Privy Council Appeal No. 55 *of* 1947

Benares Bank Ltd. (in Liquidation) - - - - - - *Appellant*

v.

The Official Assignee of Calcutta, Trustee for the Estate of M. L. Laik 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 15TH DECEMBER, 1949

Present at the Hearing:

LORD SIMONDS

SIR JOHN BEAUMONT

SIR LIONEL LEACH

[*Delivered by* SIR LIONEL LEACH]

The suit out of which this appeal arises was tried in the Court of the Subordinate Judge of Dhanbad. The real question for decision is whether that court had jurisdiction to grant the relief sought or whether it was a matter which could only be dealt with by the Calcutta High Court in its insolvency jurisdiction. The answer requires the consideration of a scheme of composition, a deed of transfer executed in connection therewith, and proceedings in insolvency extending over a period of more than 20 years.

The appellant is a limited liability company which is now in liquidation. Its business was banking and it will be convenient to refer to it hereinafter as "the bank". In 1909 the bank advanced large sums of money to a partnership of five persons, trading under the style of M. L. Laik and Bannerjee. The loans were made against hundis, which were secured by mortgages of immoveable property. Default was made in the repayment of the loans and the bank was compelled to bring mortgage suits. Three suits were filed and a final mortgage decree was obtained in each of them. On the 15th June, 1911, by an order of the Calcutta High Court three of the partners were adjudicated insolvents under the provisions of the Presidency Towns Insolvency Act, 1909, and on the 14th July, 1911, an order of adjudication was made by the same court against the other two partners. In the month of May, 1913, the insolvents made proposals for a composition in settlement of their debts. On the 4th June, 1913, the Official Assignee submitted the proposals to a meeting of the creditors. With certain amendments, the proposals were approved by a majority in number and exceeding three-fourths in value of the creditors. By this time the amount due to the bank was Rs.3,25,558-12-1. On the 15th September, 1913, the Calcutta High Court in its insolvency jurisdiction approved the scheme.

Some of the unsecured creditors who were relations of the insolvents abandoned their claims to rank for payment out of the insolvents' estate. The scheme of composition provided for payment in full to the secured creditors and of eight annas in the rupee, in two instalments of four annas, to the unsecured creditors who had not abandoned their claims.

The carrying out of the scheme was guaranteed by certain persons, who were to transfer to the Official Assignee their shares in royalties which had accrued or thereafter should accrue due in respect of specified coal mines. Special provisions were made in clause XII of the scheme for the payment of the debt due to the bank. Clause XII reads as follows:—

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

(1) Ram Ranjan Roy and Ashutosh Roy will transfer their respective half-shares in the Benahir, Bhalgora and Khas Jheria properties and the income and profits thereof to the Official Assignee. Out of such income the Official Assignee will pay to the Benares Bank Ltd. 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 Kali Dass Laik will make up the deficiency.

(2) The debts due to the insolvents so far as the same shall be realized by the Official Assignee as also the sale proceeds of Simapur and Benedih 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 payment 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 Bannerjee and as to the other half by Gopes Chandra Adhicary and Nil Ratan 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 and Womesh Chunder Bannerjee's mortgages in manner aforesaid and payment of the second sum of 4 annas 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 Nirmal Shib Bannerjee 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 clause 4, 1 and 3A for payments as stated in clause will cease."

In spite of his undertaking contained in clause XII (1) of the deed of composition Ram Ranjan Roy declined to execute the proposed deed of transfer, and it was discovered that an omission had been made from the deed embodying the scheme. The important factor was the refusal of Ram Ranjan Roy to fulfil his undertaking ; the omission was easy of rectification. The insolvents and the guarantors did not want the scheme of composition to fail, but it was necessary to satisfy the bank. Consequently it was agreed between the bank, certain of the guarantors, the insolvents and the Official Assignee that the words "with interest at the rate of 12 per cent. per annum with yearly rests" should be inserted after the words "secured debts" appearing in clause XII of the deed of composition, that Ashutosh Roy alone should transfer his half share in the Benahir, Bhalgora, and Khas Jheria properties and that out of the income from these properties the Official Assignee should pay to the bank Rs.2,500 per annum, subject to a limit of Rs.17,500. This meant that instead of simple interest at 12 per cent. per annum the bank was to receive compound interest at the same rate with yearly rests, but the Official Assignee would receive from Ashutosh Roy Rs.2,500 per annum, subject to a total sum of Rs .17,500, instead of Rs. 5,000 and no limit from Ram Ranjan Roy and Ashutosh Roy jointly.

