
(1942) 01 PAT CK 0012
In the Patna High Court

Benares Bank Ltd.

APPELLANT

Vs

George Macdonald Falkner and Others

RESPONDENT

Date of Decision : 20-01-1942

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 28
Provincial Insolvency Act, 1920 — Section 7

Citation : AIR 1942 Patna 493

Hon'ble Judges : Meredith, J;Fazl Ali, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This is an appeal by the Benares Bank Ltd., from the decree of the Subordinate Judge of Dhanbad in a suit brought by the appellant bank. The bank assails the decree on the ground that it does not go far enough, whereas two of the respondents have filed a cross-objection contending that no decree at all should have been made in favour of the bank and the suit ought to have been dismissed in its entirety. The material facts of the case are these:

Defendant 4 Sasti Kinkar Banerjee and four other persons who are now dead, namely, Krishna Kishore Adhikari, Harish Chandra Mukerjee, Mukunda Lal Laik and Narendra Nath Mukherjee, formerly used to carry on business in co-partnership with each other in Calcutta in the name and style of M.L. Laik and Banerjee. These persons became heavily involved in debt and, at the instance of East Indian Coal Company, one of their creditors, they were adjudicated insolvents by two orders dated 5th June 1911 and 14th July 1911 made by the Calcutta High Court in insolvency jurisdiction. These five persons had a number of creditors (both secured and unsecured) including the plaintiff bank (the Benares Bank, Ltd.) which had advanced a large sum of money to them on the basis of three mortgage deeds, under one of which they had borrowed a sum of Rs. 1,25,000 and under the other two Rs. 25,000 and Rs. 78,000 respectively. At the time these persons were adjudicated insolvent, the bank had already obtained mortgage decrees on the basis of two of these bonds, but no suit had yet been brought on the third bond which was for a sum of Rs. 78,000. On 4th

June 1913 the insolvents submitted a scheme of composition for the approval of their creditors which after being accepted by the majority of the creditors as required by Section 28, Presidency Towns Insolvency Act, received the approval of the Calcutta High Court on 15th September 1913. From the schedules which are annexed to the scheme it appears that the insolvents had ten secured creditors and a large number of unsecured creditors. The names of the unsecured creditors are set out in Schedule 1, which is in two parts, The creditors, whose names appear in the first part of the schedule, were to receive under that schedule two dividends of four annas in the rupee each whereas the creditors mentioned in the second part of the schedule who were either friends of or related to the insolvents were to waive and abandon the debts due to them and all claims against the insolvents and their estates in the event of the composition being finally accepted. As to the secured creditors, though they were ten in number provisions were made in the scheme for the payment of the debt of three of them only, as the debts of the remaining seven had either been satisfied or could be satisfied by the sale of the securities in their hands. The three secured creditors who were brought into the scheme were (1) Mrs. Barnard, (2) W.C. Bannerjee and (3) the Benares Bank. According to the scheme the greater part of the debts of the creditors was to be paid out of certain properties which certain friends and relations of the insolvents (who will hereinafter be referred to as guarantors) had agreed to transfer for the discharge of those debts in favour of the Official Assignee who had with the leave of the High Court accepted the position of a trustee for the purpose of the scheme. Briefly speaking the scheme provided that after the unsecured creditors had been paid eight annas in the rupee in two instalments and after payment of the sum of Rupees 60,000 to Mrs. Barnard in the manner provided in the scheme the income of one of the properties known as Bhulanbararee transferred to the Official Assignee should be applied towards the payment of such sums as still remained due to Mrs. Barnard and thereafter the income of the property as well as the property mentioned in Schedule 2 of the scheme was to be applied towards the payment of the dues of Woomesh Chandra Banerjee. As to the Benares Bank provision was made for the payment of their dues in para. 12 of the scheme which runs as follows:

(1) Ram Banjan Boy and Ashutosh Roy will transfer their respective half shares in the Benahir, Bhalgora and Khas Jharia 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. 5000 per annum towards satisfaction of this debt. Should such income not suffice to pay Rs. 5,000 then Babu Kali Das 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 Simapore and Benedin properties (which are to be sold by the Official Assignee) will also be paid to the Benares Bank 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 six 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 Adhichary and Nil Ratan Adhichary.

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

(5) Upon satisfaction of Mrs. Barnard and Woomesh Chandra Banerjee's mortgages in manner aforesaid and payment of the second sum of Rupee 0-4-0 in the Rupee to the creditors named in part 1 of Schedule 1, the income from Bhulanbararee property and the properties mentioned in Schedule 2 and the properties of N.S. Banerjee mentioned in para. 10 will be applied towards satisfaction of this mortgage including further interest at six 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 payment as stated in Clause 4 will cease.

3. It appears that though the High Court, being satisfied on examining the scheme that its terms were reasonable and calculated to benefit the general body of the creditors, gave its approval thereto, yet as no transfer deed had yet been executed by the persons who were to be guarantors under the scheme, it was directed that "the annulment would be made after the conditions contained in the scheme have been fulfilled," On 18th February 1918, those persons with the exception of one of them Ram Ranjan Roy executed a deed of transfer, or, as it was called, a deed of trust, in favour of the Official Assignee. This deed purported to have been made as between, and was duly executed by, ten parties, the first six of whom were guarantors (that is to say, were persons who had agreed to transfer certain properties to the Official Assignee for the payment of the insolvents' debts out of their income) and the remaining four were the three principal creditors Mr. Barnard, W.C. Banerjee, the Benares Bank, Ltd. and the Official Assignee respectively. Ram Ranjan Roy did not agree to execute the deed of trust, because he was not willing to transfer his share in the properties mentioned in the scheme as was originally contemplated. This fact as well as the fact that the name of one Sreemati Shiva Dasi Devi, who had also agreed to transfer her share in certain properties in favour of the Official Assignee, had been omitted by mistake, made it necessary to make slight variations in the scheme. These variations were duly made by the deed of trust which provided among other things that Sub-clause (1) of Clause 12 and Clauses 9 and 10 shall be modified in the manner following:

(a) Ashutosh Roy alone will transfer his half share in certain properties and the income and profits thereof to the Official Assignee and the Official Assignee out of such income and profits pay to the Bank Rupees 2500 per annum towards payment of the interest; but the aggregate sum to be paid out of such income to

the Bank shall in no case exceed Rs. 17,500 and the balance to make up the deficiency of interest payable to the Bank shall be paid as provided in Clause 12 of the scheme until the income of Bhulanbararee property and of the properties mentioned in Schedule 2 except the income of Shivadias's one anna Benahir and the properties of Nirmalsib Banerjee mentioned in para. 10 shall be available for payment and the satisfaction of the debt due to Bank.

(b) The reference to Semapur property shall be deleted, as the Semapur property has already been sold and the sale proceeds already paid to the Bank,

(c) The one-anna share of Shivadasi in the Benahir property shall be released after satisfaction of Mrs. Barnard's debts.

4. The trust deed introduced a further variation in the scheme which was of a far more important character and was set out in the following words : "It has been agreed by and between the said Benares Bank Ltd., the said Woomesh Chandra Banerjee, the said Ashutosh Roy, the said Kalidas Laik, the said insolvents and the Official Assignee that Clause 12 of the said proposal for composition shall be modified by the addition of the words "with interest at the rate of 12 per cent, per annum with yearly rests" after the words "secured debts" appearing in the end."

