
(1958) 04 CAL CK 0035
In the Calcutta High Court
Case No : A.F.O.O. No. 45 of 1956

Hulas Kunwar

APPELLANT

Vs

Allahabad Bank Ltd.

RESPONDENT

Date of Decision : 02-04-1958

Acts Referred:

Contract Act, 1872 — Section 176, 177, 2, 7, 8
Evidence Act, 1872 — Section 114, 16

Citation : AIR 1958 Cal 644 : (1959) 2 ILR (Cal) 252

Hon'ble Judges : P. Chakravartti, C.J; S.C. Lahiri, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

S.C. Lahiri, J.—This appeal is by the plaintiff in a suit for redemption and is directed against an order, dated 31-8-1955, passed by Sarkar, J. by which he discharged the exceptions taken by the plaintiff to the report of the Commissioner and Special Referee appointed in the suit to submit a report on certain questions referred to him. The facts which are material for the purposes of this appeal are these : On 9-3-1943 one Chandmull Batia, the predecessor-in-interest of the appellant, executed a deed of hypothecation in favour of the respondent Bank in respect of certain shares as security for advances to be made by the Bank on the plaintiff's overdraft account. By this deed of hypothecation it was agreed that the Bank was to have a margin of 40 per cent in respect of ordinary shares and 25 per cent in respect of preference shares. The limit of advances to be made to the plaintiff was originally fixed at Rs. 50,000/- but it was increased from time to time and ultimately it stood at Rs. 3,50,000/- in 1947. From August, 1948, the Bank wrote a number of letters to the plaintiff pointing out that the securities held in deposit by the Bank against the advances made to the plaintiff fell below the stipulated margin of 40 per cent and requesting the plaintiff to restore the margin either by sending sufficient funds, or by furnishing further securities. On the plaintiff's failure to restore the margin the Bank sold some of the shares in 1949 and was about to sell some more

shares when the plaintiff instituted a suit for redemption on 12-5-1950, praying for redemption of the shares pledged by him on a proper accounting of all the dealings and transactions between the plaintiff and the Bank. In the plaint the principal grievances made by the plaintiff are that (a) the defendant Bank had wrongfully debited the plaintiff's account with interest in excess of the rate fixed by agreement and (b) the sale of the shares by the Bank was in breach of the terms and conditions of the said hypothecation and was contrary to law. On 5-3-1951 it was ordered and decreed with the consent of the parties that the suit be referred to Mr. B.K. Chakravarti, Bar-at-Law, to take accounts and make the following enquiries :

"(1) An account of what, if any, is due on this date to the defendant Bank for principal and interest on the overdraft account mentioned in the plaint (3) what shares have been sold properly by the defendant bank (4) what rate of interest was agreed upon between the parties, whether 3 per cent or 3 1/2 per cent Referee is to proceed on the basis of and shall not disturb (1) any settled account or (2) any account examined and accepted as correct by conduct or otherwise (3) any sale proceeds of aforesaid shares forming part of such settled accounts or any account examined and accepted as correct by conduct or otherwise as aforesaid

Those portions of the consent order which have not been quoted are not material for the purposes of this appeal. Before the Special Referee the parties agreed that the only issues upon which he should submit his report were : (1) "what rate of interest was agreed upon between the parties, whether 3 per cent or 3 1/2 per cent?" and (2) "were the shares mentioned in the list submitted by the plaintiff and described as "improperly sold", sold properly?" The report of the Special Referee was in favour of the defendant bank on both the points. The plaintiff filed exceptions to the report claiming that the rate of interest should be 3 per cent and that the sale of the shares by the defendant bank should be held to be illegal. Sarkar, J. has overruled the plaintiff's objections and confirmed the report of the Special Referee. Hence this appeal by the plaintiff.

2. The first point which falls for determination in this appeal is what was the rate of interest agreed upon by the parties? It is common ground that originally the rate of interest was 3 1/2 per cent Ex. 1, letter from the General Manager of the Bank, dated 29-6-1944. It is also admitted that the rate of interest was reduced to 3 per cent with effect from 1-12-1944 -- See Ex. 2, plaintiff's letter to the Manager of the defendant Bank, dated 9-12-1944, acknowledging receipt of his letter dated 7-12-1944. The defendant's case is that on 17-10-1946 the rate of interest was again raised to 3 1/2 per cent by issuing a cyclostyled copy of a circular to all the Constituents of the Bank including the plaintiff. That cyclostyled circular is Ex. 9 and runs as follows

"The Bank has decided to conform to the minimum interest rates stipulated by the Calcutta Exchange Banks. You are by this letter informed that interest on your overdraft account secured by shares will be increased as from date to 1/2

per cent over Bank rate minimum 3 1/2 per cent."

The defence case is that a copy of this notice was sent to the plaintiff by ordinary post and though there was no express acceptance of its terms on his behalf, there was an implied acceptance by conduct. This case has been accepted by Sarkar, J.

3. Mr. Meyer appearing for the appellant has argued (a) that the terms contained in the Circular--Ex. 9 cannot be said to constitute a proposal (b) that it has not been proved that the circular reached the plaintiff and (c) that the evidence on the record does not justify an inference of implied acceptance on the part of the plaintiff. Mr. De appearing for the respondent Bank has contended on the other hand, that the evidence adduced by the Bank is sufficient to prove communication of the proposal to the plaintiff and alternatively that even if the case of express proposal fails, the evidence on the record is sufficient to Justify an inference of implied proposal and implied acceptance. Upon the alternative case the argument is that there was an implied agreement between the parties to pay interest at the rate of 3 1/2 per cent from 17-10-1946, both the proposal and the acceptance being implied.