These amendments to the scheme were embodied in the deed of transfer, which has been referred to throughout the case as "the deed of trust" and will be so referred to hereafter in this judgment. The deed of

trust was executed on the 18th February, 1915, by the guarantors, the secured creditors, the bank and the Official Assignee, as the trustee of the properties of the insolvents. The amendments to the scheme of composition which were embodied in the deed of trust were not approved by the unsecured creditors, who were not even consulted in the matter. On the execution of the deed of trust, the Official Assignee applied to the High Court of Calcutta for an order annulling the adjudication, but the court's attention was not drawn to the amendments to the scheme of composition, which the deed of trust purported to make. In ignorance of the true position the court, by an order dated the 15th March, 1916, annulled the adjudication. Their Lordships are satisfied that the Official Assignee had no intention of misleading the court, but he was in grievous error in not disclosing the full facts. If he had done so, much of the subsequent litigation might have been avoided.

Between 1916 and 1927 numerous proceedings were instituted in the Calcutta High Court with reference to the scheme, but it is not necessary to refer to these proceedings in detail. It is sufficient to say that on the 16th March, 1927, Page J. held that the scheme should be enforced, but he was not prepared to consider the deed of trust until it had been construed by the court on an originating summons; and that the court in its appellate jurisdiction held that an originating summons was inappropriate procedure for the purpose.

On the 17th June, 1930, the bank applied to the Calcutta High Court to approve the deed of trust and to declare the scheme of composition to be amended accordingly. This application was heard by Panckridge J., who dismissed it on the ground that before a scheme could be approved by the court the procedure indicated by the insolvency law had to be followed and the creditors' consent obtained, and these conditions had not been fulfilled. The learned Judge observed that it might be that by way of suit or otherwise the appellant could enforce the obligation which the deed of trust imposed on the guarantors, but he did not think that in "the present case" the insolvency proceedings could be utilised for the purpose. The order of Panckridge J. was upheld on appeal, but in delivering the judgment of the Appellate Court Sir George Rankin C.J. said:—

> "It seems to me that there may be a good deal to say in favour of the view that it is quite open to the Insolvency Court to enforce this scheme and to pay full regard to the subsequent contract of the parties, but that matter was dealt with once before and Mr. Justice Panckridge rightly refused to deal with it over again. In like manner we must refuse to entertain it."

These remarks negative the suggestion thrown out by Panckridge J. that the agreement with regard to the payments of compound interest might possibly be enforced in a suit in a civil court, and indicate that in the opinion of the Appellate Court the Insolvency Court alone had jurisdiction in the matter. The judgment of the Appellate Court was delivered on the 5th January, 1932.

On the 15th April, 1932, the bank applied to the Calcutta High Court in its insolvency jurisdiction for an order directing the Official Assignee to pay to the bank all sums in his hands towards the amount due to the bank, with simple interest at 12 per cent. per annum, without prejudice to the bank's right to recover "in appropriate proceedings" interest on the basis of 12 per cent. per annum with annual rests. The application was opposed by some of the guarantors, who contended that only after satisfaction of the conditions laid down in the scheme would the rate be raised to 12 per cent. Panckridge J. accepted this interpretation. An appeal followed and on the 4th May, 1934, the Appellate Court held that the bank had agreed to receive 6 per cent. upon the footing that when the whole estate had been finally wound up it would then recover the additional 6 per cent. from the time the scheme came into being. The other creditors had been paid and, therefore, the bank should receive simple interest at 12 per cent. per annum, to be calculated from the

15th September, 1913, the date on which the court approved the scheme. The Registrar of the court was directed to take an account of what was due to the bank. An account was taken, but the basis was not settled until the matter came before the Board in an appeal by the bank. In a judgment dated the 30th January, 1939, the Board held *inter alia:* (1) That the provisions of paragraph XII of the scheme and the relative portion of schedule III clearly recorded 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 ; (2) that the amount of the secured debt which was to be the subject of the new mode of payment was clearly fixed by the schedule at Rs.3,25,558-12-1 approximately, irrespective of the fact that that figure included arrears of interest ; and (3) that interest payable under sub-paragraphs 3, 4, 5 of paragraph XII fell to be calculated on Rs.3,25,558-12-1.