5. It is to be noted that though the effect of this clause was to acknowledge the right of the Bank to charge 12 percent compound interest, the matter was never brought to the notice of the other creditors nor was the approval of the High Court obtained to this new term.

6. On 11th March 1916 the Official Assignee filed a petition in the Calcutta High Court stating that the deed of transfer had been duly executed and registered in his favour in respect of the properties mentioned in the scheme of composition and asking for an order that the adjudication may be annulled. This petition was granted and on 15th March the adjudication was annulled.

7. It appears that sometime in 1921 one Maharaj Kishore Khanna filed an affidavit on behalf of the Bank in the High Court of Calcutta making certain allegations against the Official Assignee and praying that he may be directed among other things to make a complete discovery of his dealings with the trust estate and to admit the debts due to the Bank and J to pay the arrear interest. By this time the Official Assignee who was a party to the scheme and the deed of trust and whose name was Mr. Gray had vacated the office and had been succeeded by Mr. Falkner, defendant 1 in the present action. On 10th April 1922 one of the insolvents filed an affidavit in which he alleged that from the enquiries made by him he had come to know that the Benares Bank in collusion with one of the insolvents, M.L. Laik, had made the Official Assignee admit the claim of the Bank for a larger sum than was due to the Bank and that on proper account being taken a much smaller sum would be found due to the Bank, On 11th April 1922 the new Official Assignee also filed an affidavit in which he replied to some of the statements made by the Benares Bank and stated that he was not

prepared to admit that the insolvents, owed to the bank the sum claimed by it and further stated that he had been paying the bank interest on rupees three lakhs at the rate of six per cent, only, but would leave the construction of the deed of composition as to interest to the High Court. The attitude that he took up in the matter was that the bank's claim had never been properly adjudicated upon.

8. On 10th May 1922, the matter came up before Greaves, J. but the learned Judge refused on the materials before him to allow the claim of the bank to be questioned at that stage and passed an order directing the Official Assignee to admit the claim as it appeared in the scheme of composition and out of the money in his hand to pay the arrears of interest due to the bank which the learned Judge said should for the present be calculated at six per cent.

9. On 31st May 1922 some of the insolvents as well as some of the guarantors applied to the High Court for an order directing the bank to prove its claim against the insolvents before the Official Assignee or before the Court in the presence of the applicants and in the alternative for an order that the proof of the bank should be expunged or reduced. This application, however, was refused by Greaves, J. on 20th February 1923 and this order as well as the order passed by him on 10th May 1922 were upheld by a Division Bench of the Calcutta High Court on 10th August 1923.

10. On 12th September 1925 the bank made an application to the High Court in which it asked among other things (a) for the enforcement of the scheme; (b) for a direction to the Official Assignee to submit accounts and pay certain sums of money after realising them from the persons named in the petition and (c) for reserving liberty to the bank to re-adjudge the debtors as insolvents, if it appeared that the scheme could not proceed without injustice or undue delay or that the approval of the High Court had been obtained by fraud and misrepresentation. In one of the clauses it was also asserted that the amounts payable to the bank should bear interest at "the rate of 12 per cent. per annum with yearly rests. This application as well as another application by the representative of one Kali Das Laik, one of the guarantors under the scheme of composition, which was for an order annulling the scheme, were dealt with by Page, J. on 16th March 1927. Curiously enough the bank at this stage opposed the application of the representative of Kali Das Laik and the learned Judge agreeing with the contention of the bank dismissed the application for annulment of the scheme and re-adjudication of the insolvents. The learned Judge further ordered that the provisions of the scheme be enforced and the Official Assignee "do prepare and submit full and sufficient account of the income." As regards the prayer that the bank should be awarded compound interest, the learned Judge observed that inasmuch as the deed of trust had in material and serious respects altered the terms of the scheme and the rate of interest claimed by the bank depended not on the scheme as assented to by the creditors and approved by the Court but upon a term of the trust deed which was neither submitted to or

accepted by the creditors, nor approved by the Court, the Insolvency Court, while it was at liberty to take into consideration the terms of the scheme, had no jurisdiction to consider or pass orders upon the terms of the deed of trust. The learned Judge, however, being of the opinion that it was necessary that the proper construction to be placed upon the deed of trust should be settled, concluded his judgment with these words:

I propose, therefore, to direct the Official Assignee to apply to the Court under Ch. 13, High Court Rules to construe the terms of the deed of trust and under Clause 3(a) of Chap. 13 an originating summons should be served forthwith upon the bank and the other persons who have appeared upon the present application by the bank.

11. On 7th May 1927, the Official Assignee took steps to get the deed of trust construed in terms of the order passed by Page, J. but it was ultimately held that the Court did not think it fit to determine on the originating summons the question submitted thereby.

12. Thereafter on 17th June 1930 the bank made an application to the Court praying that the deed of trust in so far as it modified the scheme of composition be approved and the scheme of composition be deemed to be amended accordingly. Among other things, it was stated in this application that the failure to have the deed of trust placed before the High Court in its insolvency jurisdiction was due to inadvertence. This application which was an attempt to enforce the new term as to compound interest was dismissed on 25th November 1930 by Panckridge, J. who in the course of his judgment observed as follows:

It is clear that before a scheme can be approved by the Court a certain procedure has to be followed with regard to the creditors signifying their approval and if that procedure has not been followed and if the proposal has not been accepted in the manner laid down by the Act, there is no scheme that the Court can approve of... It is said that Section 7, Insolvency Act, is wide enough to confer such jurisdiction. But in my view what is sought here is a determination of the question of the rights and liabilities of the parties in virtue of this agreement which must be regarded as something outside the insolvency. It appears to me that this was the view which commended itself to Page, J. and I agree with him that the Court is not at liberty to consider or pass orders on the terms of the deed of trust.

13. On 5th January 1982 the order of Panckridge, J. was upheld in appeal by the Chief Justice and C.C. Ghosh J, The learned Chief Justice pointed out in his judgment that the difficulty in the way of the applicant was that the only scheme which the Insolvency Court knew anything about was the original scheme and Page J. had already held that it would not be possible for the Court in its insolvency jurisdiction to give effect to a modification of the original scheme which had not been approved by the Insolvency Court. The learned Chief Justice also remarked as follows:

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 the scheme and to pay full regard to the subsequent contract of the parties; but that matter was dealt with once before and Panckridge, J. rightly refused to deal with it over again.