4. Before entering into the merits of the rival contentions, it is necessary to consider whether it is open to the respondent to make a case of implied agreement at the appellate stage. Mr. Meyer contends that it is not open to the respondent to make that case in view of the fact that the only case made by the Bank in the trial Court was one of express proposal and implied acceptance, and that the case of implied proposal was not made in the pleadings. It is true that in paragraph 6 of the written statement filed by the Bank, it stated that on and from 17-10-1946 the minimum rate of interest was raised to 3 1/2-per cent "notice whereof was given to the plaintiff" and paragraph 9 contains a general denial to the effect that the defendant never made any wrongful or unauthorised entry in the accounts in respect of the rate of interest; but the alternative case of implied agreement was specifically made in paragraph 4 of the Statement of Facts filed by the defendant before the Special Referee on 20-3-1951 which contains the following sentence :

"In the alternative, the plaintiff by accepting the statements of accounts submitted from time to time upto 31-3-1949, as correct, agreed to pay interest at the said rate of 3 1/2 per cent".

The Special Referee also in the last paragraph of his report on the first issue relating to the rate of interest bases his conclusions partly on an implied agreement. The point was also raised before Sarkar J. but his Lordship thought it unnecessary to go into that question, because he held up on the evidence that communication of the proposal to raise the rate of interest had been proved and the "course of dealings was relevant "only in so far as it showed an acceptance of the offer contained in the circular". In other words, according to Sarkar J. "as the issue on the question of rate of interest could be decided in favour of the

defendant upon the case of express proposal and implied acceptance, the evidence and authorities in support of a case of implied proposal and implied acceptance would not be of great help". His Lordship did not reject the case of implied agreement as a whole, upon the view that no such case had been made in the pleadings. For these reasons it must be held that the plaintiff had adequate notice of the alternative case of implied proposal and implied acceptance and that she will not be prejudiced in any way if that case be allowed to be made before this Court.

5. Turning now to the merits of the argument, Mr. Meyer has pointed out that upon the language of the cyclostyled circular, Ex. 9 as quoted above, it can hardly be said to be a proposal, as defined by S. 2(1) of the Indian Contract Act; because it does not signify to the Constituent the intention of the Bank to raise the rate of interest with a view to obtaining the Constituent's assent. It is, on the other hand, a unilateral decision to enhance the rate of interest with effect from the date of the notification. If, as the circular states, the rate of interest is to be raised "as from date", the Constituent has hardly any opportunity to accept or reject the proposal. Reference is made to the evidence of Mr. Macgregor, the Manager of the Calcutta branch of the Bank who states in answer to question No. 17, that the Bank gave fifteen days' notice of the increase in the rate of interest; but it is argued that this evidence is of no value; first, because Mr. MacGregor was not in Calcutta in 1946, when the rate of interest is said to have been increased and secondly because Mr. MacGregor made the statement without looking at the language of Ex. 9 which was not available at the time he made the statement. Pannalal Burman, one of the officers in the overdraft department of the Bank also admits in answer to questions 120 and 128 to 132 that the aforesaid statement of Mr. Macgregor was not correct.

6. All this argument is undoubtedly of great weight against the case of express proposal as sought to be made by the Bank; but it hardly touches the case of implied proposal which I shall presently consider.

7. The evidence relating to the communication of the so-called proposal to the plaintiff is also not satisfactory. The case of the Bank is that the cyclostyled notice, Ex. 9, was sent to all the Constituents of the Bank by ordinary post, without even a certificate of posting. The peon who posted the circulars on 17-10-1946, has not been examined and nobody even knows his name. The Bank has produced from its custody a register called "Change in rate of interest on overdraft accounts" in which the names of all the constituents are alphabetically arranged. This register is kept in three parts; accounts under the alphabets A to H being signed by an officer named Pandit Lajjaram Dubey; those from H to N by another officer named Babu Mahabbatlal and the rest signed by a third officer named Pannalal Burman who has been examined by the Bank. There is evidence that Lajjaram Dubey who signed the overdraft account of the plaintiff Chandmall Batia is dead; but his initials against the name of the plaintiff have been proved by Pannalal Burman. There is evidence that Babu Mahabbat Lal is