The suit out of which the present appeal arises was filed by the bank on the 23rd September, 1932. By then all the secured creditors of the insolvents, other than the bank, had been paid and the unsecured creditors had received their composition of eight annas in the rupee. The object of the suit was to secure the fulfilment of the provision in the deed of trust that the bank should receive compound interest, instead of simple interest, at the rate of 12 per cent. per annum. The Official Assignee of the Calcutta High Court and the insolvents and their guarantors or their representatives were joined as defendants. The bank asked for the construction of the deed of trust, a declaration that it was entitled to interest at the rate of 12 per cent. per annum with yearly rests, an account to be taken and payment to it of the amount found due and the administration by the court of the properties covered by the deed of trust. The Official Assignee filed a written statement which amounted to an expression of willingness to act according to the directions of the court. The written statement filed by the other defendants raised numerous defences. It was alleged that the suit was barred by the law of limitation and by *res judicata,* that there had been fraud and collusion in the execution of the deed of trust, and that the suit was bad by reason of the provisions of section 23 of the Contract Act and section 30 of the Presidency Towns Insolvency Act. The learned Subordinate Judge decided all these issues in favour of the bank and held that it was entitled to enforce the stipulation for compound interest as the deed of trust was outside the Insolvency Act, but the Official Assignee was not entitled to sell the properties assigned to him. Payment could only be made out of income. Finally he held that the bank was entitled to compound interest in respect of the first 6 per cent. from September, 1913, to the date of suit and in respect of the second 6 per cent. from the 1st October, 1928, but compound interest was only to be charged from the time of default in payment of simple interest, and the bank's dues were to be calculated on the basis of the Registrar's account, dated the 15th December, 1934.

The bank appealed to the High Court of Patna and the 4th and 29th defendants (now the 4th and 40th respondents respectively) filed cross-objections. The bank's contentions were that it should get compound interest on Rs.3,25,558, not on Rs.2,28,000, the figure arrived at in the Registrar's account, that it was entitled to compound interest at twelve per cent. per annum from the date of the scheme, or at any rate from the date of the deed of trust, and that it was entitled to realize its dues by the sale of the properties transferred to the Official Assignee, not merely out of the income thereof. The contesting respondents maintained that the suit should be dismissed in its entirety.

The appeal was heard by Fazl Ali and Meredith, JJ., who accepted the cross-objections and dismissed the suit with costs throughout. The learned judges considered the action of the Official Assignee in agreeing to pay compound interest was *ultra vires* and that the agreement could not be enforced, because (1) it was a variation of the scheme which neither the creditors in general nor the court had considered and (2) it constituted an undue preference. The respondents did not contest the bank's contention that compound interest was payable on the sum of Rs.3,25,558,

not on Rs.2,28,000, or the proposition that it was payable from the 18th February, 1915 (the date of the deed of trust). The learned judges agreed with the Subordinate Judge that the bank could not realize its dues by sale of the properties assigned to the Official Assignee, but only out of the income.

The bank now accepts the 18th February, 1915, as the date from which interest is to run and that it is not entitled to have the properties sold, but must be content with payment out of the income thereof.

Notwithstanding the fact that in his written statement the Official Assignee agreed to act according to the Court's direction and that he filed no memorandum of cross-objection in the appeal to the Patna High Court he contended there that he should be allowed to take advantage of the cross-objections of the 4th and 29th defendants. The Official Assignee has filed a case in the appeal to His Majesty in Council opposing the appeal. A case in opposition has also been filed on behalf of the respondents Nos. 4, 32 and 33. The 4th respondent is one of the insolvents and respondents Nos. 32 and 33 are the sons of a deceased guarantor. Sir Herbert Cunliffe on behalf of the bank has challenged the right of the opposing parties to be heard. He has pointed out that the agreement to pay compound interest, instead of simple interest, was entered into at the instigation of the insolvents and the guarantors, that the Official Assignee signed the deed of trust as representing the insolvents and that it was also signed by the other secured creditors and the guarantors. The contesting respondents were now saying that the agreement to pay compound interest amounted to a fraudulent preference to the bank. To allow them to oppose the appeal on this ground would amount to allowing them to plead their own fraud.

