I. Case Reference

Case Citation	:	[2017] ibclaw.in 17 HC
Case Name	:	Montosh Kumar Chatterjee Vs. Central Calcutta Bank Ltd.
Case No.	:	AFOD Nos. 8 and 9 of 1952
Date of Judgment	:	28-Nov-52
Court	:	High Court of Calcutta
Act	:	Indian Contract Act 1872

II. Brief about the decision

Hon'ble Calcutta High Court held that the effect of a continuing guarantee is not to secure amounts advanced on different occasions but to secure the floating balance which may be due from time to time and it is the date of the accrual of that balance which is relevant for the purposes of limitation when it is sued for. The surety's obligation to pay would arise immediately on default committed by the principal debtor and once a cause of action against the surety has arisen the commencement of the running of time is not further postponed till the making of a demand.

III. Full text of the judgment

The Judgment of the Court was delivered by

Chakravartti, C.J:— These two appeals were argued ably and at great length on both sides, but even that argument did not wholly dispel the obscurity attaching to some of the questions of law debated. Further investigation was therefore necessary. I may add that neither of the two allied questions on which the parties presented the longest argument before us, had been raised in the court below.

2. The facts are as follows: On the 25th July, 1944, one Montosh Kumar Chatterjee opened a current account at the South Calcutta branch of the Central Calcutta Bank Ltd. with a deposit of Rs. 1,000. He was allowed almost immediately to overdraw the account, apparently without any arrangement being made in that behalf, and by the 6th December, 1944, the total of his withdrawals had already mounted up to a little over Rs. 18,000. At that stage, he was asked to "regularise the account" and furnish proper security. On the 6th December, 1944, he applied for, and the Bank agreed to grant him, an overdraft in his current account up to the limit of Rs. 30,000 on the guarantee of one Asoke Kumar Sen. The guarantee was given in the form of an endorsement on the application of Montosh who also executed a promissory note for Rs. 30,000 in favour of the Bank on the same day. He executed another promissory note for Rs. 10,000 on the 29th December, 1944, but with that note the guarantor had no connection. After formal arrangements for an overdraft had been made, Montosh went on drawing on his account and depositing various sums in it from time to time and thereby kept the account open till October, 1948. During that period, the account was almost always in debit, but it was in credit on two occasions, once to the extent of Rs. 142-5 as on the 30th

June, 1945, and again to the extent, according to the books of the Bank, of Rs. 138-14 as on the 28th June, 1946. The actual credit on the second occasion was larger, because previously a sum of Rs. 2,000 had been wrongly debited on account of financing charges to which the Bank was not entitled. On the 8th October, 1948, Montosh made his last deposit which was of a sum of Rs. 100 by a cheque drawn on the Reserve Bank of India. The pay-in-slip was signed by him and he handed over the cheque himself. Thereafter there were no further withdrawals or deposits, but the account was kept open by the addition of interest month after month till the 31st October, 1950, when it was closed. On that date the debit balance stood in the books at Rs. 19,861. The application for the overdraft and the endorsement thereon were in the following terms:

> "Dear Sirs,
>
> Would you be so good as to grant me/us on promissory note or overdraft of Rupees Thirty thousand (Rs. 30,000) only in my/our Account Current with you against the securities as per Memo, below to be duly repaid or adjusted on or before the..... next or earlier on demand by the Bank at any time before that date. I/We agree to pay interest at 6% per annum with monthly rests, on the daily debit balance for the period it will remain unadjusted.
>
> Yours faithfully,
>
> Montosh Kumar Chatterjee.

Loan guaranteed by me Asoke Kumar Sen"

3. The application was in a printed form. It will be noticed that the inappropriate alternatives were not crossed out, nor was the blank space reserved for the date of repayment filled in. There was no memorandum of any securities.

4. The promissory note executed on the same day was in the following terms:

"On demand I/We jointly and severally promise to pay the Central Calcutta Bank Ltd. at South Calcutta Branch, the sum of Rs. Thirty thousand only, with interest thereon at the rate of six per cent, per annum with monthly rests for value received by way of overdraft."