also dead. According to Pannalal Burman, the initials of Lajjaram Dubey against the name of Chandmull Batia signify two things (a) that the circular was signed by Lajjaram Dubey and (b) that the circular was sent. In his answers to questions 220 to 227 the witness repeats five times that the circular addressed to the plaintiff was signed by Lajjaram Dubey. The sample of the circular which is on the record does not, however, show that it could be signed by any other person except the Manager of the Bank. Though Pannalal Burman goes to the length of saying in answer to question No. 221 that as he used to sit at the same table with Lajjaram Dubey, he saw Lajjaram actually signing the circular addressed to Chandmull Batia, he admits in answer to question No. 225 that it was his inference from the register. Indeed, it is impossible for any man to have independent recollection of such a fact after the lapse of five years. As regards, sending of the circular to the plaintiff, both Pannalal Burman and Mr. Macgregor, the manager of the Bank state that the initials of the officers in charge of the three parts of the register against the name of each Constituent signify that a copy of the circular was sent to each constituent. Mr. Macgregor says nothing as to the manner in which the circular was sent; but Burman gives the details. He says that a bunch of circulars was handed over to Lajjaram Dubey who signed them and sent them by ordinary post without any certificate of posting through "important and reliable chaprashis of the Bank". There is no evidence as to who wrote the address and who affixed the postage stamps, and there is no evidence that the so called important and reliable chaprashis actually posted the circulars or received any bundle of circulars from Lajjaram Dubey for posting. The entry in the register under the name of the plaintiff Chandmull Batia is this : "Rate of interest is increased from Bank rate 3 per cent to 1/2 per cent O. B. R. minimum 3 1/2 per cent from 17-10-46". There is an endorsement on the left hand side of this entry to the effect "Noted" and on the right hand side there are initials of somebody. The register itself bears no endorsement that the circular was posted or that it was handed over to anybody for posting. The Bank relies upon a double presumption arising u/s 16, Illustration (a) and Section 114(f) to prove that the circular actually reached the addressee. Section 16(a) raises a presumption that a particular letter was posted if it is proved that it was put "in a certain place" from where it was the ordinary course of business for all letters to be carried to the post. It is extremely doubtful if the act of placing a bundle of circulars in the custody of an office peon is equivalent to putting it in a "certain place" within the meaning of the illustration; but assuming it to be so the presumption under the illustration cannot arise in the present case because the particular peon who was entrusted with the duty of posting the bundle of circulars could not be named by Burman. For these reasons, the gap in the evidence that the circular was actually posted cannot be filled up by the presumption under S, 16 of the Indian Evidence Act. The easiest thing for the Bank was to have posted the Circulars under certificates of posting; but no such thing was attempted.

8. The second presumption of due delivery u/s 114(f) hardly arises if, as already pointed out, there is no evidence of posting. With regard to this presumption,

however, the difficulties that stand in the way of the Bank are still greater. In the first place, the plaintiff, Chandmull Batia has pledged his oath that the circular was never delivered to him (see his answer to question No. 18} which is sufficient to rebut the presumption of due delivery by ordinary post. In the second place Burman admits that at or about the time the circular was posted, i.e., 17-10-1946, Calcutta was in the grip of communal riots and that stabbing was going on in the locality (see his answers to questions 90 to 93) from which it may be inferred that the "usual course of post was interrupted by disturbances", as is required by the explanation to illustration (f) of Section 114, Evidence Act. The case of the Bank in so far as it is based upon express proposal and express communication of that proposal to the plaintiff must accordingly fail.

9. The question, however, still remains whether there was an implied promise on the part of the plaintiff to pay interest at the rate of 3 1/2 per cent from 17-10-1946. According to Section 9 of the Indian Contract Act, if either or both the proposal and acceptance which constitute a promise is or are made in words, the promise is said to be express; but if either or both of them is or are made "otherwise than in words", the promise is implied. It is true that the notice (Ex, 9) communicating the decision of the Bank to raise the rate of interest to 3 1/2 per cent with effect from 17-10-46 cannot be said to be an express proposal within the meaning of Section 2(1) of the Indian Contract Act; but it nevertheless contains an implied proposal to the effect that if the plaintiff wanted to keep alive his overdraft account with the Bank or desired to take further advances from the Bank it could be done only on the terms contained in the notice, Ex. 9. In other words, this implied proposal invited from the plaintiff in the words of Section 8 (Indian Contract Act) a "reciprocal promise" to pay interest at the higher rate and as a consideration for that reciprocal promise the Bank offered to desist from making a demand for the immediate payment of the amount advanced and also to make further advances. If the plaintiff accepted either of these considerations with notice of the fact that the Bank had raised the rate of interest to 3 1/2 per cent from 17-10-46 there would be an implied promise on the part of the plaintiff to pay interest at that rate. It appears that the plaintiff accepted both the considerations. He kept alive his overdraft account for more than three years from 17-10-46 and thereby induced the Bank to desist from making a demand for immediate payment of the amount advanced and also took a further advance of Rs. 10,000/- on 19-3-1948, as will appear from Ex. 14. The sole question therefore is whether the plaintiff accepted these considerations with notice of the fact that the Bank had raised the rate of interest to 3 1/2 per cent. This question is particularly important because the direct evidence led by the Bank to prove the communication of the notice has been found to be unsatisfactory.

10. The Bank has produced a letter written by the Chairman, Calcutta Exchange Bank's Association to show that on 17-10-1946,

"the Association's agreed minimum rate of interest on overdrafts then current against shares was 3 1/2 per Cent per annum."

