paid to the Benares Bank Ltd., towards satisfaction of their mortgages.

“ (3) If the payments made to the Benares Bank Ltd., under Clauses 1 and 2 of this paragraph do not cover the interest at 6 per cent. per annum then the amount of the deficiency will be made good, as to one half thereof by Nirmal Shib Banerjee and as to the other half by Gopesh Chandra Adhicary and Nilratan Adhicary.

“ (4) So long as the payments mentioned in Clauses 1, 2 and 3 are regularly made the Benares Bank will accept interest at 6 per cent. per annum and will not enforce their mortgage liability.

“ (5) Upon satisfaction of Mrs. Barnard's and Woomesh Chandra Banerjee's mortgages in manner aforesaid and payment of the second sum of annas 4 in the rupee to the creditors named in part I of Schedule I the income from Bhulanbararee property and the properties mentioned in Schedule II and the properties of N. S. Banerjee mentioned in paragraph X will be applied towards satisfaction of this mortgage including further interest at 6 per cent. and thereupon the properties mentioned in Clauses 1 and 2 will be released from this mortgage and the personal liability of the persons named in Clauses 1 and 3 for payments as stated in Clause 4 will cease.”

SCHEDULE III.

LIST AND DESCRIPTION OF SECURED DEBTS.

* * * *

“ 8. Benares Bank Ld.

“ Secured by three different mortgages, firstly for a sum of Rs.1,25,000/- created by M. L. Laik, K. K. Adhikari, S. K. Bannerjee Harish Chandra Mukerjee and N. N. Mukerjee by security of the Benadi Coal property and one Simapur landed property and several outstanding of the firm of M. L. Laik and Banerjee, secondly for a sum of Rs.25,000/- created by the above named five persons by charge of the said M. L. Laik's share in the Hathnal Colliery and certain other landed properties, thirdly for a sum of Rs.78,000/- created by Sasti Kinkar Banerjee by charge of several personal properties. Approximate due up to date is Rs.3,25,558-12-1. The mode of payment is provided for in XII of the proposal and the creditor has approved of the same.”

It may be mentioned that on the 18th February, 1915, all the guarantors under the scheme, with one exception, entered into a deed of transfer in favour of the Official

Assignee in modification of the scheme, but it has been held by the Appeal Court, in a judgment dated the 5th January, 1932, that this deed cannot be enforced in the insolvency proceedings, as the requisite procedure had not been complied with. It is therefore not material to the present question.

The question for decision in this appeal is whether, upon a proper construction of paragraph XII of the scheme and the relative part of schedule III, the principal sum on which the interest is to be payable to the appellant is (a) the sum of Rs.3,25,558-12-1, which is stated as the amount of the debt in schedule III and which admittedly included arrears of interest of Rs.74,347-1-0, as the appellant contended or (b) the sum of Rs.2,51,211-11-1, the arrears of interest being excluded, as the respondents contended.

The appellant maintained further that the respondents were excluded from raising this question, in view of a judgment of the Court in these insolvency proceedings, dated the 10th August, 1923. On the merits of the question, the appellant maintained that, for the purposes of the scheme of composition the original mortgages and securities were superseded, and the appellant's debt was in effect a new debt, on which the stipulated interest was to be payable.

The respondents maintained that the original mortgage debts were not superseded by the scheme of composition, that the effect of the scheme was that a flat rate of 12 per cent. interest was substituted for the original rates of interest on the original mortgage debts, payment of half of the new rate being postponed, and that the appellant's claim involved the payment of compound interest, which should not be allowed unless clearly provided for by the scheme. They submitted a further contention under the Behar Money Lenders Act III of 1938, but it is clear that that Act does not apply to the present proceedings, and this contention need not be further considered.

Both the Courts below have accepted the respondents' contentions on the merits as to compound interest and a flat rate. Costello J., with whom Derbyshire C.J. agreed, said:—

" We have come to the conclusion that, in spite of the judgment of Mr. Justice Panckridge and of the formal judgment of myself and Mr. Justice Lort-Williams we ought not to put upon the guarantors liability for the payment of interest upon a sum which represents accumulated interest amounting to Rs.74,371-1-0 unless it is made reasonably clear and indeed clear beyond all question from the terms of the scheme of composition that that was the intention of the parties. Upon a careful and close examination of the terms of the scheme of composition on the line indicated by Mr. Advocate General and after a most careful consideration of all the arguments which he has put forward and which are based upon the grounds of objection which were set forth in the petition of the Bank dated the 17th of May, 1935, we find ourselves unable to come to the conclusion that the scheme does provide for payment of interest at 12 per cent. upon the sum which represents the accumulated interest at the date of the scheme."