5. The note was signed only by Montosh. Again, the inappropriate words were not crossed out.

6. On the 20th November, 1950, the Bank filed a suit on the Original Side of this Court against both Montosh and Asoke for the recovery of a sum of Rs. 19,861 together with interest and costs. The suit was brought in this Court on account of the provisions of the Banking Companies (Amendment) Act of 1950.

7. The plaint alleged that according to the terms and conditions on which over draft facilities had been granted, the transactions were to be on the basis of a mutual, open and current account. It proceeded to state that in spite of requests and demands, the defendants had failed to pay the sum of Rs. 19,861 which was the balance due up to the 31st October, 1950, inclusive of interest. The plaint stated further that no part of the claim was barred by limitation, [inasmuch as the principal

debtor had made various payments towards the loan and acknowledged such payments in writing, the last of such payments having been made on the 8th October, 1948.

8. The defendants filed two separate written statements. Defendant No. 1, Montosh, did not specifically deny that according to the terms and conditions of the overdraft, the transactions were to be on the basis of a mutual, open and current account, but he set out his own version of the terms and conditions which did not include any such express term. He admitted the Joan and the guarantee as also execution of the two promissory notes, but stated that on a proper taking of accounts, nothing would be found due from him. He did not deny the allegation that demands for payment had been made. Lastly, he stated that he did not admit that no part of the claim was barred by limitation and asserted that, in particular, all advances prior to the 6th December, 1944, were barred.

9. Defendant No. 2, Asoke, admitted that he had guaranteed in writing and stood surety for repayment by defendant No. 1 to the plaintiff of monies to be advanced to him by way of overdraft in his current account up to the limit of Rs. 30,000 on and from the 6th December, 1944, with interest thereon. He, however, pleaded that the guarantee given by him stood discharged by reason of advances made by the plaintiff on the basis of the second promissory note without his knowledge and consent. He pleaded further that repayment of amounts alleged to have been advanced before the 6th December, 1944, had never been guaranteed by him. He pleaded limitation in the same terms as defendant No. 1 and, like defendant No. 1, did not deny that demands for repayment had been made.

10. Seven issues were framed at the trial, the first as to the factum and the terms of the agreement, the second as to the nature of the account, the third as to the extent of the liability of defendant No. 2, the fourth as to the alleged variation of the contract, the fifth as to the validity of a debit of Rs. 2,000 on account of financing charges, the sixth as to limitation and the seventh as to the relief to which the plaintiff was entitled.

11. Only one witness was examined at the trial on behalf of the plaintiff. He was one Sailendra Kumar Sen, who had been the Accountant at the South Calcutta Branch of the Bank at the relevant time and who had been serving as a clerk under the Official Liquidator since the order for the liquidation of the Bank which had been made on the 9th May, 1950. The defendants examined no witness.

12. Bachawat, J., who tried the case, found the agreement proved and its terms to be those contained in the writing of the 6th December, 1944. He held further that the guarantee was a continuing guarantee and not liable to be exhausted by a single credit of Rs. 30,000. He also held that the pre-existing debt of a little over Rs. 18,000 (the learned Judge put it at Rs.17,000) did not affect the present claim against the guarantor inasmuch as that debt had been wiped out by appropriatious??? of subsequent payments which the plaintiff was entitled in law to make and which it had in fact made. On the fourth issue he held that while the liability of the guarantor was limited to a loan of Rs. 30,000, further advances made to the principal debtor could not have the