This letter is Ex. 21. It proves that on 17-10-46 the minimum rate of interest of all Exchange Banks on overdraft accounts was 3 1/2 per cent per annum. Although the respondent Bank is not an Exchange Bank it is affiliated to the Chartered Bank of India, Australia and China, which is an Exchange Bank. The respondent Bank was accordingly required to conform to the minimum rate of interest stipulated by the Calcutta Exchange Bank Association. (See the evidence of Pannalal Burman in answer to question 83 to 86). The plaintiff in his evidence admits that he has been dealing in shares for the last fifty years, that he also used to carry on business in jute and tea and that he had overdraft arrangements with several Exchange Banks, viz., Chartered Bank, Mercantile Bank, Eastern Bank and Hongkong Shanghai Bank, (See plaintiff's answers to questions Nos. 60 to 69). It is, therefore, impossible to believe that the plaintiff did not know that the respondent Bank which was affiliated to an Exchange Bank, had also raised its interest to 3 1/2 per cent from 17-10-1946. The respondent Bank has also produced the plaintiff's Pass Book showing the plaintiff's account from December, 1942 to February 1950 -- Ex. 14. The entries in these Pass Books show that different sums used to be debited against the plaintiff's account from month to month as interest due on his overdraft account the rate of interest charged by the Bank is not specified in this Pass Book but the plaintiff's witness Anath Bandhu Bagchi admits that the plaintiff's books of account used to be periodically audited once and sometimes twice a year and the auditors did not raise any objection on the ground that the Bank had improperly raised the rate of interest (See Question? 82 to 86). The plaintiff also admits that he did not object to the Bank having raised the rate of interest to 3 1/2 per cent per annum when his officer Anath Bandhu Bagchi came to know about it sometime in 1949 (See questions 143 to 151). After the enhancement of the rate of interest in October, 1946 three confirmation slips were sent to the plaintiff by the Bank and were signed by him without raising any objection. The plaintiff, of course, states that he signed those confirmation slips without examining the accounts; but this explanation of the plaintiff cannot be accepted in the face of the evidence of Anath Bandhu Bagchi to the effect that the plaintiff's accounts used to be audited once or twice a year. Moreover it appears that the confirmation slips were sent by the Bank on 31-3-1948, 30-9-1948 and 31-3-1949 at a time when the Bank was pressing the plaintiff for payment in order to restore the margin and was threatening to sell off the shares to liquidate the debt. It is hardly possible that a business man like the plaintiff would in these circumstances blindly sign the confirmation slips without examining the accounts. Reference may in this connection be made to the letter Ex. 5 dated 2-3-1949 by which the Bank was intimating to the plaintiff that it had instructed its broker to sell the shares mentioned therein. It appears that on receipt of this letter the plaintiff made certain arrangements with the Bank as a result of which the letter was cancelled but the point is --could the plaintiff as an experienced businessman have signed the confirmation slip dated 31-3-1949 without examining the accounts even after getting the letter Ex. 5? The answer must be in the negative. The threat to sell off the shares pledged with the Bank in the

event of the plaintiff's failure to restore the margin began as early as 3-1-1949 (Ex. 7 (iii)) and it is idle to contend that even after receiving those letters the plaintiff went on signing the confirmation slips without examining the accounts. From all these circumstances the only conclusion that can be drawn is that the plaintiff induced the Bank to desist from making a demand for the immediate payment of the amounts advanced and also took a further advance of Rs 10,000/- on 19-3-1948 with full notice of the fact that the Bank had raised its rate of interest to 3 1/2 per cent from 17-10-1946 and consequently there was an implied promise on his part to pay interest at that rate from 17-10-1946.

11. In aid of the proposition that the circumstances proved in this case justify an inference of implied promise to pay interest at the higher rate. Mr. De, relied upon the decisions in the cases of AIR 1920 61 (Privy Council) (A); Batakrishna Pramanik Vs. Bhawanipur Banking Corporation Ltd., ; Gaddar Mal Vs. Tata Industrial Bank, Ltd., and Bruce v. Hunter (1813) 3 Camp 467 (D). The decision of the Judicial Committee in Haridas Ranchordas (A) is a strong case in support of implied agreement. There the only question was whether the Bank was entitled to charge compound interest with monthly rests though the written contract between the parties provided only for yearly interest on the daily balance in respect of the overdraft. The Bank disclosed the pass books which showed that at the end of every month interest was added to the amount then due and

"the resultant balance which included the interest was carried forward to the debit of the customer as the balance due on the first of the following month".

The customer did not raise any objection to this principle of charging interest. From these facts Sir John Edge, following the principle laid down in (1813) 3 Camp. 467 (D) observed at page 23 (of Ind App): (at p. 63 of AIR)

"the fact that the defendant had not objected to a charge of compound interest in accounts which for several years he had annually received from the plaintiff afforded sufficient evidence of a promise by him to pay interest in that manner."

The same principle was also laid down by Mukerji and Guha JJ. in the case of Batakrishna Pramanik Vs. Bhawanipur Banking Corporation Ltd., where also the question was whether the Bank was entitled to charge compound interest and the only evidence adduced by the Bank was entries in the Pass Book which would show that compound interest with monthly rests was being charged without any objection by the customer. Their Lordships held

"from continued and persistent acquiescence of this character the existence of an agreement may be presumed "

The facts of the case of Gaddar Mal Vs. Tata Industrial Bank, Ltd., are very similar to the facts of the present case. There the question was whether the Bank was entitled to realise interest at the rate of Rs. 8 1/2 per cent which was originally agreed upon or at the rate of 10 per cent to which it was subsequently

raised. The Bank Intimated its intention to raise the interest to Rs. 10 per cent with effect from 21-4-1922 to which the customer, who was the plaintiff made no reply and the question that arose for the consideration of the Court was whether in the circumstances of the case there was an implied agreement on the part of the plaintiff to pay interest at the higher rate. In that case, as in this, the notice was an intimation to raise the rate of interest with effect from the date of the notice, and so their Lordships Ashworth and Iqbal Ahmed JJ. held that the sending of the notice was not sufficient by itself to render the customer liable to pay interest at the higher rate; but nevertheless their Lordships held that since the customer had taken further advances from the Bank even after the receipt of the Notice there was an implied agreement to pay the higher rate of interest. This conclusion was based upon a consideration of Sections 7, 8 and 9 of the Indian Contract Act relating to implied agreement. We respectfully agree with the principles laid down in that case and hold that upon those principles an implied promise may also be inferred in the case before us.

