
(1981) 07 CAL CK 0042
In the Calcutta High Court
Case No : Suit No. 1520 of 1966

Krishna Kishore Kar

APPELLANT

Vs

United Commercial Bank and Another

RESPONDENT

Date of Decision : 08-07-1981

Acts Referred:

Contract Act, 1872 — Section 171

Citation : AIR 1982 Cal 62

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : R.C. Deb and Rajat Ghosh, for the Appellant; Bachawat, Sujit Sinha, (for No. 1) and Brotin Ghosh, (for No. 2), for the Respondent

Judgement

Pratibha Bonnerjea, J.—This is a suit for recovery of Rs. 2,26,858.26 instituted by the plaintiff against the defendants on account of the following facts:

It is alleged in the plaint that the plaintiff, in his business of Isis Coal Company, had opened a cash credit account with the defendant bank. In his said business, the plaintiff had dealings and transactions with Durgapur Project Limited, the defendant No. 2 herein, On 2-8-62, the defendant No. 1 at the request of the plaintiff, executed a bond for Rs. 2,00,000/- in favour of the defendant No. 2 guaranteeing payment for coal supplied and to be supplied to the plaintiff by the defendant No. 2. As against this bond, the plaintiff, on 2-8-1962, executed a counter guarantee in favour of the defendant No. 1 on certain terms and conditions contained therein. The period of guarantee was from 2-8-1962 to 1-8-1963 (Ext. A pages 6 and 7). In respect of the Bank guarantee the defendant No. 2 had demanded margin money from the plaintiff to cover the said guarantee and pursuant to the same the plaintiff from time to time paid an aggregate sum of Rs. 1,83,500/- which was admitted by the defendant bank by letter dated 4-5-1963 (Ext. A page 27).

2. The plaintiff alleged that the guarantee period in favour of the defendant No. 2 had expired and he had paid in full the entire dues of the defendant No. 2 and

had demanded refund of the margin money of Rs. 1,83,500/- from the defendant Bank but it failed and neglected to refund the same. The bank is holding the said sum by way of Trust or money had and received and is bound to refund the same with interest. Hence this suit,

3. The defendant bank filed its written statement disputing that plaintiff had paid the defendant No. 2 in full on account of the fact that the bond was not returned by the defendant No. 2 duly discharged. According to the defendant Bank a sum of Rs. 19,787.32 p. was due to the Bank by the plaintiff in the cash credit account and the bank is entitled to recover the same. It was further alleged that on 27-11-1962, the Bank at the request of the plaintiff, had executed another guarantee bond for Rs. 1,00,000/- in favour of the President of India guaranteeing payment for plaintiff's transactions with the Eastern Railway. AS against this guarantee, the plaintiff also executed a counter guarantee in favour of the bank. In terms of these two bonds, the bank was unconditionally authorised to pay to the President of India and/or the Eastern Railway on demand without any reference to the plaintiff. It was also agreed that the plaintiff would reimburse the Bank on demand and in default Bank was to recover the same from the accounts or securities held or to be held by the Bank (Ext. A pages 14 and 17). The defendant bank alleged that it had paid Rs. 56,740/- to the Eastern Railway on their demand and as such became entitled to recover the same from the plaintiff. The sum of Rs. 19,787.32 and Rs. 56,740/- aggregating to Rs. 76,527.32 were adjusted by the bank against the sum of rupees 1,83,500/- in exercise of its lien and/or general lien. Alternatively, the defendant bank was entitled to appropriate and set off its said claims against Rs. 1,83,500/- and had already appropriated the said sum of Rs. 76,527.32 against the said sum of Rs. 1,83,500/-. The plaintiff was not entitled to refund as the defendant No. 2 did not return the guarantee bond duly discharged. The allegations of trust or money had and received as alleged in the plaint were all denied specifically.

4. The defendant No. 2 filed its written statement admitting that nothing was due to it from the plaintiff for the period covered by the guarantee dated 2-8-1962.

4A. The following issues were raised at the trial :--

1(a). Did the plaintiff duly pay to the defendant No. 2 all amounts in respect of the transactions for the period covered by the Guarantee dated 2-8-1962, as alleged in para 9 of the plaint?

(b) Did the defendant No. 2 fail and neglect to return or discharge the said Guarantee, as alleged in para 10 of the plaint?