effect of making the guarantee void. He upheld the plea that the claim of financing charges was illegal and the debit of Rs. 2,000, on that account must be eliminated. On the issue of limitation he pointed out that the plea in the written statement was only as regards the advances made before the 6th December, 1944, and, besides, in the course of the trial no argument had been addressed to him on the question of limitation at all. Still, in view of section 3 of the Limitation Act, he considered the issue on his own account and held that in so far as the advances made before the 6th December, 1944, and in fact up to the 28th June, 1946, were concerned, no question of limitation arose, since those advances had been liquidated by appropriation a and formed no part of the claim. The claim in the suit was for advances made after the 28th June, 1946, and that claim, the learned Judge held, was not barred, since within three years from that date, the principal debtor had, on the 8th October, 1948, paid in a cheque into his account, with a paying-in-slip signed by him, which constituted an admission of the current account and an acknowledgment of liability to pay any balance that might be found due against him and therefore an acknowledgment of liability within the meaning of section 19 of the Limitation Act. In that view, the learned Judge found it unncessary to consider whether the account was a continuous account, leading up to a single debt and whether the payment on the 8th October, 1948, could operate as a part-payment of that debt within the meaning of section 20 of the Limitation Act or whether the account was a mutual, open and current account. In the result, he passed a decree against both the defendants for a sum of Rs. 17,217-9-6 pies which was the figure arrived at on a readjustment of the account after excluding the debit of Rs. 2,000 and he also awarded future interest and costs. The two appeals before us are against that decision. Appeal No. 8 is by the principal debtor and Appeal No. 9 is by the surety.

13. What was really argued before us was the appeal of the surety and no separate argument was presented on behalf of the principal debtor. No question was raised as regards the amount of the decree. It appears from a note recorded by the learned Judge in the course of the deposition of the plaintiffs witness that except as to the debit entry of Rs. 2,000 on account of financing charges, the correctness of the entire statement of account was admitted by the defendants.

14. The contentions advanced before us were

(i) that the guarantee was not a continuing guarantee;

(ii) that, in any event, the guarantee was invalidated by the pre-existing and undisclosed debt of Rs. 18,000 and/or discharged by the subsequent advance of a further sum of Rs. 10,000;

(iii) that the account was not a mutual, open and current account;

(iv) that, therefore, the payment on the 8th October, 1948, could not operate as an acknowledgment of the general balance due on the account or as a part-payment towards the same and so the claim was barred by limitation; and

(v) that, in any event, an acknowledgment of liability by the principal debtor or a part-payment by him could not-help the claim alive against the surety.

15. It will be noticed that the third point as not considered by the learned Judge below and the

fourth and the fifth points were not raised before him at all. Before us, practically the whole of the argument was concentrated on the last three points

16. The first and the second contentions were hardly pressed before us. In my view, the learned Judge was clearly right in holding that the guarantee in the present case was a continuing guarantee. Whether a guarantee is a continuing guarantee or not is question of construction and in cases of ambiguity, "surrounding circumstances..... may be looked at to see what was the subject-matter which the parties had in their contemplation when the guarantee was given and for this purpose recourse may be had to parole evidence". (Halsbury, 2nd Edition, Vol. 16, pp. 71-72 and the cases there cited.) In English law, a continuing guarantee is one which extends to a series of transactions and is not exhausted by, nor confined to, a single credit or transaction. The definition contained in section 129 of the Indian Contract Act is that a continuing guarantee is "a guarantee which extends to a series of transactions". The guarantee in the present case was given for an overdraft in the current account, with a stipulation for interest on the daily debit balance and monthly rests end therefore it is patent from the "subject-matter in contemplation" that the guarantee was intended to extend to a series of debit transactions in the current account. It is true that the language used in the guarantee is "overdraft of Rs. 30,000", but the surety has himself given in his written statement his understanding of it as "monies to be advanced.... by way of overdraft in the.... current account to the limit of Rs. 30.000 on and from the said 6th December, 1944". He never pleaded that the guarantee had been exhausted as soon as a credit balance appeared in the current account. It is thus clear that the amount of Rs. 30,000 was not intended or expected to be advanced in a single sum, but in a series of amounts and, further, since the advances were to be made in the current account which would remain current and open for deposits, it is clear that a fluctuating debit balance, sometimes swollen by further advances and sometimes reduced by deposits, was intended to be covered. Again, it was stated by the plaintiff's witness that the surety was present at the time the arrangement for an overdraft was made and that the understanding was "that the amount of the..... overdraft from time to time would be cleared and thereafter further amounts would be advanced." The witness was not cross-examined on the point. It is again noticeable that while the guarantee speaks of the advance having to be adjusted and of payment of interest till such adjustment, the space for the date of repayment has been left blank. The guarantee was thus not of the kind which is limited to a specified sum or to a series of advances up to the limit of that sum and which is to cease immediately on the repayment thereof. It was a continuing guarantee, continuing with the continuance of the account, not intended to be limited to a single advance of Rs. 30,000, nor intended to be exhausted as soon as the limit of Rs. 30,000 was first reached or to cease as soon as there was an even or a credit balance, but intended to endure so long as the account ran and to cover the debit balance at as there was an even or a credit balance, but intended to endure so long as the account ran and to cover the debit balance at any time up to the limit of Rs. 30,000. In construing guarantees given to banks, the ordinary mercantile practice cannot be disregarded. It has therefore often been emphasised that continuing guarantees being the common form, particular care should be taken to use appropriate words if it is not intended to give a continuing guarantee.

