[IN THE PRIVY COUNCIL.]

1938 *Present:* **Lord Thankerton, Lord Romer, and Sir George Rankin.**

CARSON & Co. *v.* HULME-KING.

Mortgage bond—Debt secured in terms of bond smaller than the real liability—Stamp duty paid on smaller sum—Revenue defrauded—Action for larger amount.

Where the stamp duty on a mortgage bond was paid on the footing that the bond secured a certain sum of money as an existing debt, it is not open to the obligee to say that upon a diferent construction the real amount of the debt was larger, admitting thereby that the revenue was defrauded of the duty due on the excess.

APPEAL from a judgment of the Supreme Court.

H. Murphy, K.C. (with him *L. M. D. de Silva* and *Clive Burt, K.C.*), for plaintiff, appellant.

Stephen Chapman, for defendant, respondent.

May 27, 1938. Delivered by LORD THANKERTON.—

The present suit was instituted by the appellant for recovery of a sum of Rs. 60,730.57 and interest as due under mortgage bond No. 189 dated July 23, 1930, executed by the respondent in favour of the appellant. By decree dated June 25, 1935, the District Court of Colombo entered decree awarding the appellant the said sum and interest. On appeal, this decree was amended by the decree of the Supreme Court of Ceylon dated February 5, 1937, so as to award the sum of Rs. 10,504.79 with interest to the appellant, who now appeals against their decision, and asks that the decree of the District Court should be restored.

It is agreed that the difference between the sums awarded respectively by the District Court and the Supreme Court is represented by a sum of Rs. 43,278.52, which the appellant claims to be recoverable under the mortgage bond, and which the respondent denies to be so recoverable. The determination of the dispute depends partly on the proper construction of the bond, and partly on the true view of the somewhat unusual circumstances which surrounded its execution.

For some time prior to July, 1930, the respondent, who owned estates in the Island, had employed the appellant to manage them. The appellant appears to have been in the habit of making remittances to her from time to time, in anticipation of the receipt of the income from the estates, which was mostly derived from the production and sale of rubber and copra. These advances appear to have been so far financed by the appellant by an overdraft account with its bank in its own name. The serious depreciation in the prices of rubber and copra and the large amount of the respondent's indebtedness led the appellant in June, 1930, to ask the respondent to give it real security for the debt. At this time the respondent was absent from the Island, and Mr. P. G. Cooke, a Proctor, who held her power of attorney, represented her. Through Mr. Cooke, the respondent agreed to grant a secondary open bond over her Dicklande estate, and on July 23, 1930, the mortgage bond here in question was signed by Mr. Cooke as her attorney, and it was registered on July 26, 1930.

It is an established fact that on July 22, 1930, prior to the transactions about to be referred to, the defendant was indebted to the appellant in the sum of Rs. 53,783.31 of which Rs. 10,504.79 had been financed by means of the appellant's overdraft from the bank. On the suggestion of Mr. Cooke, conceived doubtless in the respondent's interest, an arrangement was made between him and the appellant, with the sole view of reducing the amount of stamp duty to be paid on the mortgage bond. This arrangement is not stated in writing, but it was spoken to in the evidence of Mr. Matthews, the accountant of the plaintiff company, and by Mr. Cooke, and the carrying out of the arrangement is evidenced by certain documents.

It will be convenient to state at once the contentions of the appellant before their Lordships; they were as follows:—

1. That by the carrying out of the arrangement the respondent's debt to the appellant was discharged to the extent of Rs. 43,278.52 prior to the execution of the mortgage bond on July 23, 1930. That the bond only covered the balance of Rs. 10,504.79, so far as the existing debt was concerned. That, on July 25, 1930, a further advance of Rs. 43,278.52 was made by the appellant to the respondent, which was covered by the bond as a future advance; and that it was rightly included in arriving at the balance sued for.

2. Alternatively, if it were held that the appellant's debt was not so discharged to the extent of Rs. 43,278.52 prior to the execution of the bond, that it was covered, as existing debt, by the terms of the bond, and was rightly included in arriving at the balance sued for.

3. That, apart from the foregoing contentions, the balance sued for, being signed and certified by the directors as provided in the bond was sufficient at law and conclusive proof of the respondent's liability under the bond without any other document or voucher to support the same, as provided in the bond.

The material portions of the mortgage bond are as follows:—

And Whereas the said obligor is indebted unto Carson & Company, Limited, a company duly incorporated under the Ceylon Joint Stock Companies Ordinances and having its registered office at the Australia Buildings in the Fort of Colombo aforesaid (hereinafter sometimes called and referred to as the said company which term or expression as herein used shall where the context so requires or admits mean and include the said Carson & Company, Limited, its successors and assigns) in the sum of Rs. 10,504.79 of lawful money of Ceylon.

And Whereas the said obligor has requested the said company to lend and advance to her such further sum and sums of money as the said company may in its absolute discretion think fit which the said company has agreed to do on the said obligor entering into and executing these presents and giving and granting the security hereinafter mentioned.