12. Learned counsel for the respondent has also argued that under the terms of the order of reference the plaintiff is not entitled to raise the point that the rate of interest should be calculated at 3 per cent instead of 3 1/2 per cent. Reliance has been placed upon the following extract of the order of reference to the Special Referee :

"And it is further ordered and decreed with the like consent that in taking the said accounts and in making the said enquiry the said Special Referee is to proceed on the basis of and shall not disturb (1) any settled account or (2) any account examined and accepted as correct by conduct or otherwise....."

13. It is argued that since the plaintiff signed the last confirmation slip on 31-3-1949 he had no right to claim that the rate of interest prior to 31-3-1949 was less than 3 1/2 per cent. There is no substance in this contention of the respondent. The order of reference does not give the respondent an independent right to resist the plaintiffs claim that interest should be calculated at the rate of 3 per cent. All that it says is that the plaintiff shall not be entitled to travel beyond any settled account or an account which has been examined and accepted as correct which necessarily postulates an investigation into the question whether the plaintiff examined the accounts submitted by the Bank and accepted them as correct. Before the Special Referee the defendant agreed to the framing of an issue as to what was the rate of interest agreed upon between the parties whether 3 per cent or 3 1/2 per cent, without any reservation. It is therefore not open to the respondent to argue that the appellant is not entitled to challenge the rate of interest prior to 31-3-1949 in view of the terms of the order of reference. It is true that upon a consideration of the evidence and circumstances of the case I have held that there was an implied promise on the part of the plaintiff to pay interest at the rate of 3 1/2 per cent and that he signed the confirmation slips with full knowledge of the fact the rate of interest had been raised by the Bank to 3 1/2 per cent, but if my conclusion on the

evidence had been otherwise the respondent would not have been entitled to set up the terms of the order of reference in support of the plea that those terms by themselves rendered the appellant liable to pay interest at the rate of 3 1/2 per cent. The first point argued in support of the appeal accordingly fails.

13. The second question raised by the appellant relates to the validity of the sales of the pledged shares by the Bank. In the trial Court the validity of the sales was challenged on two grounds, namely. (a) that on the dates the sales were held the Bank had no right under the instrument of hypothecation to sell the shares and (b) that the sales had been held without giving proper notice to the plaintiff. Before us Mr. Meyer has confined his attack only to the second ground. It appears that from the month of August, 1948, the Bank was complaining that the margin of securities pledged by the plaintiff had fallen below the stipulated level of 40 per cent and repeatedly requested the plaintiff to restore the margin failing which "we reserve to ourselves the right to sell off your securities to such an extent as will restore the margin to 40 per cent in terms of the letter of hypothecation signed by you." (Ex. 7 (iii)). It is contended on behalf of the appellant that such a notice does not comply with the requirements of S, 176, Indian Contract Act because it is merely a reiteration of the rights which the pledgee has under the law and under the instrument of hypothecation and is not "a reasonable notice of the sale" which is required to be given by Section 176. Relying upon the provisions of Section 177 it is argued that the notice contemplated by Section 176 must be such as to give the pawner an opportunity to redeem the goods pledged "at any subsequent time before the actual sale of them". Therefore, according to the appellant, the notice must specify the actual date, time and place of the intended sale so as to enable the appellant to redeem the shares before the sale is actually held. In support of this proposition reliance is placed upon the case of Co-operative Hindusthan Bank Ltd. and Another Vs. Surendra Nath Dey and Others, . The language of Sections 176 and 177 of the Indian Contract Act seems to suggest that those two sections apply in terms only to cases where a time is stipulated in the agreement of hypothecation for the payment of the debt or the performance of the promise But even in the case of a loan for an indefinite period it is necessary to put an end to the debtor's credit by requiring him to repay the loan within a particular date before the pawner can exercise the right of sale, as the debtor cannot be said to be in default unless he fails to repay the loan within that date. In such a case therefore the debtor is in the same position as if a date for the payment of the loan had been fixed in the original agreement of hypothecation. Consequently, Sections 176 and 177 of the Indian Contract Act apply equally to cases where a time for the payment of the debt has been fixed in the original agreement of hypothecation and to cases where no such time is stipulated.

14. Mr. De has sought to distinguish the case of Co-operative Hindusthan Bank (E) cited by the appellant on the ground that in that case the sale was for the realisation of the entire debt to which. Sections 176 and 177 would apply whereas in the present case the sale was only for the restoration of the

stipulated margin of 40 per cent where Sections 176 and 177 would have no application, This argument, however, is without any substance, because the agreement to keep the margin at the stipulated level is a "promise"" in respect of which the goods were pledged" within the meaning of Section 176 and "performance of the promise for which the pledge is made" within the meaning of Section 177,

15. The decision in the case of the Co-operative Hindusthan Bank (E) is an authority for the proposition that the provisions of Section 176, Indian Contract Act, relating to a "reasonable notice of the sale" are mandatory and supersede any contract to the contrary. In that case, as in the case before us, there is a stipulation in the original agreement of hypothecation authorising the pawnee to sell the pledged goods without any notice to the pawner. That agreement was held to be invalid by Mukerji and Cuba JJ. in the reported case and for the reasons given in that judgment I hold that that agreement is invalid in the present case as well. I have therefore no hesitation in rejecting Mr. De's contention that the pledgee had a right to sell the pledged securities without any notice to the plaintiff.