14. On 15th April 1932, the bank made an application to the High Court with the following prayers: (a) for an order that the scheme be enforced; (b) for an order that the Official Assignee do pay to the bank all the sums in his hands towards the payment of the amount due to the bank with interest at 12 per cent. per annum without prejudice to the right of the bank to recover in appropriate proceedings interest on the basis of 12 per cent, per annum with annual rests and (c) for an order that the properties available under the scheme of composition or a sufficient portion thereof be sold and the sale proceeds be applied in payment of the amount due to the bank. This application was dealt with on 26th May 1933 by Panckridge, J. who held on a construction of the scheme that the bank was entitled to receive interest only at the rate of six per cent, per annum. The order of Panckridge J. was however reversed on appeal by a Division Bench consisting of Costello and Lort-Williams, JJ. who held that the bank was entitled to interest at 12 per cent. per annum upon the debts due to it. The learned Judges further directed the Registrar to take an account of what was due to the bank under the scheme of composition on account of principal and simple interest at the rate of 12 per oent. per annum. After this a question arose before the Begistrar as to whether for the purpose of calculating interest, the principal sum should be deemed to be Rs. 3,25,558 odd as mentioned in the scheme or a sum of Rs. 2,28,000 which on calculation was found to be due to the bank on the three mortgages held by them. The Registrar reported that in his opinion the sum of Rs. 2,28,000 should be regarded as principal and interest should be charged thereon, The view of the Registrar was upheld by Panckridge J. who held that the effect of the scheme of composition was to substitute a flat rate of 12 per, cent, simple interest on the principal amounts of the three several mortgage debts for the rates provided for in the mortgage deeds. The view o: Panckridge J. was upheld on appeal by a Division Bench of the Calcutta High Court but the Privy Council held on 30th January 1939 that the sum of Rs. 3,25,000 mentioned in the scheme should bi treated as the principal: see Benares Bank, Ltd. v. S.C.H. Meyer (39) 180 I.C. 353.

15. It will thus appear that the Benares Bank had agitated the question of compound interest in various forms in the insolvency Court, but it was finally held by Panckridge, J. that the insolvency Court could not give effect to an agreement which had been arrived at in variation of the scheme and which had not been approved by the Court. This decision was pronounced on 25th November 1930 and the view of Panckridge J. was upheld on appeal by a Division Bench of the Calcutta High Court on 5th January 1932. The present suit was instituted by the bank on 23rd September 1932 against no less than 32 defendants including the Official Assignee, the insolvents or their heirs and representatives and the guarantors (that is to say the persons who had

transferred their properties under the deed of trust) or their heirs and representatives. The most important prayer in the suit was that on a construction of the deed of trust the right of the plaintiff bank to recover compound interest be determined and declared and the plaintiff also prayed for an account to be taken in regard to the plaintiff's dues; for administering the trust properties; for restraining defendant 1 by injunction from releasing the properties until the debt due to the plaintiff bank had been fully satisfied; for a decree personally against such defendants as may be held to be personally liable on account of any fraud or negligence on their part, and for the appointment of a new trustee, if necessary, in the interest of justice. In the plaint the bank referred to the events which had led to the approval of the composition scheme and to the subsequent execution of the deed of trust and alleged that though the other unsecured creditors had been paid off in full, the dues of the bank had not been paid off and defendant 1, that is to say, the Official Assignee, at the instance of the other defendants had wrongly asserted firstly, that the claim of the bank had been paid in full and secondly, that he could no longer retain possession of the properties made over to him and should re-transfer them to the parties entitled thereto in terms of the deed of trust. The bank further stated that its dues up to the date of the institution of the suit were Rs. 14,55,815 (this sum was differently stated at different stages and was afterwards reduced to Rupees 11,60,124) and "That the plaintiff bank, without prejudice to its right to claim interest in terms of the provisions of the scheme of composition as modified by the deed of trust as hereinbefore claimed has applied to the Honourable High Court of Judicature at Port William in Bengal in its insolvency jurisdiction for an order of the Official Assignee to pay to the plaintiff bank Rs. 11,58,793-8-4 being the amount due with simple interest up to 15th April 1932, at 12 per cent, per annum in terms of the scheme of composition which will amount to Rs. 12,01,523-1-6 on 23rd September 1932. The said matter is still pending and should the said claim or part thereof be held not to be tenable in the said insolvency Court, the plaintiff will crave leave to include the same also in the present suit."

16. The last important prayer made in the plaint was that should the High Court in its insolvency jurisdiction refuse the plaintiff's claim in whole or part, a further decree for that amount may also be granted in favour of the plaintiff bank after taking such additional court-fee which may be payable.

17. The suit was contested by the Official Assignee, defendant 1, and by defendants 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31. As the written statements filed on behalf of these defendants have been fully summarized by the learned Subordinate Judge in his judgment, it is unnecessary to set out all the defences raised on their behalf and it will be sufficient for the purpose of the present appeal to, say that their main contentions were (1) that the suit was not maintainable; (2) that the suit was barred by limitation and by the principle of *res judicata*; (3) that for a number of reasons the Subordinate Judge of Dhanbad had no jurisdiction to try the suit; (4) that the trust deed in so far as it was not in conformity with the

scheme could not be enforced; (5) that the agreement to pay compound interest was void for want of consideration or, at any rate, if there was any consideration for it, the same was unlawful; (6) that the plaintiff's claim could not succeed in its entirety in view of certain provisions of the Bihar Money-Lenders Act; and (7) that no valid charge had been created in respect of the properties which were in possession of the Official Assignee.

18. The learned Subordinate Judge overruled most of the objections raised by the defendants as to the maintainability of the suit and held firstly that the plaintiff bank was entitled to compound interest and secondly that the bank was entitled to a decree for such a sum as may be found to be still due to it on an account being taken.

19. As to the compound interest, two main questions, appear to have arisen before the learned Subordinate Judge, firstly, as to the date from which such, interest was payable and secondly, as to the exact sum on which it was payable. In regard to the first point the learned Subordinate Judge referred to the provision in the scheme according to which the bank was entitled to charge six percent, interest till the dues of all other creditors were satisfied and after that to charge twelve percent, per annum from the date of the scheme onwards. After referring to this provision and to the fact that all the other, creditors' dues had been fully liquidated by 1st October 1928 the learned Subordinate Judge observed as follows;

It is seen that the second 6 per cent, did not fall due before 1st October 1928 and it is common sense and a well known principle also that compound interest runs when there is a default of payment of simple interest on the due date and that compound interest would be calculated from the date of default and not from before.

20. The learned Subordinate Judge thus held (1) that, the bank was entitled to charge compound interest. at 6 per cent, from September 1913 or from any subsequent date on which there was default in payment of six per cent, simple interest; (2) "that the further six per cent. compound interest was chargeable only from the date on which the default in payment of the further six percent, simple interest was made." In other words, he disallowed compound interest on what he described as "further six per cent." from the date of the scheme to 30th September 1928 during which period according to him simple interest had not at all fallen due and no simple interest had remained unpaid. As to the sum on which compound interest was to be charged, the learned Subordinate Judge was of the view that such interest was chargeable on Rs. 2,28,000 only and not on Rs. 3,25,558-odd. It may be recalled here that on 15th December 1934 the Registrar of the Calcutta High Court after examining the account had come to the conclusion that the sum of Rs. 3,25,558 which was mentioned in the scheme as the debt due to the bank was composed of four items (1) Rs. 2,28,000 which was the principal sum advanced by the bank under three mortgages; (2) Rs. 74,371-1-0 being interest on the principal sum; (3) Rs. 22,114-12-6

representing certain advances made by the bank which under the terms of the bond were to be added to the principal sum and (4) the sum of Rs. 1096-14-7 representing certain costs incurred by the Bank.

21. The learned Subordinate Judge further held that the trust deed had created a qualified charge on the properties in the hands of the Official Assignee with the result that the plaintiff Bank could realise its dues only out of the income of the properties and these properties were not liable for sale. He also directed a commissioner to be appointed to ascertain the actual sum due to the Bank.