Now Know Ye and these presents witness that the said obligor doth hereby for herself and her heirs, executors, and administrators covenant and agree with and bind and oblige herself, her heirs, executors, and administrators to the said company that she the said obligor and her aforewritten shall and will on six calendar month's notice in writing

being given to her or her aforewritten well and truly pay or cause to be paid in Colombo aforesaid to the said company all and every the sums and sum of money now due owing and payable and which shall or may at any time and from time to time and at all times hereafter be or become due owing and payable to the said company by the said obligor upon or in respect of any loans and advances or payments made or to be made by the said company to or for the use or accommodation or on account of the said obligor or upon or in respect of any account or transactions whatsoever between the said obligor and the said company or upon or in respect of any overdraft obtained by the said company for and on behalf of the said obligor together with interest thereon at the rate of eight per centum per annum from the date or respective dates of such payments or advances and also any balance of account which may be found due by the said obligor to the said company and of which said balance a stated account in writing made out of the books of the said company and signed and certified by the Directors for the time being of the said company shall be sufficient at law and conclusive proof without any other document or voucher to support the same.

The last contention of the appellant may be disposed of first, and it is enough to say that the stated account in writing bringing out the balance sued for, which is certified by seven directors of the appellant company, shows on the face of it that the indebtedness of Rs. 43,278.52, which is in question, is taken into computation, and, if that indebtedness is not covered by the bond, such a clause cannot entitle the directors to bring it within the bond. Accordingly the third contention fails.

The appellant's main contention, however, was the first one, and it is necessary to consider carefully the steps taken to secure reduction of the stamp duty, in order to see whether they effected at the same time the discharge of the defendant's indebtedness to the extent of Rs. 43,278.52.

The appellant's case is that, under the arrangement made with Mr. Cooke, the appellant advanced to Mr. Cooke personally the amount necessary to discharge the respondent's indebtedness to the appellant to the extent of Rs. 43,278.52, and that Mr. Cooke did so discharge the respondent's indebtedness by a cheque drawn against the said advance; that this was done prior to the execution of the bond; that, on July 25, 1930, after the execution of the bond, the appellant, on Mr. Cooke's instructions, made a fresh advance of Rs. 43,278.52 to the respondent, which was used to discharge Mr. Cooke's indebtedness to the appellant. The evidence may now be examined to see what the reality of this transaction, which admittedly resulted in stamp duty being paid on the footing that the existing debt of the respondent was Rs. 10,504.79, was in a question between the appellant and the respondent.

On July 22, 1930, the day before the execution of the bond, the appellant and Mr. Cooke exchanged cheques. In the first place, the appellant wrote Mr. Cooke a letter the material part of which is as follows:—

"Dear Sir.

Mrs. Daisy Hulme-King.

We have pleasure, as arranged, in handing you cheque in favour of the above for Rs. 45,278.52 and shall be glad to receive your cheque for a like amount in due course".

The cheque was drawn on the National Bank of India, Colombo, in favour of "Mrs. Daisy Hulme-King" or order, and it will be noted that it was for an amount exceeding the indebtedness in question by Rs. 2,000. The cheque was evidently endorsed by Mr. Cooke, as the defendant's attorney, with the addition of "Please credit my a/c P. G. Cooke" and presented to the bank. From a note "Payees endorsement required 22-7-30", it may be inferred that the bank declined to accept the attorney's endorsement in his own favour and returned the cheque. The original payee's name was then deleted and replaced by "P. G. Cooke" as the payee, and the alteration initialled by the drawers, and the original endorsement and its addition, and the bank's memorandum were all deleted. The cheque was then endorsed by Mr. Cooke in his own name. It may be assumed from the word "transfer" marked on the cheque that it was again presented to the bank, but there is no information as to the day on which it was presented.

On the same day, July 22, Mr. Cooke wrote to the appellant enclosing a cheque "in your favour for Rs. 45,278.52 in settlement of the amount due to you by Mrs. Daisy Hulme-King, the receipt of which kindly acknowledge". This cheque was also drawn on the National Bank of India, Colombo, and was signed by Mr. Cooke personally. It was endorsed to the Bank by the appellant, and is marked by the bank as paid on July 25, two days after the execution of the bond. The appellant's letter to Mr. Cooke acknowledging receipt of this cheque is dated July 24, the day after the execution of the bond. It will be noticed that it is also in excess of the indebtedness by Rs. 2,000. That completes the documentary evidence as to the alleged discharge of the indebtedness in question. There remains the evidence of Mr. Matthews and Mr. Cooke.