16. Mr. Meyer also contended that even if Sections 176 and 177, Indian Contract Act do not apply in terms to the present case, the parties would Be governed by the rules of English Common Law as embodying rules of justice, equity and good conscience and that those rules are thus summarised in Halsbury's Laws of England -- (2nd Edition) Vol. 25, P. 14, Article 34 :

"If there be no stipulated time for payment, the pawnee may demand payment and in default thereof may sell upon notice to the pawner of his intention to do so, the pawner retaining his right to redeem at any moment up to sale"

As I have held that Section 176 applies to the present case, I need not pursue the matter further.

17. The next question is whether the notices that were given by the Bank to the appellant can be said to be reasonable notices of the intended sale or of the intention to sell. The evidence of Mr. Macgregor, Manager of the Bank, makes it quite clear that the notices by which the Bank "reserved to itself the right to sell off the securities" were not intended as notices to sell the shares (See Questions 612, 613 and 614) because he expressly admits in his answers to these questions that by reserving the right to sell, the Bank never intends to sell. Sarkar, J. however, has relied upon the letter dated 12-5-1949 for his conclusion that the Bank had given a reasonable notice of its intention to sell by that letter. That letter runs as follows :

"We regret to observe that in spite of our repeated requests you have not found it convenient to call at the Bank to see us nor have you taken any steps to restore the requisite margin on your account. Your account is daily deteriorating and we shall therefore arrange to effect sale of your securities as and when opportunity offers in terms of our letters Nos. Secy/OD/23859 of 9-2-49 and

31593 of 10th March last."

18. Mr. Meyer contends that this notice is bad, because it does not give any intimation of the date, time and place of the intended sale and is not a notice of the sale. Reliance is again placed upon the case of Co-operative Hindusthan Bank Ltd. and Another Vs. Surendra Nath Dey and Others, . In the case of Co-operative Hindusthan Bank Ltd. (E), a notice expressed in the following terms -- "Failing which we shall arrange for the sale of the hypothecated stock", -- was held to be bad because it was merely "an intimation that arrangements will be made for a sale and not a notice of the sale that is to be held". The language of the notice in the present case, however, is different from the language of the notice in the reported case. Here the Bank was telling the appellant that it would "arrange to effect sale of the securities as and when opportunity offers", which amounts to a notice of the intention to sell. The objection that the notice is bad, because it does not state the date, time and place of the sale is also untenable. As has been rightly pointed out by Sarkar, J. having regard to the nature of the securities hypothecated by the appellant, it was impossible for the Bank to mention the exact date and time of the sale. There can be no question that the price of tea shares which constituted the subject-matter of sale varies from day to day and the Bank had every right to sell them at the best available price of which no previous notice could be given. The Bank accordingly was within its rights in telling the appellant that it would sell the shares "as and when opportunity offers" which means as and when market conditions are most favourable. The law does not require that the pawnee should arrange for the sale beforehand and then give the pawner a notice of the date, time and place of that sale. All that is necessary is that a notice should be given of the pawnee's intention to sell in default of payment by the pawner within a specified date. This was the view taken by the Allahabad High Court in the case of Kunj Behari Lal v. The Bhargava Commercial Bank ILR All 522: (AIR 1918 All 363 (2)) (F). Mr. Meyer, however, pressed us to dissent from this view by relying upon the language of Section 176. According to him the use of the article "the" in the expression "reasonable notice of the sale" indicates that notice must be given of the sale that will be actually held; or in other words the pawnee must first arrange for a sale and then give a reasonable notice thereof. I cannot, however, accept this argument as correct. "The sale" in Section 176 means the intended sale and not the sale that has been actually arranged by the pawnee. If the pawnee is required to give notice to the pawner after entering into a binding agreement for the sale of the pledged goods, he will be liable for damages for breach of that agreement to the intending buyer in case the pawner chooses to redeem the pledged goods before the actual sale, u/s 177. For these reasons I agree with the view taken by the Allahabad High Court in Kunj Behari Lal's case (F) and hold that the reasonable notice of the sale does not require specification of the date, time and place of the sale. The decision in the case of Co-operative Hindusthan Bank Ltd. and Another Vs. Surendra Nath Dey and Others, does not lay down any contrary proposition but merely says that the contents of the notice

required to be given u/s 176 depend upon the facts of each case. I, accordingly, hold that the notice dated 12-5-49 read with the notices dated 9-2-49 and 10-3-49 to which it refers is a good notice u/s 176, Indian Contract Act.

