(1942) 11 PAT CK 0010

In the Patna High Court

Chota Nagpur Banking Association Ltd. APPELLANT

Vs

Lal Mohan Trivedi and Others RESPONDENT

Date of Decision : 30-11-1942

Acts Referred:

Citation : AIR 1943 Patna 301

Hon'ble Judges : Shearer, J;Manohar Lall, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This is an appeal by the plaintiff bank whose suit for enforcing a mortgage bond has been dismissed. The question for decision in the appeal depends upon the construction of the mortgage bond in order to see whether the bond was given as a security for the amount due on that date or for the balance which may be found due from the mortgagor from time to time. Lal Mohan Trivedy, defendant 1, is the karta of a Hindu family governed by Mitakshara law consisting of Pashupatinath Trivedi and Sarda Prasad Trivedi. He had a current account with the plaintiff bank. The joint family had a number of joint business like lac factory business for which the account was opened, but in 1923, he, Lal Mohan, had the necessity to overdraw the amount to meet the requirements of the family business.

2. On 23rd January 1923 he made an application to the bank that he should be allowed to over, draw to the extent of Rs. 25,000, but the directors sanctioned an overdraft to the extent of Rs. 15,000 only after taking a security. Accordingly the mortgage bond, Ex. 5(a), was executed by Lal Mohan Trivedi as the head and karta of his family on 12th March 1923. After narrating the facts which I have just stated it is provided:

I as karta of the said joint Hindu family mortgage to you the property, mentioned in the schedule below which belongs to our said joint Hindu family, and hereby promise that I shall pay interest at Rs. 10 (rupees ten) per cent, per annum on the aforesaid ''overdraw'' money till final payment. The interest of the amount I shall overdraw in each English month will be debited at the said rate in my said current account in the following month, and I shall repay the same within seven days of the said next month. If the aforesaid entire amount be in arrear I shall not be able to overdraw any more money. And as soon as the aforesaid arrear amount of interest and the overdrawn amount will exceed Rs. 15,000 (rupees fifteen thousand) it will be a ground for your suit.... Out of the amount of sale proceeds you will be able to realise the ''overdrawn'' amount due to you and the amount of interest which will be due on calculation at the aforesaid rate.... As security of the said Rs. 15,000 (rupees fifteen thousand) of this bond, I as karta of our aforesaid joint Hindu family mortgage our joint transferable property, specified in the schedule below.

3. On that date, the current account of Lal Mohan Trivedi was overdrawn to the extent of Rs. 7489-2-7: see Ex. 1, part 3, p. 18. A further examination of the ledger entries shows that the defendant was allowed to overdraw in March and April and that on 2Srd April 1923, the overdraft stood at Rs. 15,025-12-11. As this was beyond the limit sanctioned by the directors mentioned in the mortgage bond, the very next day the defendant put in a sum of Rs. 4900 to reduce the overdraft. On 3rd May, the overdraft reached Rs. 15,159 and on 7th May Rs. 17,159, but on the next day, that is on the 8th, the defendants put in Rs. 1949 and the overdraft was reduced to Rs. 15,210. But, by the end of the month, the overdraft came to almost exactly Rs. 15,000. In June the overdraft exceeded Rs. 15,000 by the addition of the interest of Rs. 126-4-2. In July and August the overdraft remained below Rs. 15,000 and exceeded Rs. 15,000 on 9th October, but, on 12th October, it was again reduced and remained at over Rs. 15,400 by the end of December 1923. In 1924 the bank appears to have allowed an overdraft of over Rs. 17,000 but by the end of the year it was reduced to Rs. 13,000. In 1925, the over-draft stood at Rs. 16,000 and over from September to7 December but was reduced in February 1926 to Rs. 12,500 and was always in excess of Rs. 15,000 from April to the end of the year. In 1927 the overdraft was always above Rs. 16,000. In 1928 the overdraft went to Rs. 19,000, in 1929 up to Rs. 29,000 and in 1931 up to Rs. 23,800. It should be observed here that the overdraft on 12th April 1926 was Rs. 15,101-12-5 and thereafter the defendant did not at all operate upon his account and the overdraft which came up to about (Rs. 45,069-5-9 on nth August 1937 is composed almost wholly of interest which was being added on every month at the rate of Rs. 130 to Rs. 150 per mensem. Only one cheque was drawn by defendants on 29th January 1932 and two sums of Rs. 50 and Rs. 11 were put in to the credit of the account on 11th April 1927 and on 29th January 1932.

4. As the account remained overdrawn and no payments were being made from April 1926 the bank took a deed of assurance from Pashupati Nath Trivedi and Sarda Prasad Trivedi, defendants 2 and 3. This is Ex. 6 dated 28th January 1930. In paras. 3 to 6 it is stated, that the bank had sanctioned Lal Mohan Trivedi to overdraw to the extent of Rupees 15,000 for which he, in order to carry on the joint family business, executed a simple mortgage bond, that by that overdraft the joint family has been benefited but as the head office on 5th December 1929

wanted a further assurance therefore Pashupati Nath Trivedi and Sarda Prasad Trivedi were giving a further assurance.