17. The learned Judge, in my view, was also right in holding that neither the preexisting debt of Rs. 18,000, nor the second promissory note for Rs. 10,000, affected the claim against the surety. As regards the first, the argument before us was not based on concealment and it was not contended that non-disclosure of the prior indebtedness of the principal debtor was itself sufficient to invalidate the guarantee. It is well-settled that a banker is not bound to volunteer to an intending guarantor information as to the state of the customer's account [**London General Omnibus Co., Ltd.. vv.. Holloway (1) (1952) 2 K.B 72 C.A**; **National Provincial Bank of England v. Glansuck (2) (1913) 3. K.B 474 , C.A]** and that if the guarantor wants to know whether there is already a balance against the customer, the duty lies upon him to enquire, there being no presumption that the account stands clear at the time a guarantee is given. Kirby v. Marlborough (3) [(1813) 2 M. & S. 18], and **Seaton v Heath, Seaton v. Barnard (4) [(1899) 1 Q.B 782** (reversed, but not on this point)]. The state of a customer's account in such a case is thus not a "material circumstance" within the meaning of Section 143 of Indian Contract Act which has been held not to go beyond the English authorities and which therefore does not cover cases where there is no duty to disclose. What, however, the surety contended in the present case was that the guarantee had been invalidated by reason of a variation of the contract, because, whereas he had only guaranteed a loan to be granted after the guarantee, he was being made responsible for previous advances. That argument, to my mind, has been sufficiently answered by the learned Judge who has pointed out that in fact the surety was not being made to answer for any pre-existing liability of the debtor. The creditor is entitled in law to appropriate payments, received subsequently to a guarantee, to a pre-existing debt of which the surety had no notice or knowledge: **Williams v. Robinson (5) [(1825) 3 Bing. 71]**. "Where at the date of the guarantee the debtor is already indebted upon an existing account to the guaranteed creditor and that pre-existing debt is not mentioned in the contract of surety, the creditor may appropriate to such debt subsequent payments made by the debtor, whether the surety knew of such pre-existing debt or not when he became bound, and the creditor need not apply them in reduction of the guaranteed debt"—Halsbury, 2nd Edition, Vol. 16, p. 125: Kirby v. Marlborough (3) [(1813) 2 M. & S. 18]. In the present case, the account shows that the subsequent payments had in fact been appropriated to the pre-existing debt by carrying such payments to the current account in the ordinary course of business till at last that debt was paid off and the appropriation is indicated by the striking of a balance from time to time. "And if there is nothing more than a current account kept by the creditor, or a particular account kept by the creditor and he carries the money to that particular account, then the Court concludes that the appropriation has been made". **Deely v. Lloyds Bank Ltd. (6) [(1912) A.C.756**, per Lord Shaw at p. 783]. To such appropriation the surety cannot object. **Re Sherry, London and Country Council Banking co. v. Terry (7) [(1884) 25 Ch. D 692, C.A].** If therefore the appropriation was rightly made and the effect of the appropriation was to wipe out the pre-existing debt, what is being now claimed is no part of the pre-existing debt which the surety had not guaranteed. The learned Advocate for the surety referred to Illustration (d) of Section 133 of the Indian Contract Act. I can see no relevancy of that illustration. The matter is governed by sections 59, 60 and 61. The pre-existing debt was also a debt in the current account and since the debtor made payments into the account, he obviously intended the payments to be applied to the