2. Is the defendant No. 1 liable to pay to the defendant No. 2 the sum of Rs. 2,06,272.90 p. in terms of its letter dated 29-4-1963 out of Rs. 1,83,500/- held by the defendant No. 1 under the Guarantee dated 2-8-62?

3. Is the defendant No. 1 entitled to recover Rs. 56,740/- out of the aforesaid

sum of Rs. 1,83,500/- in terms of the letter dated 27-11-62 written by the plaintiff, as alleged in paras 13 and 15 of the written statement of the defendant No. 1?

4. Is the defendant No. 1 entitled to exercise a lien in respect of its alleged claims of Rs. 76,527.32 against the said sum of Rs. 1,83,500/-, as alleged in para 16 of the written statement of the defendant No. 1?

5. Is the defendant No. 1 entitled to appropriate and/or set off a sum of Rs. 76,527.32 p.. as pleaded in para 16 of their written statement?

6. Is the claim of the defendant No. 1 for set off and/or counter-claim and/or adjustment barred by limitation, as stated in the Additional Written Statement of the plaintiff?

7. To what relief, if any, is the plaintiff entitled?

5. During hearing, it was admitted by the defendant No. 2 that the guarantee bond dated 2-8-1962 was not returned. In view of the admission of the defendant No. 2 in its written statement that there was no claim against the plaintiff for the guarantee period, I directed the defendant No. 2 to produce the bond in Court. This order was complied with and the bond is kept in the records of this proceeding. The defendant No. 2 did not contest the suit but watched the proceeding. The plaintiff examined himself and the defendant No. 1 examined four witnesses.

6. The execution of the aforesaid two guarantee bonds in connection with the plaintiff's transactions with the Eastern Railway are admitted facts. The deposit of Rs. 1,83,500/- by the plaintiff byway of margin money against the bank's guarantee in favour of the defendant No. 2 is also admitted by the parties to the suit. It appears from the evidence that on 29-4-1963, the defendant No. 2 made a demand on the defendant bank for Rs. 2.06,272.90 p. under the guarantee dated 2-8-1962, but the plaintiff had disputed this alleged claim. As a result the plaintiff had instituted a suit against the present defendants on 16-5-1963 being suit No. 875 of 1963 for restraining the bank from paying the said sum out of the margin money under the guarantee dated 2-8-1962. The plaintiff, thereafter took out an application in the said suit for injunction and on that application on 1-7-1963 an order was passed after hearing the parties to the said suit and in their presence, that "the United Commercial Bank shall not pay to any of the parties to the suit any amount lying with the Bank without leaving a sum of Rs. 90,000/- with the Bank" (Ext. C). The order therefore, limited the amount of margin money to the extent of Rs. 90,000/- only and the balance of Rs. 93,500/- out of Rs. 1,83,500/- became free for payment to the parties. None of the parties to the said suit took any step against the order dated 1-7-63 and the order became final and binding. Mr. Deb, the counsel for the plaintiff, however, submitted that this balance Rs. 93,500/- in the hands of the Bank retained its character as the margin money in spite of order dated 1-7-63. In support he cited (1930) 2 Ch. 293 where on the facts of that case it was held:--

"That the deposit being money handed over to the insuring company for a specific purpose, the balance remaining after satisfying the specific purpose continued to be excluded from the course of account between the parties and could not be subject of set off."

7. But the facts of the present case are entirely different. In this case, not only the Court made the balance sum of Rs. 93,500/- free for payment to the parties, but the parties themselves construed the order of 1-7-63 to be so. The plaintiff himself demanded this balance amount from the Bank by his letter dated 7-9-63 and sent another reminder on 3-10-63 on the basis that Rs. 93,500/- became free for refund. The plaintiff maintained this stand during hearing of the suit while suggesting his case in cross examination of the Bank's manager Mr. N.K. Bhattacharjee:--

Q. 143 "I suggest to you that the Court order of 1st July 1963 modified the arrangement between the Bank and the plaintiff in regard to the guarantee to Durgapur Project."

Q. 145 "I suggest to you that in terms of the order dated 1st July 1963 the Bank was given liberty to return Rs. 93,500/- being the balance of rupees 1,83,500/- to the plaintiff."