22. The Bank has now preferred an appeal from the judgment of the learned Subordinate Judge, whereas a memorandum of cross-objection has been filed on behalf of respondents 4 and 36, these respondents being Sasti Kinkar Banerjee, one of the insolvents and Birbhum Colliery Co., Ltd., who are the assignees of some of the properties belonging to Sasti Kinkar Banerjee.

23. The contentions put forward on behalf of the appellant are firstly, that compound interest should be held to be payable not on Rs. 2,28,000 but on Rs. 3,25,558. Secondly, that the plaintiff Bank is entitled to charge compound interest from the date of the scheme, or at any rate from the date of the deed of trust, and thirdly, that the plaintiff Bank is entitled to realise its dues by the sale of the properties transferred to the Official Assignee and not merely out of their income.

24. The contention of respondents 4 and 36, on the other hand, is that the plaintiff's suit is not maintainable at all and that the plaintiff is entitled to no decree whatsoever in the present suit and the suit ought to be dismissed.

25. I will first deal with the cross-objection of respondents 4 and 36, because if the cross-objection is allowed, as in my opinion it must be, the points raised in the appeal will not arise.

26. In order to appreciate the points raised in the cross-objection it will be necessary to refer once more to certain important facts. It may be recalled that the scheme of composition dated 4th September 1913 was the only scheme sanctioned by the Court and though at one time the case of the appellant Bank was that one of the terms agreed upon as between the Bank and the insolvents at the time when the scheme was settled was that the Bank would be entitled to charge compound interest, this case has been negatived and it is now conceded that under the scheme as it stands the Bank cannot charge compound interest. The Bank now relies wholly upon the deed of trust or the deed of transfer, which was executed on 18th February 1915. In this deed there is a provision entitling the Bank to charge compound interest but this condition was never sanctioned by the Court nor approved by the creditors in the manner required by Section 28(2), Presidency Towns Insolvency Act. The Bank made several attempts to enforce the deed of trust in the insolvency Court so far as the compound interest was concerned but that Court finally held that it could not take notice of any provision of the deed which was outside the scheme and had not been approved

by the Court. After this decision, the Bank never repudiated the scheme but continued to receive payment from time to time from the insolvency Court of its dues in accordance with the terms of the scheme. An account of these payments is given by respondent 36 in an affidavit which shows that as against the principal sum of Rupees 3,25,558 a sum of Rs 9,87,000 odd was paid by the Official Assignee to the Bank up to 11th December 1936 and a further sum of Rs. 50,000 was paid by Slim to the Bank, under an order of the High Court of Calcutta made on 9th July 1940. It is clear (from this affidavit that the amount which the Bank has received from the Official Assignee in the insolvency Court includes the principal as well as the entire simple interest payable according to the scheme. The present suit is really a suit for recovery of compound interest though in the plaint which has been somewhat ingeniously drawn up the Bank has prayed for several reliefs in addition to the relief relating to the compound interest. The question which now arises is whether a claim for recovery of compound interest, which was held to be unenforceable in the insolvency Court, can, on the facts stated above, be enforced in a Court exercising ordinary civil jurisdiction.

27. As I have already stated, the plaintiff Bank relies upon the trust deed and the present suit has been instituted on the footing of the agreement made in that deed. This deed must be treated as a J supplement to the scheme of composition and must be read along with it, because its main object was to give effect to the important provision in the scheme according to which certain persons named in the scheme were formally to assign and transfer certain properties belonging to them to the Official Assignee. The agreement in regard to the compound interest which is to be found in this document cannot in my opinion be dissociated from the rest of the document, because it was intended to be enforced as a part of the scheme and one cannot legitimately take the view that while the rest of the document goes with the scheme, this agreement is something independent of the scheme and is enforceable as an independent agreement in a Court of ordinary jurisdiction. The Bank obviously realised its difficulty and therefore its case in the first instance was that; at the time the scheme was agreed upon, the parties concerned had agreed to the payment of compound interest to the Bank but this condition was through oversight not very clearly stated or incorporated in the scheme. This case, however, as I have already stated has not been substantiated. In my view therefore the agreement to pay compound interest which was evidently intended to be treated as part of the scheme could be enforced only in the insolvency Court and in no other Court. It is obvious that one cannot agree to pay compound interest apart from simple interest, because compound interest can be charged only when simple interest is not paid. It will, therefore, be a very peculiar situation if it is held that while simple interest is recoverable in the insolvency Court, compound interest can be recovered in another Court and though the insolvency Court has held the agreement as to compound interest to be unenforceable, it can yet be enforced in the ordinary civil Court. The respondents in this connexion rely strongly on the decision of the

Privy Council in 43 CWN 205 That was a case under the Companies Act, and related to a scheme of arrangement arrived at between a certain company, its creditors and shareholders which was ultimately sanctioned by the Court u/s 153, Companies Act. The point which was decided in that case was that upon confirmation by the Court of such a scheme its terms can only be varied by an order of the Court after the variation has been approved at a meeting of the creditors and share-holders and it is not competent to the company or its directors or share-holders, whether by resolution, ratification or otherwise, to alter the scheme even though the alteration is made under the guise of a compromise with a share-holder. It was further held that a resolution of the directors to do something which was not provided in the scheme was ultra vires. It seems to me on the same principles that the act of the Official Assignee in agreeing to the payment of compound interest in variation of the scheme was also ultra vires and cannot be enforced in any Court.

28. Section 30, Presidency Towns Insolvency Act, provides that if the Court approves a scheme, the scheme shall be binding on all the creditors so far as it relates to any debt due to them from the insolvent and provable in the insolvency.

29. Section 46 (3) provides that all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency. There can be no doubt that the debts due to the bank from the insolvents were provable in insolvency and in fact they were proved, the bank receiving numerous payments from the Official Assignee on that footing. Therefore u/s 30 the scheme is as binding on the bank as it is upon the other creditors who were included in the scheme. That being so, and because the entire debt of the bank due at the date of the scheme was included within the scheme, that debt was payable only in the manner and to the extent provided in the scheme. If the entire debt of the bank has been paid off under the scheme, the bank cannot be allowed to say that a part of the debt still remains unpaid which is implied in saying that only part of the interest has been paid and another part has not been paid.

30. In *Flint v. Barnard* 1888. 22 Q.B.D. 90 construing Section 18, Sub-section (8), Bankruptcy Act, (1883), which is very similar in language to Section 30, Presidency Towns Insolvency Act, Lord Esher, M.R., observed as follows:

Such a provision is not consistent with the supposition that when this is done there shall still be claims subsisting against the debtor which should remain in force, and ultimately enable the persons who are entitled to make them to sue for the whole amount of their claim instead of accepting a composition. In such a case judgment would be obtained, and execution might issue against the property which had been handed back to debtor. This would be entirely to nullify the effect of all that had gone before. I think, therefore, that applying the rule of interpretation that I first mentioned to this Act, we must construe Section 18,

sub Section (8), as including the liabilities as well as the debts of the debtor, so that when the scheme is accepted and proved he would get the same absolute relief as is given by a discharge in bankruptcy.