reduction of his total liability. If he indicated no particular mode of appropriation, the creditor Bank had a discretion to appropriate the payments to any debt it liked and it did appropriate them first to the earlier debt. Even apart from any specific appropriation in the accounts or in the plaint, the payments are to be applied to the discharge of the debts in order of time, as in England under the rule in D**evaynes Noble, Clayton's case (8) [(1816) 1 Mer. 572** at p. 608]. That being so and the amounts which constitute the present claimv. Noble, Clayton's case (8) [(1816) 1 Mer. 572 at p. 608]. That being so and the amounts which constitute the present claim having all been advanced after the execution of the guarantee, it is clear that the guarantor is not being made responsible for any past advances. In those circumstances, the decision in In re, **Boys, Eedes v. Boys Ex Parate Hop Planters Company (9) [(1870) 10 Eq. 469],** cited on behalf of the guarantor, has no application.

18. The second branch of the surety's argument under this head was that the guarantor had been discharged by the Bank making a further advance of Rs. 10,000 to the principal debtor. The facts are that on the 26th December, 1944, when the second promissory note was taken, the account stood in debit to the extent of Rs. 20,533 and the advance of Rs. 10,000, next made on the 29th December, carried the debt beyond the guaranteed amount only to the extent of Rs. 533. As regards the promissory note itself, the explanation given by the plaintiff's witness was that since the limit of the guaranteed overdraft was Ps. 30,000, but the debt might exceed that figure “from time to time or at any time”, an additional security by way of a promissory note for Rs. 10,000 had been taken from the debtor. The mere acceptance of an additional security does not discharge the surety, as the learned Judge has held and as was laid down in **Two penny v. Young** (10) [(1824) 3 B. &. C. 208] and **Wyke v. Rogers** (11) [(1852) 1 De G.M & G. 408], but apart from that, to the extent the amount of the promissory note, taken along with the existing debit balance, exceeded the guaranteed amount, it was not even an additional security in the sense of being a second security for the same debt, but further security for a further debt. The same was its character in so far as it was intended to secure future advances in excess of the guaranteed amount up to the limit of Rs. 10,000. The real question therefore is whether the granting of advances to the debtor in excess of the guaranteed amount vacates the guarantee, in the absence of a condition in restraint of such advances. It was held in Parker v. Wist (12) [(1817) 6 M.& S. 239:105 E.R 1232], that a plea that the guarantee was rendered void in such a case was “ill-pleaded”, though the surety could not be made liable for any sum beyond the amount guaranteed and the same was the decision in **Gordon v. Sarah Rae** (13) [(1858) 8 B1 & B1. 1065 : 120 E.R 396] and **Laurie v. Scholefield** (14) [(1869) 4 C.P 622], An Indian decision in point is **Hajee Moosa Sait & Brothers... v. P.S.P Abdul Kareem...Opposite Party**. (15) [A.I.R(1937) Mad. 360] though it is a decision of a single Judge. The reason behind these decisions is plain. Although a surety is answerable only according to the proper effect and meaning of his engagement and no further and although any variation will give him the right to say that the obligation is at an end, a provision to the effect that the guarantee is for a debt “up to” or “not exceeding” a certain limit means only that his own liability will be limited to the sum named, but does not mean that the whole indebtedness of the debtor shall not exceed that sum. “Not exceeding” or “up to” is therefore not a condition, a breach of which will avoid the guarantee, because by granting the debtor further advances, no term of the guarantee or the original contract

with the debtor is varied, so long as the surety is not sought to be made liable for the excess. In the present case, the surety is not being sought to be made liable for any amount exceeding the amount guaranteed by him.