7A. In the premises aforesaid, the plaintiff should not be allowed to say that Rs. 93,500/- had retained its character as margin money even after passing of the order dated 1-7-1963. The submission of Mr. Deb that Rs. 93,500/- was part of the margin money being contrary to the stand taken by the plaintiff himself, cannot be accepted. The Bank, however, did not return the money and alleged that it had claim against the plaintiff to the extent of Rs. 34,523.63 in the cash credit account maintained with the New Market Branch.

8. The plaintiff also had transactions with the Eastern Railway on "weight only" system under an agreement dated 19-11-61. According to the terms of the agreement of "weight only" system, the plaintiff was to pay to the Railway its provisional bills for freight in full regardless whether the plaintiff had received the full quantity of coal or not and irrespective of the fact whether the bills contained any error or overcharge. If there was any shortfall in delivery or if there was any error or overcharge in the bills, the plaintiff was to notify the Eastern Railway about the same which would be subject to correction at the time of adjustment of the accounts between the parties in due course. The period of transaction was from 23-11-1961 to 22-11-1962. The plaintiff was to deposit Rs. 1,00,000/- by way of security. The Railway exempted the plaintiff from furnishing this security and in lieu thereof, on 21-11-1962, the plaintiff executed a bond (hereinafter referred to as the principal bond) in favour of the President of India for continuing to have transactions on "weight only" system on terms and conditions contained therein and the period was extended from 23-11-1962 to 22-11-1963 (Ext. A pages 14-15). The plaintiff was described therein as the privilege holder. This bond was accepted by the President of India. The Bank guarantee dated

27-11-1962 given by the Bank in favour of the President of India was to remain in force for the period of this principal bond. On 3-1-1964, the Eastern Railway made a demand on the defendant Bank for Rs. 57,314.70 in enforcement of the Bank guarantee dated 27-11-1962. Prior to that the Railway had demanded the said sum from the plaintiff himself by its letter dated 5-11-1963 and had threatened the plaintiff that if the said sum of Rs. 57,314/- would remain unpaid, the Railway would enforce the Bank guarantee.

9. The claims of the Railway were on the basis of the four freight bills set out below :--

Bill Nos. Date Amount

1. 1/20 10-4-1963 Rs. 22,566.25
2. 1/70 20-4-1963 Rs. 6,843.35
3. 1/23 30-3-1963 Rs. 25,028.90
4. 1/21 10-5-1963 Rs. 2,876.20

Rs. 57,314.70

(Ext. A page 88)

10. On 10-1-1964, the defendant Bank informed the plaintiff about the said demand and further intimated that the Bank was going to pay the said sum (Ext. A page 47). By letter dated 31-1-1964, the plaintiff asked the Bank not to pay on the allegation that nothing was due to the Eastern Railway. On the same day viz. 31-1-1964, the defendant Bank, by a letter informed the plaintiff that the Eastern Railway had already been paid and the Bank had appropriated and adjusted the said sum against Rs. 93,500/- by virtue of order dated 1-7-1963 passed in suit No. 875 of 1963 (Ext. A page 51), This letter was actually posted on 5-2-1964 and received by the plaintiff on 6-2-1964. The plaintiff alleged that the Bank had ante dated this letter to circum-vent the plaintiff's instruction contained in his letter dated 31-1-1964 prohibiting the Bank from making payment, The plaintiff also made this allegation in its letter 20-2-1964 but the Bank did not reply. Is there any substance in this allegation ? No motive has been imputed in the plaint. In his testimony, the plaintiff alleged that the defendant Bank did so in collusion with the Railway, This new story set up at the stage of evidence is liable to be rejected as there was no proper pleading of collusion in the plaint nor any issue had been raised thereon. Moreover, the question of Bank's ante dating the letter for circumventing plaintiff's instruction will only arise, if Bank was under any obligation to comply with plaintiff's instruction contained in his letter of 31-1-1964. Could the Bank on the basis of plaintiff's letter refuse to pay in violation of the express terms of the Bank guarantee dated 27-11-1962 and that of the plaintiff's counter guarantee? To ascertain this, the principal bond, Bank guarantee and the counter guarantee have to be scrutinised carefully. For the sake of convenience, the relevant

portions of these three documents are set out below:--

Clause 2 of the principal bond :

"Periodical bills (10 days period) will be issued for transactions and these bills are strictly payable in full on presentation whether the wagon contents are taken delivery of or not by us or by our accredited representatives and regardless of errors or overcharge which on being detected or brought to notice will be open to adjustment in due course".