31. Mr. P.R. Das who argued the case on behalf of the appellant raises a somewhat ingenious point here. His contention is that the agreement to pay compound interest must not be taken to be an agreement in variation of the scheme, but to be an independent agreement creating a new debt or liability which was not provable in insolvency u/s 46, Presidency Towns Insolvency Act, because it was not an obligation incurred by the insolvents before the date of their adjudication.

32. But the question is whether the agreement really creates a new debt or liability or merely provides how the old debt is to be computed. Strictly speaking one cannot dissociate interest from the principal and the compound interest from the simple interest and I am loath to hold in the absence of good authority that while the claim for the principal with simple interest is provable in insolvency, the claim for compound interest on the same amount is a debt independent of the debt which is so provable and not merely accessory to it.

33. Assuming, however, that the agreement in regard to the compound interest created a new debt which is not provable in insolvency, there still remains the question whether that agreement can be enforced in law. Now, there is overwhelming authority for the proposition that an agreement which has the effect of giving undue preference to one of several creditors whose debts are included in a scheme of composition and which is arrived at without the knowledge of and behind the back of the other creditors, cannot be enforced. The cases which may be cited on this subject are many, but I shall refer only to a few of them to illustrate the principle upon which the view is founded. I will first refer to *Couldery v. bartrum* (1880) 19 Ch. D. 394 because Jessel, M.R. has explained in very lucid terms the principle underlying the provision that a composition is binding upon all the creditors. What he says is this:

According to English Common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common law, he could not take 19s. 6d. in the pound; that was nudum pactum. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary together with his 19s, 6d. there was no accord and satisfaction. That was one of the mysteries of the English Common law....

Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. There might be friends of the debtor who would come forward and pay something towards the debts; or it might be that the debtor was in such a position, that, if the creditors took less than their debts, he would have something over for himself and would exert

himself to pay the dividend;.... Therefore it was necessary to bind the creditors;....it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer nudum pactum, but an agreement made for valuable consideration; then there would be satisfaction. Consequently, if the creditors came in and all agreed inter se to take 10s. in the pound; the agreement inter se supplied the additional consideration which was supposed to be necessary, and the debts were satisfied so satisfied, that, if one of the creditors obtained an unfair advantage, a Court of Equity actually interfered, and allowed the debtor to recover back the surplus from him, because he was not entitled to take from the debtor anything more than the composition, The principle upon which the creditor was made to repay was, that his debt was satisfied and that he had no right to take an unfair advantage.

34. The Master of the Bolls then proceeds to examine the position of the secured creditors in the Bankruptcy Court and then observes as follows:

But in the case of composition, where the secured creditor comes in voluntarily and accepts the composition, he is a party assenting to the discharge of the debt and to the discharge of the debtor. He has accepted satisfaction, and no further provision is required.

35. Thus, a scheme of composition is even apart from Section 30 not a nudum pactum but an agreement which is supported by good consideration, the consideration being, to put in a few words, the common sacrifice of the creditors who join the scheme. The very nature of the consideration, however, which supports such an agreement makes it necessary that no creditor should be allowed to score off a secret advantage for himself or to commit any act which may amount to a breach of faith with the other creditors. The Courts have never failed to emphasise this aspect of the matter and have consistently refused to enforce transactions which have been entered into in disregard of what is sometimes called "commercial morality" even though the other creditors may have not been prejudiced in any way. How rigorously this principle has been enforced will appear from the cases cited below.

36. In *Mallalieu v. Hodgson* (1861) 117 E.R. 1045 the facts were these: The defendants being indebted to the plaintiff for goods and being indebted also to other persons proposed to enter into a composition with their creditors. The plaintiff refused to join unless the defendants would pay him dividends at a rate exceeding that which was accepted by the others. This was agreed upon between the plaintiff and the defendants without the knowledge of the other creditors. Defendants had stated to the plaintiff as an inducement for his making this contract that no other creditors had a similar preference. At the time of the above agreement, the plaintiff received securities from the defendants on account of the composition bargained for by him. The statement that no other creditors had been preferred equally with the plaintiff was false within the

knowledge of the defendants. At the time of the above agreement between the plaintiff and defendants, and of the composition, there were bills outstanding which the defendants had accepted in payment of the debts compounded for with the plaintiff. The plaintiff after executing the release omitted to take up the bills and defendants being threatened with proceedings on the acceptances gave him their promissory notes in order that he might provide funds to meet the bills. Being afterwards sued by him upon the notes it was held that there had been no consideration for the notes. Erle, J. in the course of his judgment in that case pointed out that the plaintiff by entering into the composition deed with the other creditors contracted a duty towards them to release the defendants from his debt. He then proceeded to observe as follows:

Each creditor consents to lose part of his debt in consideration that the others do the same; and each creditor may be considered to stipulate with the others for a release from them to the defendants in consideration of the release by him. Where any creditor in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no advantage from it, but he is also to lose the benefit of the composition. The requirement of good faith among the creditors, and the preventing of gain by agreement for preference, has been uniformly maintained by a series of cases from *Leicester v. Rose* 1803 4 East 372 to *Howden v. Haigh* 1840 11 ALL.1033 and *Bradshaw v. Bradshaw* 1841 9 M&W 29.

37. In *Leicester v. Base* one of the cases cited above [*Leicester v. Rose* (1803) 4 East 372] the facts were these: A trust deed was proposed to the creditors at large of an insolvent whereby they all engaged to accept payment of their whole debts by certain instalments, the first four of which were to be guaranteed by collateral security and the last two were to remain upon the single security of the insolvents. Several of the creditors refused to sign, unless the plaintiffs signed, and the plaintiffs stipulated privately with the insolvent as the condition of their signature that he shall procure them collateral security for the two last instalments as well as the prior ones, conceiving that they had collateral security to cover their debt; and upon the faith of such private agreement they signed the general trust deed which was also signed by the rest of the creditors. Upon these facts it was held that such a private agreement was a fraud upon the other creditors and therefore void, although the effect of it was not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum. Lord Ellenborough C.J. delivering the leading judgment in the case pointed out that:

Though this be not like some of the cases mentioned where security was obtained by the particular creditors for more than the others were to receive; yet the principle of all of them is the same that where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself.

38. Another learned Judge Le Blanc, J. observed as follows in the same case:

This case only differs thus far from the others, that this is not a deed of composition in common acceptance of the term because it provides that every creditor shall ultimately receive his full demand: it is more like a letter of licence being merely to give time. But it is clear upon the face of it that the creditors at large were not satisfied with the personal security of their debtors; for they required collateral security for a part of their demands. Such being the agreement, whether entered into at a meeting of all the creditors assembled for the express purpose or impliedly by their affixing their signatures to the same deed carried round to each separately and signed by all; is it not a fraud upon the creditors at large if the plaintiffs, having holden out to them that they would come in under the general agreement, have notwithstanding, stipulated for a further partial benefit to themselves? And there is no difference in substance whether a creditor stipulates for that which he thinks will produce him money more certainly, or for a larger sum of money than he had agreed to take in common with the other creditors. It is equally a fraud upon the other creditors to stipulate for either.