19. The remaining three grounds all bear on the question of limitation in different aspects. So far as the principal debtor is concerned, the question, in my view, is concluded by the decision of the Privy Council in the case of **Maniram v. Seth Rupchand** (16) [(1906) L.R 33 I.A 165 : I.L.R 33 Cal. 1047]. In that case it was held that an admission of the existence of an open and current account implied an acknowledgment of liability to pay the debt due thereunder, if an adverse balance was found to exist against the maker of the admission and that from such acknowledgment a conditional promise to pay could be inferred which would operate in English law to save limitation on proof of an adverse balance. Under the Indian law, less was required, because an acknowledgment of liability was sufficient to satisfy section 19 of the Indian limitation Act. In that regard, there was no difference between an unqualified acknowledgment and an acknowledgment qualified by a condition which was fulfilled and accordingly an admission of the existence of an open and current account, which involved an acknowledgment of liability to pay the debt due thereunder, if a debt existed, was sufficient which involved an acknowledgment of liability to pay the debt due thereunder, if a debt existed, was sufficient acknowledgment to start a fresh period of limitation under section 19 of the Limitation Act for a suit to recover the balance due under the account, provided, of course, the other requirements of the section were satisfied. In the case before the Privy Council, the admission was contained in a petition presented to a Court and it was 7 direct admission. But it is no less direct or conclusive when it takes the form, as in the present case was a mutual, open to the creditor with a paying-in-slip, containing instructions to credit the sum to the account. Whether or not the account in the present case was a mutual, open and current account, it was certainly an open and current account and if it was the paying of the cheque with the paying-in-slip on the 8th October, 1948, must be held, under the authority of the decision of the Privy Council, to have been an admission of the existence of an account and an acknowledgment of liability for any balance that might be found due thereunder. The amount sued for has been found due, for the correctness of the statement of accounts is admitted. The advances which make up the amount were all made after the 28th June, 1946— the date of the last credit balance—which was within three years from the 8th October, 1948, and therefore even if the advances are taken individually as constituting a series of separate loans, the acknowledgment was made before the expiry of the period of limitation for a suit in respect of each of the advances. In that state of the facts, it is not necessary to consider whether in the case of a current account with a banker on which overdrafts have been drawn, each one of the advances gives rise to a separate cause of action or whether there is only a single cause of action for the general balance. The distinction, however, is material from another point of view, because, under section 19, the acknowledgment must be an acknowledgment of liability in respect of the right to which the suit relates and therefore if there are separate rights of suit in respect of the several advances, it will be a question to which of the rights the acknowledgment of liability, inferred from the admission of a current account, is to be referred. The question, however, has been laid at rest by the decision of the Privy Council. Their

Lordships were not unmindful of the distinction, for they observed that the controversy in the case before them was whether the debt due to Motiram was 'a simple debt or a series of debts', and yet they held the acknowledgment of liability for the balance due on the account, if any, inferable from the admission of the account, to be sufficient acknowledgment to start a fresh period of limitation for the whole claim. The same rule must apply in the present case. The only other condition which remains to be considered is whether the acknowledgment was made in writing signed by the person against whom the right is claimed. The paying-in-slip was signed by Montosh. That being so and the acknowledgment having been made on the 8th October, 1948, the suit brought on the 20th November, 1950, was not barred as against the principal debtor, whether Article 57 or Article 59 applies and even if Article 85 does not.