5. A number of letters on the record show that Lal Mohan Trivedi agreed to pay the debt by an instalment of Rs. 2000 in February 1930 but owing to his financial embarrassment he could not keep his promise. On 8th March 1935 Lal Mohan Trivedi, Pashupati Nath Trivedi and Sarada Prasad Trivedi, the three defendants in the action, executed a deed of acknowledgment, Ex. 7, in which they stated that Lal Mohan Trivedi as karta for carrying on the joint business of the family of the three brothers had overdrawn money, that a further assurance was given to the bank on 28th January 1930 by Pashupati Nath and Sarda Prasad, and that on account of the mortgages up to 7th March 1935, Rupees 85,389-8-3 remained due which they were acknowledging on that date jointly and severally. The plaintiff instituted the suit giving rise to this appeal on 11th August 1937 and claimed a mortgage decree for Rupees 45,048-5-9.

6. The defence to the action was that the suit was barred by limitation, that the mortgage was not executed and attested in accordance with law and that the mortgage in suit was executed to repay Rs. 15,000 namely Rs. 7,489-2-7 which was due on the date of the mortgage and further sums which would be overdrawn from that date as long as the limit of Rupees 15,000 was not reached. It was asserted that this limit was reached on 23rd April 1923 and thereafter all the payments made by the defendants to their credit in the current account must be taken to wipe off the whole of this advance of Rs. 15,000 so that nothing was due from the defendants on the mortgage bond, and if the defendants had overdrawn any further sums the bank can obtain only a personal decree provided the suit is within time. The learned Subordinate Judge has held that the mortgage bond in suit was executed and attested in accordance with law. He took the view that upon a proper construction of the bond the sum secured was only Rs. 15,000 which had been paid off and if the plaintiff bank made further advances to defendant 1 it cannot recover those advances by the sale of the mortgaged property. He then considered the next question whether the plaintiff bank can have a money decree in respect of the further advances but he held that the money claim was barred by limitation. Hence the appeal by the plaintiff.

7. In my opinion, the learned Subordinate Judge has entirely misconstrued the mortgage bond and was wrong in applying the principles laid down in In re Medewe''s trust (1859) 26 Beav. 588 to the facts of this case. The mortgage bond says very clearly at line 25 that the joint family would be allowed to over-draw "up to Rs. 15,000."

8. It should also be remembered that on the date of the mort-gage bond the executant had overdrawn only Rs. 7489. The subsequent conduct of the parties also shows that the bank allowed the defendant to overdraw and then pay any such sums as the defendant chose to pay to his credit and all these went to reduce the overdraft from time to time. This is the common practice in the Indian banks and it would be utterly impossible for any banking business to proceed if

the contention of the respondent was well-founded. Of course it will be open to the parties to enter into a transaction which would clearly attract the operation of the rule in Claytons''s case (1816) 1 Mer. 572. For instance, if the security was given to secure a particular overdraft or a particular sum the bank could not be allowed to enforce that security against another overdraft or another sum.

9. I now proceed to consider the case relied upon by the learned Subordinate Judge. In In re Medewe''s trust (1859) 26 Beav. 588 the security was given by a customer to his banker for the balance which shall or may be found due on the balance of the account. The Master of the Rolls, Sir John Romilly construed the particular document to mean that it was intended to cover the existing balance only and not to be a continued security for the floating balance and, therefore, applied the rule in Claytons''s case (1816) 1 Mer. 572. The facts in that case were that Medewe kept three accounts with his bankers, Messrs. Alexander, and these accounts were considerably overdrawn. The bankers required some security and, therefore, on 12th January 1857 Medewe gave them a deed-poll which after reciting these facts stated that Messrs. Alexander "having required security for the balance due on the said several banking accounts" Medewe agreed to charge his estate. It will be noticed that the words are "the bank required security for the balance then due." In these circumstances the Master of the Rolls refused to be guided by the cases which were cited before him because, if I may say so respect, fully, he correctly observed:

The cases cited do not affect the present case, which, I am of opinion, depends on the words of the deed, and I think that its true construction is, that it was to secure the existing and not a future balance.

10. On the construction of the mortgage bond in suit I have construed the mortgage bond to mean that it was intended to secure not any existing balance but was to stand as a security for an overdraft up to Rs. 15,000 which may be taken from time to time. The more apposite case is the one which was cited by Mr. P.R. Das, Deeley v. Lloyds Bank (1910) 1 Ch. 648. In that case the head-note runs thus:

The rule in Claytons''s case (1816) 1 Mer. 572 that payments carried by a creditor to a current account which is communicated to the debtor are to be appropriated to liabilities in order of date, is founded on a presumption of the creditor''s intention and will not be applied in a case where it is proved by the conduct of the parties that the creditor had no such intention.