(Ex. A pages 14-15).

The Bank guarantee in favour of the President of India dated 27-11-1982 :--

"We the United Commercial Bank Ltd. do hereby undertake to indemnify and keep indemnified the government any loss or damage caused to or suffered by the government by reason of any breach by the said privilege holder of any of the terms or conditions contained in the said principal bond. The United Commercial Bank Ltd, further agree that the guarantee herein contained shall remain in full force and effect during the period of the said principal bond is in force".

(Ext. A page 17).

The plaintiff's counter guarantee to the Bank dated 27-11-1962 :--

"We also hereby unconditionally authorise you to pay on demand any claim arising hereunder without making any reference to us and we undertake to pay to you on demand the amount of such claim paid by you together with the expenses incurred in connection therewith which sum if not paid by us on demand may also be recovered by you from the account or accounts maintained by us with you or from securities held or to be held by us with you....."

(Ext. A page 16).

11. On proper construction of these three documents, it appears that the plaintiff was liable to pay the freight bills on presentation by the Railway regardless whether he had obtained delivery of coal or not and irrespective of the fact that the bills contained error or overcharge. His remedy was to have the adjustment of the accounts between him and the Railway subsequently for any over payment or error in the bill or non-delivery or short delivery of goods by the Railway. The plaintiff was under absolute obligation to pay the freight bills at the first instance on presentation. If the plaintiff would commit breach of the terms of payment contained in the principal bond, the Railway or the President of India would be entitled to enforce the Bank guarantee dated 27-11-1962 and in terms of the counter guarantee, the Bank would be unconditionally liable to pay to the Railway its claims on demand without reference to the plaintiff and would in its turn be entitled to be reimbursed by the plaintiff. The plaintiff committed breach of the terms of the principal bond by non-payment of four freight bills set out above, I, therefore, hold on the facts and circumstances of this case, that the

Railway had rightly enforced the Bank guarantee and the Bank was not entitled to refuse payment on the basis of the plaintiff's instruction dated 31-1-1964. I further hold that this instruction of the plaintiff to the Bank was in breach of the terms of the counter guarantee dated 27-11-1962 and Bank had rightly ignored the said instruction. The Bank had no right to verify the genuineness or otherwise of Railway's claim before payment nor it could refer the matter to the plaintiff for ascertaining its correctness. In view of the Bank's absolute obligation to pay under the counter guarantee, the question of Bank's ante dating the letter as alleged by the plaintiff did not arise. The Bank had nothing to circumvent and was bound to act in accordance with the express terms of the agreements between the parties. There is some discrepancy regarding the date of payment alleged by the defendant Bank and the actual date of payment to the Railway. But date of payment is immaterial.

12. The plaintiff had disputed the claim of the Railway on the allegation that he had a huge claim against the Railway at that time and therefore the payment made by the Bank to the Railway was wrongful. Let us examine how far the plaintiff has been able to prove that Railway had no claim. In support of his contention that Railway had no claim, the plaintiff relied on certain refunds made by the Railway. It would be noted that the Bank paid the Railway on 6-2-1964 and Railway started giving refund on and from May 1964. As I have stated earlier, Railway's demand for four freight bills mentioned above was on the basis of the express terms of the principal bond whereby the plaintiff's obligation to pay the freight bills on presentation was absolute. It may be that upon receipt of this amount and upon adjustment of accounts, in terms of the principal bond some amount was found due and refundable to the plaintiff and the same was refunded by the Railway. These refunds do not prove that Railway had no claim against the plaintiff when the claim was made. The plaintiff's obligation to pay did not depend on the actual dues of the Railway but on the basis of the provisional bills as prepared by the Railway. The plaintiff had no right to withhold payment of freight bills on the basis of actual accounting position between the parties. The plaintiff, thereafter, filed a suit against the Railway for Rs. 8000/- being M. Suit No. 81 of 1965 and was satisfied by obtaining a consent decree for Rs. 5263/- passed by the City Civil Court in the said suit. In that suit, the plaintiff did not ask for refund of Rs. 56,740/- alleged to have been recovered by the Railway wrongfully from the Bank. As a matter of fact, the plaintiff never took any action for finalisation of the accounts between the parties or for recovery of Rs. 56,740/- against the Railway, Mr. Deb, plaintiff's counsel submitted that the plaintiff had no cause of action against the Railway. Why the plaintiff should file a suit against them ? The Railway did not get any portion of the plaintiff's money. The sum of Rs. 56,740 was paid out of Bank's money by bank's cheque. It is because the Bank had appropriated and adjusted this amount against the plaintiff's margin money, the plaintiff got the cause of action against the Bank to institute this suit. This argument although very interesting has no basis whatsoever, The facts of the case proved that the Railway had demanded the