39. Again in *McKewan v. Sanderson* (1873) 15 Eq. 229 Sir B. Malins V.C., said this:

It is a doctrine founded on the soundest principles, namely, that whenever there are proceedings in bankruptcy or insolvency or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any security given will be ordered to be given up, and this Court will treat the whole thing as fraudulent against the other creditors; and anything done in favour of the creditor who obtains this advantage will be set aside by this Court.

40. In the above case reference was made to *Jackman v. Mitchell* 1807 33 E.R. 412 in which it was held by Eldon L.C. that a bond to secure to one creditor the deficiency of a composition not communicated to the other creditors though it might be otherwise good was bad because it was proved that it was intended to be kept secret.

41. In *knighat v. Hunt* 1829 130 E.R. 1127, the facts were as follows: The plaintiff had refused to sign an agreement to receive of his debtor a composition of 10s. in the pound; but the debtor's brother offering to supply him with coal to the amount of the other 10s., he signed the composition agreement, the other creditors knowing nothing of the coal transaction. For the 10s. in the pound the plaintiff agreed to take a promissory note and the note was given. The debtor's brother supplied the plaintiffs with coal to the amount agreed on and the interest was also paid on the promissory note. The note, however, remaining unpaid, the plaintiff brought a suit against the defendant. The suit failed and in deciding against the plaintiff Best C.J., observed as follows:

These agreements for composition with creditors require the strictest good faith.... It has been argued, that here the debtor was not injured, nor the funds for other creditors rendered less available. No doubt those topics have been urged in some of the cases; but one question always is, that whether the judgment of the creditors has been influenced by the supposition, that all are to suffer in the same proportion? That was the case here. It is a very different thing, where, without any previous contract, a debtor after having discharged his engagements under the composition deed, honourably adds the remainder.

42. The same principle was emphasised in the well-known case in *Ex parte Barrow* 1881.18 Ch. D. 464. In that case the creditors of the insolvent, Andrews, had resolved by the proper statutory majority to accept a composition of 5s in the pound with respect to their debts to be paid in three instalments. Barrow who was one of the creditors, bound by the resolution, before the first instalment of the composition became due, entered into an arrangement with the debtor to the effect that his debt should be paid in full and that he should continue to supply the debtor with goods on credit. He received the first instalment of the composition but it was in dispute whether the other instalments were paid to him when they became due. The Court of appeal, however, were of opinion upon the evidence that if the second and third instalments were not paid to Barrow when they became due, he had dispensed with the punctual payment, and that he could not be heard to say that the original debt had revived by reason of default on the part of the debtor. On 10th May 1880, the debtor accepted in favour of Barrow three bills of exchange for the unpaid balance of the original debt. It was held that after composition the debtor cannot before the completion of the composition enter into a valid agreement that one of the creditors who is bound by the composition should be paid his debt in full even though the creditor agrees at the same time to give the debtor fresh credit. In this case Lord Selborne L.C., in the course of his judgment observed as follows:

It may well be that after a composition has been fully and finally worked out, and all the instalments of it have been paid, the position of the debtor is the same as that of a debtor who has obtained his discharge in a bankruptcy or a liquidation by arrangement, and that an agreement by him with one of the creditors, such as that which was made in *Jakeman v. Cook* (1878) 4 Ex. D. 26 may be supported. But in the present case everything was done before any of the instalments of the composition had become payable to any of the creditors. By Section 126 it is expressly provided that no addition to or variation in the composition is to be made except by an extraordinary resolution of the creditors. If there can be no addition or alteration for the benefit of all the creditors with such a resolution, 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 11t 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.... But it is said that fresh credit was given by the appellant to the debtor, and in this way there was a consideration for the

agreement to pay the old debt in full. That might well be so in a case like *Jakeman v. Cook* (1878) 4 Ex. D. 26 where there was no question of good faith with the other creditors, and no question of compliance or non-compliance with the terms of composition resolutions. But no consideration can support an agreement which is inconsistent with good faith to the other creditors, and with the spirit of Section 126.

43. I do not think that it will serve any useful purpose to cite any further cases on a point on which there is no conflict of opinion either in England or in this country. What is now to be considered is how far the principles laid down in these cases apply to the present case. It appears that there were three classes of creditors included in the scheme of composition with which we are concerned in the present case. There were a number of creditors who being friends and relatives of the insolvents had agreed to forego their debts altogether in the event of the composition being agreed upon by the majority of the secured creditors. Then there were creditors mentioned in Schedule 1 who had agreed to accept in lieu of their debts an amount representing eight annas in the rupee in two instalments. Lastly, there were certain secured creditors including the Benares Bank. It was contended by Mr. Das that there was no "equality of benefit and mutuality of security" in the present case and that all the creditors were not treated on the same footing, because the measure of sacrifice was not the same. In my opinion however so long as there is some sacrifice on the part of each creditor who is a party to the scheme of composition, the principle of good faith must come into play and no creditor will be permitted to secure an individual benefit to himself behind the back of the other creditors. This view, I think, is to some extent supported by the observations in *Leicester v. Rose* (1803) 4 East 372 where it was pointed out that the principle of good faith will apply even though the scheme was not exactly one of composition but of "licence". In the present case all the creditors who had joined the scheme had given up something. Some gave up all their debts; some half their debts; and so far as the Benares Bank is concerned, the sacrifice it made consisted in agreeing to the postponement of the payment of its debt till after the other creditors had been paid off. There are several documents on the record which show that the bank had taken part in the voting for the scheme and the scheme incorporates a special arrangement as to the payment of the dues of the bank which has been fully availed of by the bank, because it is not denied that the bank has received numerous payments under the scheme.

44. I do not see how it can be said in such circumstances that the principles which have been laid down in the cases to which I have referred will not apply here. The agreement as to compound interest was apparently a special concession to the bank which was not contemplated in the scheme and to this agreement the other creditors who were parties to the scheme were no party. A question naturally arises whether the creditors who had forgone all their debts and those who had given up 50 per cent. of their debts, would have agreed to the scheme if they had known that the bank was going to be paid on its

outstanding dues not only simple interest at the rate of 12 per cent., but compound interest at that rate, notwithstanding the fact that in none of the mortgages which stood in its favour the bank was entitled to receive only 8 per cent, simple interest. In my opinion, the agreement in question was inconsistent with the principle of good faith to the other creditors and, as pointed out in *Ex parte Barrow* (1881) 18 ChD 464 a composition for the benefit of all the creditors and this particular agreement which is for the benefit of a particular creditor cannot stand together. It was contended by Mr. Das that the decision in *Ex parte Barrow* 1881.18 Ch. D. 464 depended largely on the specific provision contained in Section 126 of an old Bankruptcy Act, but Lord Selborne has also emphasised very strongly the principle of good faith to the "other creditors" and in any event the underlying principle of Section 126 is no strange principle but is also deducible from the provisions of the act with which we are concerned.

45. It will be contrary to all principles of Bankruptcy law, if before the composition scheme is worked out, the scheme is varied in favour of one creditor only behind the back of the other creditors and that creditor is allowed to enter into an agreement with the debtor whereby he gets more than he would have got under the composition scheme and also gets more than he would have got under the bonds upon which the original debt due to him from the insolvents is founded.