19. The notice dated 12-5-1949 does not however call upon the debtor to repay his debt within a particular date, but incorporates the provisions of the earlier notices dated 9-2-49 and 10-3-49 by express reference. The notice dated 10-3-49 has not been printed in the paper book but a type-written copy was supplied to us at the hearing. It appears from the said notice dated 9-2-49 (Ex. 7 (V)) and 10-3-49 that by those notices the debtor was required to restore the margin to the stipulated level of 40 per cent "within a week from the date hereof. That period of seven days was also allowed by the still earlier notices dated 18-1-49, and 3-1-49. It is, therefore, reasonable to infer that by the notice dated 12-5-49, the Bank required the plaintiff to restore the margin within a week from that date; that is to say, the plaintiff was given time till 19-5-49 to restore the margin, failing which he would be deemed to be in default. It appears, however, from the broker's letters to the Bank, Ex. 7 (xi), Ex. 7 (x) and Ex. 7 (vi)d that several shares pledged by the plaintiff were sold on 15-5-49; 17-5-49 and 19-5-49. These three sales were in my opinion illegal, because they were premature. Even upon the notice dated 12-5-49 the Bank had no right to sell any of the plaintiffs share before 20-5-49. Thereafter the broker acting on behalf of the Bank sold the plaintiff's shares on divers dates in 1949 beginning with 20-5-1949 and ending with 5-8-1949. (See Exs. 7 (vii), 7 (ix) and 7 (viii)).

20. After 5-8-1949, the Bank did not sell any share for about nine months and the next series of sales started shortly before 13-5-1950. No fresh notice was given to the plaintiff before these sales and the Bank purported to act on the notice dated 12-5-1949. The question that has to be determined is whether the Bank was within its rights in proceeding with, the sales after a year of the notice without giving any fresh intimation to the plaintiff.

21. It appears that on getting information of the last sale in 1949 which was held on 5-8-49 the plaintiff lodged a protest with the Bank by a letter dated 9-8-49 and requested the Bank not to sell any more of his shares with a promise to clear his account on hearing from the Bank (Ex. 4 (v)). On 11-8-49 the plaintiff wanted to know on what terms the Bank would be willing to release certain Tea and Timber shares (Ex. 4 (vi)). In reply to both these letters, the Bank informed the plaintiff on 11-8-49, that it would release the Tea and Timber shares on payment of Rs. 67,000/- and ended by saying; "It is possible if you called to have an interview with us, an arrangement suitable to both will be made" (Ex. 4 (vii)). By Ex. 4 (viii) the plaintiff informed the Bank on 22-8-1949 that it was arranged at the interview proposed by the Bank that the plaintiff would deposit further securities of the value of Rs. 40,000/- and would make monthly payments of Rs. 5,000/- in consideration of which the Bank would desist from further sales and would also hand over Barduar Tea Shares.

22. The plaintiff has also disclosed a receipt granted by the Bank on 22-8-49,

showing the deposit of a large number of shares by plaintiff on that date (Ex. 4 (ix)). There is also another receipt granted by the Bank, on 20-2-1950 which shows that the plaintiff deposited further securities in the Bank. Ex. 4 (xiv)). The list of shares sold by the Bank and disclosed by the Bank as annexure D to its "State of Facts" before the Special Referee shows that on 23-2-50, 30-3-50, and 9-5-50 the Bank delivered to the plaintiff's agent a large number of shares against payment. As a result of all these transactions and arrangements there was certainly a considerable alteration as to the extent of the plaintiffs liability to the Bank and it was the duty of the Bank to give a fresh notice u/s 176, Indian Contract Act before proceeding to hold the sales in May, 1950. It also seems to me that the notice dated 12-5-49 spent its force as soon as the Bank by its letter dated 11-8-49 (Ex, 4 (vii)) invited the plaintiff to an interview with a view to "making an arrangement suitable to both". That some arrangement was arrived at between the parties is evident from the fact that the Bank did not sell any of the plaintiff's shares after 5-8-49 and before 12-5-50. The Bank was under a legal obligation to put an end to that arrangement by a fresh notice u/s 176, Indian Contract Act before proceeding to hold the next series of sales in 1950. All the sales held in 1950 are therefore vitiated by the omission of the Bank to serve a fresh notice u/s 176.

23. I shall now proceed to deal with the sales) held in 1951. On 12-5-50 the plaintiff instituted the present suit and on 14-6-50 obtained an order of injunction restraining the Bank upon certain terms, from selling the plaintiff's shares. That order of injunction was in force upto 20-2-51. On that date the suit appeared on the peremptory list before Sarkar, J. and was dismissed for default and with the dismissal of the suit the order of injunction also stood dissolved. Immediately thereafter, the plaintiffs attorney addressed a letter to the defendant on that very day informing it of the plaintiff's intention to file an application for the restoration of the suit and requesting the defendant "not to sell any of the shares pledged with you" as the plaintiff intended to pay off the amount due to the defendant and redeem the shares. This letter ended with a request to communicate to the plaintiff's attorney the amount due to the defendant "in the course or today" to enable the plaintiff to pay the same. (See Ex. 12).

24. The defendant's manager, Mr. Mac Gregor states in his evidence that he received intimation of the dismissal of the suit at about half past eleven by a telephonic message from the defendant's solicitor and then got a confirmation and immediately thereafter sold a large number of shares pledged by the plaintiff in nine lots, before 3 P.M. when the share market closes. He admits receipt of the letter sent by the plaintiff's attorney on that date but says that he had probably issued the "sale cards" before that though he is not at all sure of that. (Questions 667 to 686). I am not at all convinced that the defendant had issued "Sale cards" before the receipt of the letter of the plaintiff's attorney. What is more probable is that the defendant was racing with time to sell as many of the plaintiff's shares as could be sold during the short interval the injunction stood dissolved. It

appears that the plaintiff applied for restoration of the suit and also the order of injunction on the following day, i.e. 21-2-51 and the suit and the order of injunction were restored on 22-2-51 upon the plaintiff depositing with the defendant's attorney a sum of Rs. 30,000/-.