money on the allegation that the plaintiff had committed breach of the terms of the principal bond for which the president of India had enforced the Bank guarantee dated 27-11-1963. It is also on record that after receipt of Rs. 56,740/- from the Bank, the Railway had acknowledged the said payment and had returned both the principal bond and the Bank guarantee duly discharged (Ext. A pages 78-80 & Ext. 6A)". The return of these two documents are not disputed by the plaintiff. Therefore, the basis of Railway's demand was the plaintiff's breach of the terms of the principal bond. If according to the plaintiff, this allegation was false then certainly the plaintiff had cause of action against the Railway and should have taken some step against it. But by not challenging this allegation, the plaintiff had accepted the position that he was guilty of committing breach of the terms of the principal bond. Under the circumstances the plaintiff should not be allowed to say that the payment made to the Railway by the Bank was wrongful. The plaintiff tried to challenge the genuineness of the Railway's claim in his evidence in the present suit in absence of the Railway. Therefore, these allegations cannot be entertained. The plaintiff failed to prove that the Bank's payment to the Railway was wrongful, The payment of Rs. 56,740/- to the Railway was proved by the Bank's witnesses Mr. D. Ghosh and Mr. Bijoy Krishna Chowdhury as well as by Railway's letters being Ext. A pages 78-80 & Ext. 6A. I have no doubt in my mind that the plaintiff filed the present suit for obtaining two benefits. He already got one benefit by obtaining payment of four freight bills by the Bank to the Railway and the second benefit he is trying to obtain by not reimbursing the Bank in terms of his counter guarantee by alleging that Bank's payment was wrongful. The conduct of the plaintiff is absolutely inequitable. The Bank is certainly entitled to be reimbursed. The only question now is whether Bank was entitled to appropriate or adjust its claims against Rs. 93,500/- or not. One thing is to be noted that the Railway had originally demanded Rs. 57,314/- but it was satisfied in receiving Rs. 56,740/-. Why it was so, has not been explained by any of the parties to the suit.

13. The next question naturally would be, could the Bank adjust or appropriate Rs. 56,740/- against Rs. 93,500 ? Mr. Rajat Ghose, counsel for the plaintiff, strenuously argued that the entire sum of Rs. 1,83,500/- was deposited with the Bank by way of margin money and/or for a specific purpose. Therefore, the Bank was holding the said sum in trust. Being a trust fund, for a specific purpose, Bank could not adjust its claims against this sum, He made an elaborate argument supported by a number of cases, in his argument however, he did not take into account the effect of the order dated 1-7-1963 on the margin money. It appears from the judgment delivered on 1-7-1963 in suit No. 875 of 1963 (Krishna Kishore Kar v. Durgapur Project), that Durgapur had submitted that Rs. 90,000/- should be set apart from Rs. 1,83,500/- to meet its claims whereas the plaintiff had submitted that entire amount should be refunded to him, This argument on behalf of the plaintiff could only be made on the basis that the entire Rs. 1,83,500/- became free from being margin money and was refundable to him. On hearing the parties to the said suit the learned Judge directed that