It is a plausible argument, but it cannot be accepted. In the first place it is manifest that there was no intention to defraud. The agreement to pay compound interest may amount to a fraudulent preference within the meaning of the insolvency laws, but their Lordships are convinced that there was no intention to defeat the unsecured creditors and that the agreement to pay compound, instead of simple, interest was entered into in all innocence on the supposition that it was the best method of saving the scheme when Ram Ranjan Roy repudiated his undertaking. The bank was a party to the agreement and if there is illegality attaching to it the bank must share the responsibility. Moreover the Official Assignee was allowed to appear in the appeal to the Patna High Court and he has been directed by the Calcutta High Court in its insolvency jurisdiction to contest the appeal to His Majesty in Council. In these circumstances their Lordships consider that he and the opposing respondents are entitled to be heard.

Coming to the main argument in the appeal, the bank contends that the judgment of the High Court was wrong because the agreement to pay compound interest, instead of simple interest, is outside the scheme of composition and therefore can be enforced in a civil court as opposed to a court with only jurisdiction in insolvency. Of course, if the agreement were outside the purview of the laws relating to insolvency it might be enforced in a civil court, just as any contract supported by consideration might be. There was consideration for the agreement in that the bank did stay its hand and abstained from wrecking the scheme of composition when Ram Ranjan Roy failed to fulfil his undertaking and in that it agreed to defer payment to itself until all other creditors had been paid. But it is patent that the agreement was not an agreement outside the scheme. The deed of composition provided for the payment to the bank of twelve per cent. simple interest on its debt. The deed of trust which followed in order to implement the scheme of composition changed simple interest into compound interest. One has only to look at the following recital in the deed of trust to see how lacking in substance is the contention that the agreement was a thing apart from the scheme of composition:—

> "And whereas it has been agreed by and between the said Benares Bank Limited, the said Banerjee and the said Asutosh Roy, the said

> Kali Das Laik, the said Insolvents and the said Official Assignee that clause XII of the said proposal for composition shall be modified by the addition of the words 'with interest at the rate of twelve per cent. per annum with yearly rests', after the words 'secured debts' appearing therein."

The words "shall be modified" put argument on the point out of the question.

As the agreement to pay compound interest instead of simple interest constituted an amendment to the scheme it could not be enforced without the consent of all classes of creditors and the approval of the Insolvency Court. In spite of the innocent intention of the parties to the deed of trust the agreement did in law constitute an infringement of the principles on which compositions are approved and enforced. In addition to the provisions of the Presidency Towns Insolvency Act there are considerations of public policy. See *Cullingworth* v. *Loyd* (2 Beavan's Reports 385); *Jackman* v. *Mitchell* (13 Ves. Jun. 581). And in *Ex parte Barrow In re Andrews* (18 Ch. Div. 464), Lord Selborne, L.C., said:—

> "If there can be no addition or alteration for the benefit of all the creditors without such a resolution" [a resolution under section 126 of the Bankruptcy Act, 1869] "how can there be an addition or alteration for the benefit of one creditor, and that behind the backs of the others and without any communication to them? It appears to me impossible that a composition like this for the benefit of all the creditors and such an agreement for the benefit of a particular creditor can stand together."

Their Lordships hold that the Court of the Subordinate Judge had no jurisdiction to try the suit. The deed of trust which embodied the agreement to pay compound interest instead of simple interest is undoubtedly part and parcel of the scheme of composition, as their Lordships have already indicated, and this being the case the only court which can deal with the matter is the Calcutta High Court in its insolvency jurisdiction. Whether at this late stage it is still open to the bank to take steps there to secure the enforcement of the agreement their Lordships express no opinion. What is patent is that its action in attempting to enforce the agreement by a suit in a civil court was misconceived.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. In view of the fact that the contesting respondents were parties to the deed of trust their Lordships make no order as to costs.

(67165) Wt. 8084—42190 1/50 D.L. G. 33

In the Privy Council

BENARES BANK LTD.
(IN LIQUIDATION)

v.

THE OFFICIAL ASSIGNEE OF CALCUTTA, TRUSTEE FOR THE ESTATE OF M. L. LAIK AND OTHERS

DELIVERED BY SIR LIONEL LEACH

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1950