25. What happened on 21-2-51 is very interesting. According to the plaintiff he sent a cheque for Rs. 60,642/12/- to the defendant on that date "pursuant to the directions given by Sarkar, J." As the defendant refused to accept a cheque from the plaintiff the plaintiff's man tendered the amount in cash a little later with a request to deliver all the shares held by the defendant. The defendant kept the plaintiff's money and the plaintiff's man waiting till 4 P.M. when it returned the money on the ground that it could not deliver the shares over which the defendant had a lien for the claim due to the defendant from Messrs. Jaipur Investment Ltd (See Exs. 12 (ii) and 12 (iii)) Mr. MacGregor admits that the debit balance against the personal account of the plaintiff on 21-2-51 was Rs. 60,646-12-0 and that is why the plaintiff tendered that amount to the Bank on that date (See Questions 722 to 727); but he goes on to say that he could not part with the shares as he had a lien for a sum of Rs. 65,000/- due on the overdraft account of Jaipur Investment Ltd. The incidents that took place on 21-2-51 have no direct bearing on the validity of the sale held on 20-2-51 but they show what the plaintiff could have done if he had got a notice of the sale held on 20-2-51.

26. The plaintiff apparently did not know on 21-2-51 that a large number of shares belonging to him had been sold on the previous day. That is why he addressed a letter to the defendant on 21-2-54 requesting it to return the shares enumerated in the list including all the shares sold on the previous day against payment of Rs. 60,646/12/- in cash (Ex. 12 (iv)). The defendant also informed the plaintiff by two letters dated 20-2-51 and 21-2-51 (Exs. 13 and 13 (ii)) that it had sold many of the plaintiff's shares on 20-2-51 for a total sum of Rs. 42,711/5/- but it is not clear when these letters reached the plaintiff. Presumably the plaintiff did not get them before he wrote Ex. 12 (iv).

27. In the back ground of all these facts I shall have to consider whether the sale held on 20-2-51 was legal and proper and I have no hesitation in answering this question in the negative. Mr. Macgregor admits that he did not give any fresh notice to the plaintiff before the sale held on 20-2-51, because he had no time and also because the Court "told us so" (Q. 800 to 802). It is truly difficult to understand why he says that the Court directed the Bank to sell the shares on 20-2-51 without any notice. If he means that the dismissal of the suit for default on 20-2-51 resulting in the discharge of the order of injunction is equivalent to an order made by the Court authorising the defendant to sell the shares without notice, he is entirely mistaken. The discharge of the order of injunction meant nothing more than this that the parties were free to take any action they liked entirely at their peril. It did not confer any authority to any of the parties to act in a particular manner. If the Bank did not serve any fresh notice before the sale

held on 20-2-51, it must be taken to have proceeded on the strength of the notice dated 12-5-49. That notice, as I have already said, is not sufficient in law to justify the sales held in 1950 and it is still more insufficient to justify the sale held in 1951.

28. The second reason why I hold the sale dated 20-2-51 to be invalid is that many of the shares sold on that date were pledged by the plaintiff long after 12-5-49 and consequently they cannot be covered by that notice. For example 100 Barmahjan Tea shares sold on 20-2-51 (Ex. 13 (ii)) were pledged on 22-8-49 as per receipt (Ex. 4 (ix)); 100 Hashinara Tea shares sold on 20-2-51 were also pledged on 22-8-49 as per receipt (Ex. 4 (iv)); out of 800 Telojian Tea shares sold on 20-2-51 (Exs. 13 and 13 (ii)) 600 were pledged before 1-4-49 (Annexure B to the State of Facts before Special Referee), but 200 were pledged on 22-8-49 (Ex. 4 (xiv)).

29. The third reason which vitiates the sale held on 20-2-51 is the indecent haste with which the defendant rushed to the Share market on that date and sold off 2,531 shares belonging to the plaintiff in nine lots within three hours for a total sum of Rs. 42,711/5/- without giving intimation to the plaintiff, without caring to ascertain whether the prices likely to be fetched were the best available prices and without paying any heed to the letter written by the plaintiff's attorney written on that date offering to redeem the shares if the defendant gave notice of its dues. Apart from the fact that this conduct is wholly unworthy of a respectable Bank like the defendant it illustrates how a power of private sale is liable to be gravely abused to the serious prejudice of the pledger. The incidents which took place on the following day show that the plaintiff could have easily redeemed all the shares sold on 20-2-1951, if only He had been given one day's notice. For all these reasons I hold that the sale held on 20-2-51 is illegal and improper.

30. In the result, this appeal is allowed in part. The order of Sarkar, J. that the plaintiff is liable to pay interest at the rate of 3 1/2 per cent is affirmed; but his order relating to the validity of the sales is modified in the following manner: (a) all the sales held by the Bank prior to 20-5-1949 are declared invalid; (b) all the sales held in 1949 on and after 20-5-1949 are confirmed; (c) all the sales held in 1950 are declared invalid and (d) the sale held on 20-2-1951 is also declared invalid.

31. As the success is divided the parties will bear their own costs before the Special Referee and the Court below; but the the appellant will be entitled to half the costs of the paper book and the hearing fee in the appeal. Certified for two Counsel.

P. Chakravartti, C.J.

32. I agree.