the Bank would not be entitled to pay to the parties to the suit the balance money without setting apart Rs. 90,000/- from Rs. 1,83,500/-. I have already pointed out that pursuant to the order dated 1-7-1963, the plaintiff had demanded refund of the balance sum of Rs. 93,500/- from the Bank (Ext. A pages 74 and 36) This demand for refund could only be made by the plaintiff on the basis that this balance sum had lost its character as margin money, On the facts and circumstances of this case. I am unable to accept the submission of Mr. Ghose that Rs. 93,500/- was a trust fund and as such I also refrain from dealing with the cases cited on this point. But in view of the express terms of the counter guarantee that the Bank would first make a demand for reimbursement, could the Bank appropriate its claim for Rs. 56,740 against the balance of Rs. 93,500/- without making a demand ? It is admitted by the Bank that no demand was made prior to alleged appropriation or adjustment. On behalf of the plaintiff, it was submitted that without a demand, the Bank would not have any cause of action for adjustment or appropriation and in support thereof reliance was placed on (1918) 2 KB 833 (Bradford Old Bank Ltd. v. Sutcliffe) where it was held :--

"That the plaintiff's claim was not barred by the Statute of Limitations, as no cause of action arose against the surety until demand had been made by the plaintiff and no demand was made till 1912."

14. The counsel for the plaintiff also relied on (1954) 1 All ER 734 (Lloyds Bank Ltd. v. Margolis)". In this case the Bank took a legal charge from the defendant Goerge John Lyster by way of security for his overdraft on current account. The charge provided as follows :--

"Hereby covenants with the Bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due....."

15. It was held that on true construction of the legal charge, the making of the demand was a condition precedent to recovery of the money secured thereby and therefore, time ran from the date of the demand and the claim was not barred. On the basis of the aforesaid two decisions, it was submitted that the alleged appropriation or adjustment was wrongful as no prior demand was made by the defendant Bank and I accept this submission.

16. According to the counsel for the Bank, the Bank did not appropriate or adjust on the basis of the counter guarantee but did so in exercise of its general lien u/s 171 of the Contract Act. The Bank could retain any goods bailed by the customer and/or money in the accounts of the customer with the Bank to make up any loss suffered by the Bank on account of the customer. The Bank, in exercise of this general lien, appropriated or adjusted its claims against Rs. 93,500/-. In support Punjab National Bank Ltd. Vs. Satyapal Virmani, was cited to establish that the word "goods" in Section 171 of the Contract Act includes money. My attention was invited to para 8 of the judgment where it was held :--

"According to the law merchant, the Banker can look to his general lien as a protection against loss on account or loss on loan or overdraft. And money has

been held to be a species of goods over which lien may be exercised,"

17. The counsel for the Bank also cited AIR 1960 Punj 632 (Punjab National Bank Ltd. v. Arura Mal Durga Das) where It was held (at P. 635) :

"The Statutory law in India does not expressly refer to the Banker's lien in respect of cash deposits.....that Indian Contract Act is not exhaustive of the entire law relating to contract....."

Where the statutory provisions do not cover a particular matter, the principles of English Law. in so far as they embody the rules of justice, equity and good conscience may be applied."

18. The next case relied on by the defendant Bank is AIR 1946 Nag 114 (Devendra Kumar Lalchandji v. Gulabsingh Nekhe Singh) where it was held at page 116 :--

"In the absence of specific provisions on the subject, when moneys are held by the Bank in one account and the prayer in respect of these moneys owes the Bank on another account, the Banker's lien gives the Bank a charge on all the moneys of the payer in its hands so that they may be transferred to whatever account the Bank chooses to set off or liquidate the debt."

Section 171 of the Contract Act is set out below :--

"Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

19. Mr. Deb, the counsel for the plaintiff, submitted that an express contract between the parties creating a lien or security would exclude operation of the statutory general lien u/s 171 of the Contract Act, In the present case, the plaintiff and the Bank had an express contract by way of counter guarantee providing the method of reimbursement. This contract will exclude application of Section 171 of Contract Act. In support he relied on L.R. (1) P.C. 296 (George Henry Chambers v. Patrick Davidson). It was held in that case that general lien given by law is excluded if lien is created an express written contract.

"Therefore, if a consignee takes an express security, such security, being the stipulation and agreement of the parties, it excludes his general lien".

20. For this principle, we need not look into the English cases as Section 171 of the Contract Act itself clearly lays down that the provisions of this section will apply only in absence of the express contract to the contrary. Therefore, in the present case the defendant Bank cannot exercise any general lien u/s 171 of the Contract Act in view of the existence of the Counter guarantee dated 27-11-1962. I accept this submission on behalf of the plaintiff and hold that the Bank was not entitled to appropriate or adjust its claims u/s 171 of the Contract

Act.