46. As I have already indicated, I do not agree with Mr. Das's view that in order to make a scheme bind all the creditors, it is necessary that each creditor should give up the same amount or the same proportion of his debt. It is true that the word "composition" implies that each creditor gives up something and that word may not strictly apply to a case where some of the creditors give up a part of their debt while others are to be paid in full. But the Act advisedly uses the expression "scheme or composition" and the arrangement with which we have to deal in this case is at least a "scheme" though it has been loosely described as a scheme of composition. The points to be emphasised are firstly that this was not a case where the insolvent had come to an arrangement individually with each creditor without reference to the other creditors, but it was the case of an arrangement arrived at in the manner contemplated by Section 28, Presidency Towns Insolvency Act, secondly that each creditor had made some sacrifice which by itself was sufficient to bind all the other creditors; and, thirdly, that the bank having taken benefits under the scheme cannot be allowed to turn round and say that it stands outside the scheme. For example, under the scheme a sum of Rs. 78,000 which was recoverable only as interest was made part of the principal and a flat rate of interest was fixed though the bank was entitled under its mortgages to two rates of interest, that is to say, 12 per cent, on two of the debts and 8 per cent, on the third debt.

47. Now, if the scheme was such that the original rights of the parties were disturbed and new rights were substituted for them, it was a scheme under the Act and it would be wrong to say that the bank stood outside the scheme and

was at liberty to alter the arrangement behind the back of the other creditors. The arrangement with the bank being part of the same scheme was not separable from the arrangement with the other creditors.

48. Mr. Das greatly relies on the decision of Atkin, J. in *Wild v. Tucker* 1914 3 K.B. 36. In that case a contract by an undischarged bankrupt in consideration of a small loan to pay in full a debt of a large amount due from him at the commencement of and provable in his bankruptcy was held to be a valid and enforceable contract. That case certainly goes very far but it was not a case of composition and as was pointed out by Atkin J. the principles applicable to an agreement for a composition were not applicable to the proceedings in that case under the Bankruptcy act of 1883.

49. Another case which was very much relied on by Mr. Das was *In re McHenry; Mcdermott v. boyd* (1894) 3 ChD 365. In that case a bankrupt desiring to obtain the annulment of his bankruptcy induced some of his creditors to sell their debts to two trustees who were provided with, funds for the purpose and who were as assignees of the debts to consent to the annulment. The trustees obtained assignments of the several debts on various terms including an assignment of a debt of ₹25,000 in consideration of ₹2,000 paid by them to the creditor. This assignment was made in pursuance of an agreement between the creditor and the bankrupt, whereby the bankrupt agreed to pay to the creditor a further sum of ₹6,000 at a future time. The bankruptcy was annulled on the petition of the bankrupt with the consent of the creditors or their assignees. The agreement to pay the ₹6,000 was not disclosed to the Court or to the other creditors, but it was held on the facts stated above that "there was no duty to disclose the agreement to the Court, inasmuch as the function of the Court was merely to ascertain whether the proper parties consented; nor to the other creditors, inasmuch as there was no common basis of consent, and that the agreement was valid."

50. The expression "common basis" was explained by Lord Herschell as meaning that the debtors were acting together and were consenting to an annulment in consideration of receiving some proportionate shares or some named shares out of a fund that was to be distributed among them and Lindley, L.J. pointed out that the key to that case was to be found in the fact that each creditor "consents upon such terms as he may think proper. They do not work in unison. It is not like a composition deed or anything of that kind. The bankrupt makes the best arrangement he can with each creditor, and all that the Court usually enquires into is whether that creditor consents."

51. In other words, that was not a case in which there was a composition or a scheme of arrangement embracing all the creditors, but a case in which the debtor had made his own arrangement with each creditor.

52. I will now deal with two other points raised by Mr. Das, these being firstly, that the promise to pay compound interest was a promise supported by good

consideration; and, secondly, that the doctrine of, "undue preference" does not arise in this case, because the agreement was not between the Bank and the debtors, but between the Bank and the Official Assignee. In my opinion, the last argument can be of very little assistance to Mr. Das firstly, because if the agreement was opposed to public policy, it could not be regarded as valid merely because the Official Assignee was a party to it and secondly, because the Official Assignee admittedly entered into this agreement without the leave of the Court.

53. So far as the first proposition is concerned Sir Manmatha Nath Mukherjee, who appeared on behalf of some of the respondents, relied upon *Humphreys v. Welling* 1862 158 E.R. 780 where the Court refused to enforce an agreement even though it had been sanctioned by the insolvency Court. In that case the matter was dealt with by Pollock, C.B. as follows:

The action is brought on a promissory note; there is a plea that the note was given in consideration of the plaintiff withdrawing his opposition to the defendant's obtaining a final order for protection. It is unnecessary to cite the authorities which decide that the plea is good. There is a replication to the plea, stating that the agreement was made, and the note given, with the sanction of the insolvency Court. We are all inclined to think that the Court had no authority to sanction such an arrangement; and we are of opinion that it was illegal, notwithstanding such sanction and that no action can be maintained upon the note.

54. As to the second point Mr. Das referred to Sections 68, 86 and 101, Insolvency Act. Section 68 provides that the Official Assignee may realise the property of the insolvent, and he may for that purpose, among other things, compromise all debts, claims and liabilities on such terms as may be agreed upon. Section 86 provides that if the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may appeal to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just. Section 101 provides that the period of limitation for an appeal from any act or decision of the Official Assignee shall be 20 days from the date of such act or decision. It is contended by Mr. Das that even though the agreement as to compound interest was concluded by the Official Assignee without the leave of the Court, yet inasmuch as there was no appeal from the act of the Official Assignee, the act can no longer be challenged. But as has been already pointed out the act in question was a variation of the scheme and because the scheme was varied in a manner not contemplated by the Insolvency Act, the agreement was ultra vires. Our attention has also been drawn to the fact that the Official Assignee had agreed to act as a trustee in regard to the scheme and that being so, he could not enter into an arrangement in violation of the trust. The fact that the Official Assignee was a trustee under the scheme is supported by several documents and it appears that on 11th March 1916 he himself stated this fact in para. 3 of the petition (exhibit G (2)) filed by him in the Insolvency Court and that statement

has never been challenged as incorrect.

55. There was a good deal of discussion before us as to whether the agreement to pay compound interest was supported by any consideration whatsoever. In dealing with this question, Mr. Das pointed out that, after the scheme had been approved, it was discovered firstly, that the name of Sreemati Shivadasi, one of the guarantors, had been left out by mistake in the scheme and secondly, that one of the guarantors Ramranjan Roy had refused to carry out his undertaking. In these circumstances, according to Mr. Das, the bank was entitled to say that as two of the conditions of, the scheme had not been satisfied, the bank was not bound by the scheme and was entitled to enforce the original securities. According to Mr. Das this was the situation which had arisen and in that situation the insolvents and the Official Assignee had agreed to pay compound interest to the bank, because as business men they considered that it was vitally necessary to prevent the bank from repudiating the scheme. Thus, Mr. Das's contention is that the promise was supported by good and valid consideration and that though it was not enforceable in the insolvency Court, there was nothing in the general law to prevent its enforcement in a Court of ordinary civil jurisdiction. I have put the arguments of Mr. Das in the strongest possible words and it seems to me that the point raised by him that there was some consideration for the promise cannot be seriously contested. The fact, however, remains that the agreement is directly hit by a well established principle of the Bankruptcy law which requires that a creditor who has agreed to a scheme should not enter into a new bargain with his debtors under which he gets more than the scheme provides.

