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case falls outside the scope of section 104, sub-section 2, is that the auction-purchaser happens to be the decree-holder and that the order on the application of the judgment-debtor is an order relating to the execution of the decree between the parties under section 47. We do not think, however, that the accident of the auction-purchaser being the decree-holder makes any difference in the effect of the provisions of section 104, sub-section 2. Whether the auction-purchaser be the decree-holder or a third person, the result is the same so far as the appealability of the order is concerned.

The appeal must, therefore, be dismissed with costs on the ground that no second appeal lies to this Court.

Appeal dismissed.

R. R.

PRIVY COUNCIL.*

P. C.*

1919.

November 18.

HARIDAS RANCHORDAS (AND ANOTHER, DEFENDANT) *v.* MERCANTILE BANK OF INDIA (PLAINTIFFS).

[On appeal from the High Court of Judicature at Bombay.]

Bankers—Interest on overdrafts—Practice of paying interest in a different mode from that agreed on—Compound interest charged without any objection for long time—Implied contract to pay it—Evidence Act (I of 1872), section 92—Refusal to honour cheques.

The appellants carried on business at Bombay as cotton merchants, and the respondents were their Bankers. From 1906, the Bank had allowed the appellants' firm to overdraw their accounts under an agreement between the parties consisting of a letter in a printed form signed and given by the appellants to the respondents on 1st December annually, and providing that interest should be charged at 7 per cent. per annum, and be calculated on the daily balance due in respect of the overdraft, pledging as security the cotton stored by them in the godowns of the Bank. The practice of the Bank

* *Present* :—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

as to interest was to strike a balance of each of its customers' accounts on the last day of each month, and charge interest on the amount of the balance, in fact compound interest with monthly rests; but the appellants though they knew it was done never objected until after 1st August 1914. In a suit by the Bank to recover a balance due by the appellants, the latter counter-claimed for damages for the dishonouring of two of their cheques:

Held, that the acquiescence of the appellants for 9 years in the mode of charging interest entitled the respondents to set up an implied agreement on the appellants' part to pay it in that way and there was nothing in section 92 of the Evidence Act to prevent such an agreement being proved. It was found by all the Courts that the respondents were justified under the circumstances at the time in not increasing the appellants' overdraft by honouring the cheques, and had rightly refused to do so.

APPEAL No. 68 of 1918 from a decree (30th November 1916) of the High Court at Bombay in its Appellate Jurisdiction which affirmed a decree (23rd March 1916) of the same Court in the exercise of its Ordinary Civil Jurisdiction.

The suit which gave rise to this appeal was brought by the respondent Bank to recover from the appellants Rs. 56,427-15-0 as the balance remaining due on an account in which for many years credit had been given to the appellants against cotton pledged by them after sale of the cotton.

The appellants counterclaimed (1) for an account of their dealings with the Bank, and (2) for damages for dishonour of two cheques drawn by them on the Bank.

The only questions in this appeal are whether the appellants are entitled to these reliefs.

The appellants and one Bhanji Madhavji, Hindus, were cotton merchants, trading under the name of Dharamsey, Jetha & Co., and the respondents an English Banking Company with a Branch in Bombay. The appellants used to finance their cotton business partly by depositing cotton with the respondents and

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obtaining credit from them against it. Dealings of this kind began between the parties in 1906, and continued till August 1914. They were regulated by written agreements renewed every year. The last of such agreements, dated 1st December 1913, is an Exhibit in the suit, and the respondent Bank admits that the form of this agreement has been in use for eight or nine years.

The material part of this agreement is set out in the judgment of the Judicial Committee, where the facts and the evidence given is also sufficiently stated for the purposes of this report.

The suit came on for hearing before Macleod J. who held that the respondents were, having regard to the political crisis and its inevitable effect on the cotton market, justified in dishonouring the cheques; and he also held that the respondents were entitled to prove and had proved an agreement by the appellants to pay compound interest, as the written agreement, in his opinion, was silent as to the way in which interest should be charged. He, in the result, passed a decree for the respondents as claimed and dismissed the appellants' counter-claim with costs.

The appeal to the High Court on its Appellate Side came before Scott C. J. and Heaton J. who affirmed the decree of the trial Judge.

On this appeal,

De. Gruyther, *K. C.* and *E. B. Raikes*, for the appellants contended that the respondents were bound by the written agreement to honour the cheques. The evidence, it was submitted, showed that the amount of cotton on deposit with the plaintiff Bank entitled them to a further advance; and the appellants should have had a decree for damages in respect of the dishonouring of the cheques. As to interest the agreement

provided for yearly interest, and the respondents should not have been allowed to set up an agreement to pay interest with monthly rests amounting to compound interest, to pay which the respondents had not proved any agreement on the part of the appellants. Such an agreement could not be implied, because by section 92 of the Evidence Act the respondents could not give evidence to vary the written agreement and show another agreement either by implication or proof. Reference was made to *Daniell* v. *Sinclair*[1]. The respondents, moreover, were not entitled to charge interest at rates higher than those stipulated for in the written agreement.