21. The Bank further alleged that there was a balance amount of Rs. 34,523.83 P. outstanding in the plain-tiff's cash credit account with the defendant Bank. The plaintiff had pledged fix deposit receipts by way of security against overdraft and had agreed that on maturity, the proceeds of the fixed deposits would be credited in the overdraft account to liquidate plaintiff's liability. In the written statement the defendant Bank alleged that after crediting the proceeds of the fixed deposits, a sum of Rs. 19,787.32 remained due and payable by the plaintiff in the overdraft account which amount was also adjusted against Rs. 93,500/- and the account was closed on 1-2-1964. A statement of account was annexed to the written statement which is Ext. I in the suit. The plaintiff disputed the correctness of this account in his testimony. Bank's witness Suresh Chandra Roy Chowdhury proved the security ledger entries relating to the fixed deposits of the plaintiff as well as the cash credit ledger entries relating to the account of Isis Coal Company. He also proved the correctness of the contents of Ext. I. This witness stated that these books were kept under his supervision and he had personal knowledge regarding the entries. This witness was not at all cross-examined on his evidence of correctness of the entries in the cash credit ledger or Ext. I. It was suggested to him in cross-examination that entries at page 80 of the security ledger were not correct but plaintiff failed to prove incorrectness of any entry at page 80 of the security ledger either in cross-examination of Roy Chowdhury or through his own witness. It is the case of the plaintiff that he never received statement of account from the defendant Bank But the two branch managers of the new Market Branch, Mr. N.K. Bhattacharjee and Mr. D. Ghosh as well as two of its employees Bijoy Krishna Chowdhury and Suresh Roy Chowdhury all in their respective testimony said that plaintiffs office was very nearer to this branch office and the plaintiff often used to come to check his account and under the instruction of these two branch managers, these two employees used to personally hand over the statements of accounts to him. The usual Banking practice was that against delivery of statements of account personally to the customer no receipt was taken. It appears from the statement of account Ext. I that on or about 5-6-1963, the plaintiff paid Rs. 11,885.34 by cheque No. 688756 to the Bank for liquidation of his liability in the said overdraft account. This is corroborated by the counter foil of the cheque produced by the plaintiff being Ext. L in the suit. Normally such payment would not be made unless the party paying was aware of the accounting position. Moreover it also appears that the Bank credited the proceeds of the fixed deposits in the cash credit account and duly informed the plaintiff about the same by its letter dated 21-2-1964. By this letter the plaintiff was also informed that after giving credit of the fixed deposits the Bank had adjusted the outstanding dues of Rs. 19,787.32 by appropriating the equivalent amount from Rs. 93,500/- in terms of order dated 1-7-1963 (Ext. A page 51). The plaintiff did not reply to this letter. It appears from the evidence on record that after adjustment of the aforesaid sums the cash credit account was closed by the Bank on 21-2-1964. The present suit

was instituted by the plaintiff on 3-8-1966. At the time of filing of the suit the plaintiff was fully aware as to how the Bank had adjusted this Cash Credit account and what was the alleged liability of the plaintiff in this account. But in the present suit, the plaintiff did not challenge these allegations of the defendant Bank nor the adjustment made by it in respect to the same. The plaintiff's alleged liability in the cash credit account, Bank's adjustment by crediting the fixed deposit proceeds as well as setting of the balance outstanding against Rs. 93,500/- all remained unchallenged by the plaintiff in spite of his full knowledge of these facts as far back as on 21-2-1964. If there was any doubt in plaintiff's mind regarding the correctness of this account, the plaintiff would have challenged this account in this present suit because the plaintiff was fully aware of what would be the bank's defence in the present suit. On the facts and circumstances of this case, I have no hesitation to accept the testimony of the Bank's witness Roy Chowdhury that the entries in the cash credit ledger, security ledger and Ext. I are all correct. Now, the question would be, could the Bank adjust the balance of Rs. 19,787.32 in the cash credit account by appropriating the same amount from Rs. 93,500/- which was lying in a separate account with the Bank? There was no express contract between the plaintiff and the defendant Bank regarding the manner of adjustment of this outstanding balance in the cash credit account. All the proceeds of the fixed deposits had been duly credited in this account. Therefore the Bank could exercise its general lien u/s 171 of the Contract Act for making up the loss caused by the plaintiff and the Bank had rightly adjusted this claim against Rs. 93,500/- set free by order dated 1-7-1963.