56. Another point which was argued at some length before us was whether the bank can maintain a suit for recovery of compound interest alone and cases were cited to show that a suit could be maintained, if there was a separate agreement for the payment of interest only. It seems to me however to be hardly profitable to deal with the abstract question as to whether a separate suit for interest can, lie or not. That question can be dealt with properly only in relation to the facts of a particular case and when it is so dealt, the answer should be quite clear. In the present case the compound interest cannot be dissected from the simple interest as both are payable under the same covenant and one cannot think of the obligation to pay compound interest independently of the scheme, because the parties intended that it should be payable under the scheme and this was expressly stated in the trust deed. The agreement to pay compound interest cannot be enforced firstly, because it was a variation of the scheme which neither the creditors in general nor the Court had considered and which according to the trust deed had been arrived at only as between the Bank, Woomesh Chandra Banerjee, Asutosh Roy, Kalidas Laik and the Official Assignee and secondly because it is hit by the doctrine of undue preference.

57. Sir Manmatha Nath Mukherjee in the course of his arguments raised several points against the appellant's suit these being (1) that the suit is barred by limitation; (2) that the suit is barred by the principle of res judicata; (3) that the

learned Subordinate Judge of Dhanbad had no jurisdiction to try the suit; and (4) that the suit cannot be entertained, because it was instituted without the leave of the insolvency Court.

58. These points hardly arise in view of the opinion already expressed by me on the more important issues in the case and some of them have not also been established. As to limitation, it was pointed out by Mr. Das that in so far as the suit is for the administration of trust, it is covered by Section 10, Limitation Act, and in so far as it relates to the enforcement of a charge on the properties in the hands of the Official Assignee it is protected by Article 132, Limitation Act. As to *res judicata*, though the point was raised under various heads, it seems to me that the only point which has any substance is that if the agreement as to compound interest could not be enforced in the insolvency Court, it cannot be enforced in any other Court. In regard to the jurisdiction of the Subordinate Judge of Dhanbad, it must be pointed out that the question of jurisdiction must be decided with reference to the case made out in the plaint and upon that case I am unable to hold that the Court at Dhanbad had no jurisdiction to deal with the suit. Whether the Subordinate Judge should have decreed the suit is a different question. I also doubt whether the suit, if there was any merit in it, would have failed, merely because it was instituted without the leave of the insolvency Court. Sir Manmatha Nath Mukherjee further argued that the claim for interest made by the bank was hit by certain provisions of the Bihar Money-lenders Act, but he was unable to show to us how those provisions would be applicable to the present case.

59. Lastly, it was argued by Sir Manmatha Nath Mukherjee that the bank had entered into a collusive compromise with regard to one of the properties, namely, Benedih colliery, with one Rhishikesh Roy, a benamidar of Mukunda Lal Laik, one of the insolvents, who it was said had taken a fraudulent assignment of that property from the Official Assignee; and that accordingly the bank was bound to give credit in the suit for the full and actual value of that property. It appears that with regard to this property a claim was set up by the widow of M. L. Laik that it had been sold to him orally for rupees d 10,000 and that after that the property had been leased out to certain persons. When the matter was brought to the notice of the insolvency Court, that Court ordered the bank to institute a suit against the widow and the lessees and obtain a proper adjudication as to their rights. The suit was instituted and ultimately it was compromised with the widow of M.L. Laik and under the compromise the property was sold to her for Rs. 34,000. She also agreed to pay Rs. 3000 as costs. I do not wish to deal with this point, firstly, because it does not arise in view of what I have already held and secondly, because in my opinion the matter has been very carefully dealt with by the learned Subordinate Judge who has rightly pointed out that on the materials on the record it is difficult to hold that there was no agreement for sale and that the compromise by the bank was fraudulent.

60. As in my opinion the present suit ought to have been dismissed and the bank

was not at all entitled to a decree, it does not seem to be really necessary to deal with the points urged in appeal, but I will briefly record my views on those points also. The points urged are three in number firstly, that the appellant bank is entitled to compound interest on the entire sum of Rs. 3,26,558 which is treated as the principal sum under the scheme; secondly, that the bank is entitled to compound interest from 18th February 1915, the date on which the deed of trust was executed and thirdly, that the bank is entitled to sell the properties which are in possession of the Official Assignee for realising such amounts as may be found to be due to the bank. So far as the first two points are concerned they were not contested by the respondents and but for the fact that the cross-objection is going to be allowed, I would have accepted the appellant's contentions in regard to them and ordered the preparation of the decree accordingly. The third point, however, seems to me to be a more difficult one. Briefly speaking, Mr. Das's contention is that when the scheme is read with the trust deed which implements it, there can be no escape from the conclusion that the bank has a charge on the properties transferred to the Official Assignee and he contends that once it is held that the bank has a charge on them, it must also be held that the bank has a right to a decree directing their sale for the purpose of satisfying the dues of the bank. On the other hand, Sir Manmatha Nath Mukherjee contends that the bank is bound by the terms of the deed of trust and all that the deed of trust provides is that the bank should realise its dues out of the income of the properties and there is no provision that the properties are liable to be sold. On an examination of the deed of trust it seems to me that the contention put forward by Sir Manmatha Nath Mukherjee is correct. That deed clearly contemplated that only some of the properties mentioned therein should be sold, and so far as the rest of the properties were concerned, certain creditors were to be paid out of their income and after their debts had been paid off the properties were to be released and re-transferred to the owners. Paragraph 11 of the deed expressly provides:

That upon payment and satisfaction of the several debts secured and unsecured mentioned in the said scheme of composition modified as aforesaid in manner therein provided the Official Assignee will at the request and cost of the said parties hereto of the first, second, third, fourth, fifth and sixth parts respectively release and re-transfer unto them respectively the properties and premises hereby respectively transferred by them.

61. The only other point which I need refer to is a point raised on behalf of the appellant with regard to the cross-objection. It was pointed out by Mr. Das that only two of the respondents have preferred the cross-objection and the Official Assignee who is the principal defendant has not filed any cross-objection at all. It is contended that in view of this fact the decree as against the defendants other than the respondents who have preferred the cross-objection, and particularly the decree as against the Official Assignee, should be upheld. The position taken up by the Official Assignee and some of the respondents, on the other hand, is that they should be allowed to take advantage of the cross-objection filed on

behalf of respondents 4 and 36 and they maintain that this is a fit case in which this Court should act under Order 41, Rule 33 and dismiss the entire suit. In my opinion, the objections raised on behalf of respondents 4 and 36 go to the very root of the matter and a very anomalous position would arise if there are two contradictory decrees which must be the case if this Court were to hold in the same judgment that the suit is on the one hand liable to be dismissed and on the other that the plaintiff is entitled to a decree for compound interest.

62. I would, therefore, allow the cross-objection, dismiss the appeal and hold that the plaintiff bank is entitled to no relief and that the suit should be dismissed with costs throughout. The costs of the appeal will be payable to the respondents who have preferred the cross-objection.

Meredith, J.

63. I entirely agree upon all points and have nothing to add.