Wootten (with him *Gore Brown*, *K. C.*), for the respondents being called upon only as to the charge of compound interest contended that such a charge with monthly rests was established by a long course of dealing between the parties as was shown by the Pass Books extending over a period of nine years, and was accepted without demur by the appellants, and accepted also by them in their letter of 11th August 1910, whereby the appellants expressly accepted the accounts containing charges for compound interest as correct. Reference was made to *Fergusson* v. *Fyffe*[2]; *Rufford* v. *Bishop*[3]; and *Bruce* v. *Hunter*[4].

1919, November 18th:—The judgment of their Lordships was delivered by

SIR JOHN EDGE:—This is an appeal from a decree, dated the 20th November, 1916, of the High Court at Bombay, which confirmed a decree of that Court made in a suit which was instituted in that Court in its ordinary civil jurisdiction on the 27th May, 1915, by the Mercantile Bank of India, Limited, against Haridas

(1) (1881) 6 App. Cas. 181.
(2) 1841) 8 Cl. & Fin. 121.
(3) (1829) 5 Russ. 346.
(4) (1813) 3 Camp. 467.

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Ranchordas, Ludha Dossa, and Bhanji Madhavji. The Mercantile Bank of India, Limited, is the respondent here. Bhanji Madhavji, named as a defendant to the suit, was not served and has, it is said, disappeared. The appellants here are Haridas Ranchordas and Ludha Dossa.

The defendants, under the name of Dharamsay Jaitha & Co., carried on business at Bombay as cotton merchants, their bankers were the plaintiff Bank, and the suit was brought by the Bank to recover from them a balance due by the defendants to the Bank and interest on that balance. The defendants Haridas Ranchordas and Ludha Dossa filed a written statement and counterclaim in which they claimed an account, and damages for the dishonour on the 1st August, 1911, by the Bank of two cheques drawn by their firm upon the Bank. Their Lordships are informed by counsel that by the Rules of the High Court at Bombay relating to suits in its original civil jurisdiction counterclaims are permitted.

The trial Judge ordered that the suit as against the defendant Bhanji Madhavji should stand adjourned and on the claim of the Bank made a decree against the defendants Haridas Ranchordas and Ludha Dossa as two of the partners in their firm of Dharamsay Jaitha & Co., and also in their individual capacities for Rs. 39,025, 10 annas for the debt (including compound interest with monthly rests), with future simple interest from the date of the decree until payment, and by his decree dismissed the counter-claim. The High Court in appeal made a decree confirming that decree of the trial Judge. From that decree of the High Court this appeal has been brought.

The questions now in dispute are (1) was the Bank entitled to charge compound interest with monthly

rests on the amounts from time to time overdrawn by the defendants, and (2) was the Bank entitled to refuse to honour the two cheques. To understand these two questions it is necessary briefly to refer to the course of dealing between the Bank and the defendants' firm. For several years, at least from 1906, the Bank had allowed the defendants' firm to overdraw their account. The practice was that annually on the 1st December the defendants, in the name of their firm and individually, signed a letter in a printed form addressed to and given to the Bank, and in accordance with those letters the Bank allowed the defendants' firm to overdraw their account. The last of such letters was given to the Bank on the 1st December, 1913, and so far as it is material it was as follows :—

"In consideration of your allowing us an overdraft to the extent of but not exceeding at any one time, Rs. 10 lacs in current account it is hereby agreed that all moneys advanced and hereafter to be advanced in pursuance of these presents (hereinafter referred to as 'the said overdraft' or 'such overdraft') shall be advanced upon the terms and conditions hereinafter mentioned :—

"1. The said overdraft shall be repayable within twelve months from this date and/or at your option on demand being made therefor.

"2. Interest shall be charged at 7 per cent. per annum and shall be calculated on the daily balance due to you in respect of the said overdraft, till 30th June, 1914, and thereafter till 1st December, 1914, at 5 per cent. per annum.

* * * * * * *

"4. As security for the said overdraft we hereby agree to pledge with you all cotton pressed and unpressed at present stored in your godowns and/or Jethas and/or which may hereafter be stored by us in your godowns and/or Jethas.

"5. Notwithstanding anything hereinbefore contained you shall be under no obligation to advance any moneys except against the deposit of cotton by us from time to time as provided by clause 4 hereof and in no case shall such advances exceed Rs. 10 lacs outstanding at any one time and such advances shall not exceed seventy-four and a half per cent. (74½%) on the net market value of the cotton for the time being deposited in your

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godowns and/or Jethas against which cotton such advances shall from time to time be made.

"6. If at any time a margin of twenty-five and a half per cent. (25½) on the net market value of the cotton stored in your godowns and/or Jethas shall not be fully maintained you are to have full right to dispose of the cotton stored in the said godowns and/or Jethas and apply the proceeds thereof towards making up such margin and/or claim on us for any such margin and/or for any balance due in respect of the same after the disposal of the cotton in pursuance hereof.

* * * * * * *

"10. A register shall be kept by you of all cotton deposited in and/or removed from any godown and/or Jetha in pursuance of this agreement and such register shall be open to our inspection at any time during the usual business hours: no cotton shall be removed from the said godowns and/or Jethas except on a delivery order or orders signed by you.