22. The last issue to be decided is whether the Bank's claim for adjustment, set off or appropriation of Rs. 56,740/- was barred by limitation. This issue can be disposed of easily. The Bank did not make any demand in terms of the counter guarantee which was a condition precedent and Bank had no cause of action for appropriation, adjustment or set off. Until today, the Bank's cause of action under counter guarantee has not arisen. The question of limitation therefore, cannot arise. Several cases were cited on the point of limitation which were not relevant on the facts of this case. Regarding the set off and adjustment of Rs. 19,787.32 due on the cash credit account, there could be no question of limitation as the adjustment was made in this mutual open and current account on 21-2-1964 on which date the last entry of crediting the proceeds of the cost fixed deposit was made in terms of the agreement between the parties.

23. The defendant No. 2 had failed and neglected to return the guarantee dated 2-8-1962 duly discharged, in spite of the fact that nothing was due and payable to the defendant No. 2 by the plaintiff for the period of guarantee. Due to this wrongful conduct of the defendant No. 2 it was not possible for the Bank to refund Rs. 90,000/- set apart by order dated 1-7-1963. Without receiving back the bond duly discharged, the refund could not be made to the plaintiff. This bond was returned by the defendant No. 2 after hearing of this suit started. In the premises the amount of Rs. 90,000/- became refundable to the plaintiff by the Bank only after the bond was discharged and returned. Hence the Bank is not

liable to pay any interest on this sum. Regarding the balance Rs. 93,500/- the Bank has already appropriated Rs. 19,787.32 Out of this sum leaving a balance of Rs. 73,622/-, but the appropriation of Rs. 56,740/- was done contrary to the terms of the counter guarantee dated 27-11-1962. The Bank was not entitled to appropriate this sum in the manner it was done. The Bank is, however, entitled to be reimbursed by the plaintiff on making a demand on the basis of the counter guarantee.

The issues are, therefore decided as follows :--

Issue No 1 (a) -- Yes.

Issue No. 1(b) -- Yes.

Issue No. 2 --

Issue No. 3 --

Yes, after making a demand and on default of the plaintiff to pay.

Issue No. 4 --

Yes, but in respect of Rs. 19,787.32 only being the balance amount due in the cash credit account.

Issue No. 5 --

Yes, to the extent of Rs. 19,787.32 or has been done and in respect of Rs. 56,740/-only after making a demand on the plaintiff in terms of the counter guarantee and On plaintiff's failure to make the payment.

Issue No. 6 -- No.

24. In the premises aforesaid, there will be a decree for Rs. 1,63,622/-, in favour of the plaintiff against the defendant Bank, but this decree will not be drawn up, completed or executable before expiry of four months from date, If in the mean time, the Bank makes a demand in writing on the plaintiff within a month from date, for payment of Rs. 56,740/- in terms of the counter guarantee dated 27-11-1962, and the plaintiff pays the said sum within one month from the date of receipt of the said demand notice, then in that case the defendant Bank will refund the entire sum of Rs. 1,63,622/- to the plaintiff within two months from the receipt of payment of Rs. 56,740/-. In case the plaintiff defaults in making payments as aforesaid within the period mentioned above, then the defendant Bank will be entitled to set off, adjust or retain Rs. 56,740/- out of the said sum of Rs. 1,63,622/- and refund to the plaintiff the balance amount of Rs. 1,06,882/- before expiry of four months from data and the plaintiff will accept the same in full and final satisfaction of the decretal dues. If, however, the Bank fails to make the demand as aforesaid, in that case also the Bank will refund the entire sum of Rs. 1,63,622/- to the plaintiff within four months from date, If the plaintiff has to execute the decree against the Bank then the Bank will be liable to pay interim interest on the sum recoverable by execution at the rate of 3%

per annum and interest on judgment at the rate of 6% per annum. In any event, the defendant Bank will pay the costs of the suit to the plaintiff. The suit against the defendant No. 2 is dismissed without any order as to costs.