Their Lordships regret that they are unable to agree with this construction of the scheme of composition, and, further,

the previous judgments of the Court which are referred to in the passage above quoted do not include the previous judgments on which the appellant relies as excluding the respondents from raising the present question, vizt., the judgment of Greaves J. dated the 10th May, 1922, affirmed on appeal on the 10th August, 1923.

In their Lordships' opinion the provisions of paragraph XII of the scheme and the relative portion of schedule III clearly record the acceptance by the bank, for the purposes of the scheme of composition, of a new mode of payment of their secured debt on the terms set out in paragraph XII, and that the amount of the secured debt which is to be subject to the new mode of payment is clearly fixed by the schedule at Rs.3,25,558-12-1 approximately, irrespective of the fact that that figure includes arrears of interest. It follows that the appellant bank is right in its contention that the interest payable under sub-paragraphs 3, 4 and 5 of paragraph XII falls to be calculated on that figure.

But their Lordships are also of opinion that the decision of this question was necessarily involved in the decisions of Greaves J. and the High Court above referred to, and that the respondents should not be allowed to reopen it.

Subsequent to the annulment of the adjudications on the 15th March, 1916, the appellant rendered statements of account to the Official Assignee, showing the amounts due to the appellant from time to time under the scheme; these statements were compiled on the footing that the principal sum due was Rs.3,25,558-12-1, and that the appellant's claim for that amount had been proved and admitted in the office of the Official Assignee. The Official Assignee on various dates, which are detailed in the judgment of Greaves J., dated the 10th May, 1922, admitted the correctness of these accounts, until, on the 31st August, 1920, the Official Assignee for the first time suggested that the appellant's claim had never been adjusted, founding on the use of the word "approximate." The present appellant replied that its claim had been investigated and admitted by the Official Assignee before the scheme of composition was entered into, and, as the Official Assignee denied this the appellant made the application to the Court in May, 1921, asking that the Official Assignee should be directed to admit the debts due to the Bank and to pay the arrears of interest thereon. An application was also made by the guarantors to have the appellant's proof expunged, which was heard on appeal and decided along with the appeal in the appellant's application. The present appellant was successful in both applications in both Courts, and it is sufficient to state the decision of the High Court delivered on the 10th August, 1923, in affirming the decisions of Greaves J. The High Court held that the bank's claim had been duly lodged with the Official Assignee on or about the 4th June, 1913, and that it was admitted as being correct not only by the Official Assignee, who was then litigating, but also by his predecessors, and that the guarantors were not entitled to call upon the bank to prove its claim again, or to have it expunged. They held

that the use of the word "approximate" merely referred to the arithmetical correctness of the calculation of the interest due, and they affirmed the order of Greaves J., which ordered the Official Assignee to admit the claim of the bank as appearing in the said scheme of composition subject to any adjustments that might be necessitated by reason of calculation of interest due on the said claim.

It is clear in the judgments of both Courts that the above order excluded the Official Assignee from further question as to the principal sum on which the interest fell to be calculated, which, as stated by Greaves J., was "the sum of Rs.3,25,000 odd appearing in the composition deed." Indeed, if there could be any doubt about this, it would be removed by the letter of the Official Assignee, who, after questioning the correctness of the number of days for which interest fell to be calculated, admitted in his letter dated the 19th February, 1924, the correctness of the state of account worked out by the bank on the basis of Rs.3,25,558-12-1 principal, and that it was on the basis of the judgment of the Court passed on the 10th May, 1922.

In these circumstances, their Lordships are of opinion that the Official Assignee cannot now be allowed to reopen any question as to the principal sum on which the interest provided for by paragraph XII of the scheme falls to be calculated.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgments of the High Court dated the 18th June, 1935, and 7th April, 1936, should be set aside so far as they relate to the present appellant's exceptions to the findings and report of the Registrar, that the Registrar should be directed to vary his findings and report so as to treat the sum of Rs.3,25,558-12-1 as the principal sum on which the interest due under the scheme falls to be calculated, that to this extent the appellant's exceptions should be allowed, but that otherwise they should be dismissed; that the present appellant should have its costs of the said exceptions incurred before the learned Judge of the High Court in its original insolvency jurisdiction, and of its appeal to the High Court and the costs of this appeal.

In the Privy Council.

THE BENARES BANK LIMITED

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S. C. H. MEYER AND OTHERS

DELIVERED BY LORD THANKERTON

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