Mr. Mathews did not speak to this matter in his examination-in-chief, but in cross-examination he stated:

> "My accounts show payments to Mr. Cooke of Rs. 24,339.50 and 18,939.02. In fact there was only one cheque. That sum of Rs. 45,000 we paid to Mr. Cooke at his request on July 22. He requested us to send that amount to him and he would before the signature to the bond send us a cheque squaring off the amount due to Carsons by the defendant. Mr. Cooke sent us cheque on July 22 itself. I presume the object was to reduce the amount on the bond to evade stamp duty. We received a cheque from Mr. Cooke which was credited to the defendant's account. Later the position of the account of the defendant was squared. Mr. Cooke wrote to us. His instructions were to transfer Rs. 43,000 to debit of the defendant and credit Mr. Cooke in Carsons' books."
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> To Court: "I gave a cheque for Rs. 45,000 to Mr. Cooke as a loan to him personally. He paid it back by instructing us to debit the defendant with these various amounts and credit him . . . . We entered into this manipulation at defendant's request. As a result of our agreeing to it we took a bond for Rs. 10,504.79 and now seek to charge the extra Rs. 43,278.52 after the execution of the bond. We regard it as a future advance but we received instructions from

Mr. Cooke to credit his account and debit the defendant. It was a repayment of the amount that Mr. Cooke had borrowed on account of the defendant ".

To Court: " Rs. 45,000 is paid by Mr. Cooke as an advance on behalf of the defendant. We do not credit or debit defendant's account with Rs. 45,000. This transaction did not pass through the cash book. She was temporarily credited with Rs. 43,000 but once the bond was there we restored the debit. We credited her with Rs. 45,000 in the books. After the bond was executed we restored the debit of Rs. 43,000. We made the entry on August 5 ".

Re-examined: " The cheque which was acknowledged by P 27 (letter of August 24) was sent to the credit of our bank account and realized on July 25. Mr. Cooke's instructions to us were that the cheque was to be credited to Mrs. Hulme-Kings account. In pursuance of the instructions of Mr. Cooke we credited Rs. 43,278.52 to defendant's account. I produce an abstract from the cash book p. 28, they credited that under the date, July 25, 1930. Subsequently we were told by Mr. Cooke to credit his account with Rs. 43,278.52 and to debit Mrs. Hulme-King. That resulted in Rs. 24,339.50 and 18,939.2 shown in p. 1 under the date, July 25, 1930. These instructions were given to me expressly by Mr. Cooke as attorney for the defendant. So far as I know Mr. Cooke's object was to pay the stamp duty on a reduced basis ".

This evidence, loose as to both dates and amounts, seems to prove, so far as it goes, that the appellant Company, though it received Mr. Cooke's cheque on July 22, took no steps to acknowledge it, or act on it, or to alter the amount of the defendant's indebtedness as standing in its books, until July 24, after the execution of the bond. It further makes clear that the appellant throughout accepted the instructions of Mr. Cooke as given in his capacity as the defendant's attorney.

It is enough to cite two passages from the evidence of Mr. Cooke, viz. :—

To Court: " Carsons gave a cheque for Rs. 45,000 as a personal loan to me. If they gave it to me on behalf of Mrs. Hulme-King her indebtedness would have increased. In their books I understand I was debited with that amount. I considered for the moment that I was indebted to Carsons in Rs. 45,000. I paid Carsons Rs. 43,000 odd due to them by the first defendant so that her indebtedness was Rs. 10,000 odd subject to my drawing money later on, so that I could get the bond drawn on the footing that Rs. 10,504.79 was the money to be lent. Afterwards when she was redebited with Rs. 43,278.52 her account rose, on the understanding that the money was to be appropriated by Carsons in view of the money I had borrowed. I was saving my own principal Rs. 600 or 700 ".

Re-examined: " It was never intended that the result of the arrangement was to wipe out Rs. 43,278.52 of the defendant's liability ".

To Mr. Perera: " I did not get the difference of Rs. 2,000. I do not know what happened to the difference of Rs. 2,000 or how it was applied ".

In their Lordships' opinion, this evidence makes it clear that the only reality about the transaction was the reduction in stamp duty, that it was never intended that the appellant should have recourse against anyone except the respondent for the Rs. 43,278.52, and that, in any event, the evidence does not sufficiently prove that the defendant was—even temporarily—discharged of that indebtedness. Accordingly the main contention of the appellant fails.

The remaining contention of the appellant—the second one—is that, assuming that the indebtedness in question was not discharged, it was covered by the terms of the bond. While, on construction, their Lordships are inclined to the view that the terms of the bond show that "all and every the sums and sum of money now due owing and payable" is confined to the sum of Rs. 10,504.79 referred to in the narrative of the bond, it is unnecessary to decide this question, for their Lordships are clearly of opinion that the appellant, having paid duty on the bond on the footing that it was only for Rs. 10,504.79 of existing debt, cannot now be heard, by maintaining another construction, to say that the real amount was larger and to thereby admit that the revenue was defrauded of the duty due on the excess.

Their Lordships should add that the only question before them was whether the Rs. 43,278.52 was covered by the bond. In answer to a question by their Lordships, the appellant's Counsel stated that he did not raise any question of the defendant's personal liability apart from the bond.

Their Lordships are therefore of opinion that the appeal fails, and they will humbly advise His Majesty that it should be dismissed with costs, and that the judgment and decree of the Supreme Court dated February 5, 1937, should be affirmed.

Appeal dismissed.