11. In the present case I have shown that the conduct of the parties amply establishes that the bank had no such intention that the rule in Claytons''s case (1816) 1 Mer. 572 should be applied. Defendant 1 knew the amount due from him from time to time, operated upon it from time to time, reduced the overdraft below Rs. 15,000 as occasions arose, and the subsequent acknowledgment by the brothers showed that they approved of the appropriation by the bank against the rule in Claytons''s case (1816) 1 Mer. 572. The facts in Deeley v. Lloyds Bank

(1910) 1 Ch. 648 were that in September 1893 John Glaze had mortgaged the property to a bank to secure an overdraft on his current account limited to ?2500. The bank held another security for the overdraft to the amount of ?51,000. In 1895 Glaze mortgaged the same property to Mrs. Deeley to secure ?3500 and this mortgagee gave notice to the bank of their mortgage. But, nevertheless, the bank continued the current account with Glaze instead of opening a fresh account. Glaze from time to time made payments to his account which, if applied according to the rule in Claytons''s case (1816) 1 Mer. 572 would have paid off the moneys due at the date of the second mortgage by 6th January 1896. The bank never allowed Glaze to overdraw beyond the limit of ?3500 except temporarily on deposit of fresh security. Glaze also often appropriated payments to meet particular cheques.

12. In these circumstances, it was held by Fletcher-Moulton and Buckley L, JJ. (dissentiente Cozens-Hardy M.R.) that there was sufficient evidence to shew that the bank had not intended to appropriate the payments in discharge of the debts secured by the mortgage and that the rule in Claytons''s case (1816) 1 Mer. 572 did not apply. The decision of Eve J. was affirmed. This is exactly the position in the present case.

13. Dr. D.N. Mitter relied upon the case in Eedes v. Boys (1870) 10 Eq. 467. But that case, in my opinion, does not help him. The facts were that a promissory note was given by a principal and a surety for a definite sum and was payable at a fixed date. Lord Romilly, M.R. observed that such a promissory note must be presumed to be given in consideration of an advance at the date of the note and if the payee asserts, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal and the payee, the burden of proof lies on the payee. I quote the relevant passage from the judgment at page 470:

The cases cited do not appear to me to affect the question. The one which was most relied upon was the case in Henniker v. Wigg (1869) 4 Q.B. 792, and there were several others, such as Williams v. Rawlingson (1825) 3 Bing. 71. But in my opinion, they all amount to this: that there must be evidence of some sort or other to shew that n security purporting to be for a definite sum was given to meet the balance of a current acoount. In Henniker v. Wigg (1869) 4 Q.B. 792, it was assumed that, in an ordinary case, the security would be merely for the money advanced, but in that case the Court was of opinion, upon the inferences to be drawn from the language, and from the conduct of the parties after the execution of the bond, that it was intended that the bond should stand as a continuing security, and that being so, the rule in Claytons''s case (1816) 1 Mer. 572 did not e apply. In my opinion, the inferences here are exactly the other way, and therefore the claim fails.

14. The present case falls within Henniker v. Wigg (1869) 4 Q.B. 792 cited by the Master of the Rolls, because I am of opinion that upon the inference to be drawn from the language of the mortgage bond in suit and from the conduct of the

parties after the execution of the bond as evidenced by the ledger entries, Ex. 1, and from the subsequent deeds of assurance and acknowledgment it must be held that it was intended that the mortgage bond should stand as a continuing security, and that the rule in Claytons''s case (1816) 1 Mer. 572 does not apply. For. these reasons I would reverse the decision of the learned Subordinate Judge and hold that the bank is entitled to a mortgage decree but only for the sum of Rs. 15,000 together with interest thereon.

15. The learned Subordinate Judge while deciding issue 3 held that he was not prepared to allow interest beyond nine per cent, per annum simple against the stipulation in the mortgage bond which provided for interest at the rate of Rs. 10 per cent, per annum. Mr. P.R. Das was not in a position to challenge this finding of the learned Subordinate Judge and asked that in case a mortgage decree was passed in his favour he should be allowed interest at the rate of 9 per cent. per annum simple. The office will calculate the amount of interest due at this rate from the relevant dates of the ledger entries, Ex. 1. It should be observed that it is conceded before us that the provisions of the Bihar Money Lenders Act do not apply in the case of a bank, and, therefore, will not be applied in this case. On behalf of the respondents, our attention was drawn to order No. 54 dated 5th August 1939 of the Court of the learned Subordinate Judge where it is said that calculation of interest at the simple rate of 9 per cent, per annum has been made. The office will, no doubt, take assistance from this order in order to make a proper calculation of the interest due from the defendants.

16. The result is that the appeal is allowed, the decision of the learned Subordinate Judge is set aside and the suit of the plaintiff is decreed. The office will draw a mortgage decree for a sum of Rs. 15,000 as principal together with interest thereon at 9 per cent, per annum simple. The same rate of interest will be allowed to the plaintiff pendente lite to run up to the period of grace which I would fix at three months from today and thereafter at the rate of 6 per cent, per annum. The subsequent transferees, defendants 4 to 13, who were joined in the action, will be given an opportunity to redeem. Let the usual mortgage decree be drawn up on these fines. The plaintiff is entitled to costs against the mortgagor defendants in proportion to his success in this Court as well as in the Court below.

Shearer, J.

I agree.