* * * * * * * "

Whatever may be the strict construction of clause of that letter the Bank invariably struck a balance of its customers' accounts on the last day of each month and charged interest on the amount of that balance. The interest so charged was added to the monthly balance and the resultant balance, which included the interest, was carried forward to the debit of the customer as the balance due on the 1st of the following month. The pass-book of the defendants with the Bank shows clearly that that was the way in which interest was computed and charged in their account with the Bank. The defendants never, until after the 1st August 1914, raised any objection to that principle of charging them compound interest or to compound interest being charged by the Bank on their overdrafts. It was the course of business to which it must be taken that the defendants agreed. As long ago as 1813 Lord Ellenborough in *Bruce* v. *Hunter*[a] held that the fact that the defendant in that case had not objected to a

[a] (1813) 3 Camp. 467.

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. In addition to the evidence afforded by the pass-books to which their Lordships have referred, there is the uncontradicted evidence of the manager in Bombay of the Bank that the defendants knew that their account was charged by the Bank with compound interest with monthly rests and had never objected to that course of business.

The trial Judge, on a very careful consideration, found that there was not the slightest doubt that the defendants knew that the Bank was charging compound interest and agreed to that interest being charged in that way with monthly rests, and made the decree upon the claim against the defendants Haridas Ranchordas and Ludha Dossa which has been already mentioned. He rightly held that section 92 of the Indian Evidence Act did not prevent the Bank from proving that agreement as to compound interest. The High Court in the appeal taking the same view of the facts as the trial Judge confirmed that decree, and their Lordships agreeing with the findings of the Courts below on the question of interest are of opinion that the decree of the High Court should be affirmed.

The counterclaim relates to the dishonour by the Bank on the 1st August, 1914, of two cheques drawn by the defendants upon the Bank and presented for payment on that day. On the 1st August, 1914, the overdraft of the defendants' firm amounted to Rs. 5,81,454. On the 31st July, 1914, the Bank issued a notice to the defendants' firm that the Bank was not advancing further against cotton and would be obliged by the defendants reducing "the present advance." That notice was not received by the

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defendants until after office hours on the 1st August, 1914. On the 1st August, 1914, the Bank held as security for the overdraft cotton, which at the market rates at the end of July, 1914, as deduced from the daily circulars of Messrs. P. Chrystal & Co., represented Rs. 8,45,065, or, less the 25½ per cent. margin, Rs. 6,29,574. On the 25th July, 1914, in the cotton market, prices at Bombay began to fall owing to political events in Europe. In their daily cotton report of the 30th July, 1914, Messrs. P. Chrystal & Co. made the following remark: "There is practically no business in the local market pending developments in Europe." In their daily cotton report of the 31st July, 1914, Messrs. P. Chrystal & Co. remarked: "The local market is demoralised on account of grave political situation." On the 1st August, 1914, Messrs. P. Chrystal & Co. in their daily cotton report remarked: "The local market is practically closed. Quotations are only nominal." Those remarks of Messrs. P. Chrystal & Co. were fully justified by the facts then known, and under the circumstances existing on the 1st August, 1914, the realisable value of the cotton then held by the Bank as security for the overdraft was not sufficient to cover the then overdraft; the evidence shows that there was then practically no market. Their Lordships agree with the Courts below that the Bank was justified in refusing to increase the overdraft by honouring the cheques. It is to be observed that the Bank could at any time have demanded repayment of the whole overdraft. It is proved that after the 1st August, 1914, the Bombay cotton market got gradually worse, and that there were very few purchasers of cotton at Bombay during August, 1914, and only in small lots. In August, 1914, there was a large stock of about 500,000 bales of unsold cotton in Bombay. The trial Judge by his decree

rightly dismissed the counterclaim and the High Court in appeal confirmed that decree.

Before concluding this judgment their Lordships think it right to say that they see no reason for questioning the propriety of action of the solicitor for the defendants in the suit.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors for the appellants: Messrs. *Hughes & Sons.*

Solicitors for the respondents: Messrs. *E. F. Turner & Sons.*

Appeal dismissed.

J. V. W.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.

1919.

November 10.

THAKARAMA TEJRANI, WIDOW OF THAKOR NARSINGJI HATHISANGJI AND THE MOTHER OF THE DECEASED THAKOR FULSINGJI (ORIGINAL PLAINTIFF), APPELLANT *v.* SARUPCHAND CHHAGANBHAI SETH, DECEASED, BY HIS SONS AND HEIRS (1) MANIBHAI SARUPCHAND SETH AND SIX OTHERS, AND ANOTHER (HEIRS OF ORIGINAL DEFENDANT No. 1 AND DEFENDANT No. 2), RESPONDENTS.*

Hindu law—Adoption—Joint family—Jivai grant—Impartible property—Widow of a co-parcener adopting after the death of surviving co-parcener—Absence of consent—Authority of widow to adopt.

One R, owning a *jivai* estate, died leaving a widow S and his brother's son M. S and M jointly mortgaged a part of the *jivai* estate. M died in 1882

* First Appeal No. 155 of 1917.