20. The learned Judge dealt only with the case of the principal debtor and was able to dispose of the question of limitation by relying on the decision of Lort Williams, J., in **Bengal National Bank v. Jatindra Nath Mazumdar (17) (I.L.R 56 Cal. 556 :33 C.W.N 412)** which had applied the decision of the **Privy Council in Motiram v. Seth Rupchand (16) [(1906) L.R 33 L.A 165 : I.L.R 33 Cal. 1047].** He proceeded on acknowledgment only and did not deal with the question of part-payment. That question is attended with great difficulty, because it is inter-linked with the question as to whether there is only one debt constituted from time to time by the excess of the total debits over the total credits. The distinction is material where part- payment is relied on for the purposes of section 20 of the Limitation Act, because the payment, whether of interest or of a part of the principal, must be a payment towards the particular debt in respect of which limitation is sought to be saved. If there are several debts, the first problem to solve is to which of the debts it is to be appropriated and even if it be appropriated to the earliest in time, a fresh period of limitation will be available only in respect of that debt, provided the payment was made before the expiry of the period of limitation, but not in respect of any other debt or in respect of the general balance at the date of the payment. In England, it appears to have been held in the solitary case of **Parr's Banking Co. Ltd. v. Yates (18) [(1888) 2 Q.B 460]** that each advance was a separate debt, but that case, after having given **Great Co. Ltd. v. Yates (18) [(1888) 2 Q.B 460]** that each advance was a separate debt, but that case, after having given great trouble and having never been approved of, though not expressly dissented from, has at last been sidetracked by the invention of a doctrine that where the nature of the transaction or the language used by the parties suggests that a demand for payment shall be made, no cause of action shall arise till after a demand and the old rule that money payable on demand shall be payable without demand and that time shall begin to run forthwith **[Norton v. Ellam (19) (1837) 2 M.& W. 461:46 R.R 646]** being subject to modification to that extent, a demand is required in the case of action by a Bank for the recovery of advances made to a customer in his current account, since in such a case the debit balance requires to be ascertained. In other words, since in such a case there is no debt which is self-evident and known but it requires to be seen whether the total result of the debits and credits is to give rise to a debt, the nature of the transaction is such as to imply a condition that the result shall be worked out and if a debt is found due, a demand for payment shall be made, before a cause of action can arise. A doctrine of that kind was laid down in the case of **Hartland v. Jukes (20) [(1863) 1 H. & C. 667 : 158 E.R 1052]** which

was a case of an action against a surety, but the principle laid down appears to apply to the principal debtor as well; and in the case of Rouse v. Bradford Banking Co. (21) [(1894) A.C, 586], Lord Hers-chell, at page 596 of the report, points out the serious consequences that would follow if a Bank was to be entitled to sue for an overdraft immediately after granting it. It will be noticed that if time does not begin to run till a demand is made, it is not of much importance for purposes of limitation whether there is one or several debts, because the Bank may combine all the advances in one demand. In India, however, there is great difficulty in applying the doctrine of demand, because there is no special Article in the Limitation Act for an action by a Bank against a customer for monies advanced and the general. Articles, 57 and 59, both prescribe the starting point of limitation as "when the loan is made." An attempt however can be made to solve the difficulty by not avoiding but facing the question of one or several debts. In the case of **Kedar Nath Mitra v. Dinabandhu Sana (22) (I.L.R 42 Cal. 1043)**, one of the questions to be considered was whether a cheque paid to a creditor, between whom and the payer there was an account consisting of items of timber sold and payments made from time to time, could operate as part-payment under section 20 of the Limitation Act so as to save limitation for the whole claim, the payment having been made towards the principal due. It was held by Jenkins, C.J, and Woodroffe, J., that the payment was a good part payment under section 20, be cause there was no separate cause of action in respect of each item of credit, but only one claim. In so holding, their Lordships applied the following principle which had been laid down in B**onsey v. Wordsworth (23) [(1856) 18 C.B 324 : 139 E.R 1395]** in respect of tradesmen's bills. "Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided." The same case was relied on in **Hiralal Motichand v. Ganpat Lahanu (24) (I.L.R 46 Bom. 142)** where it was held that items of debit in a running account did not constitute "two or more distinct subjects" within the meaning of Sec 17 of the court fees Act, but formed in all only one cause of action and therefore court-fee was payable not separately on each item, but on the aggregate amount on behalf of the surety, reference was made to the decision in **Abdul Aziz v. Munna Lal (25)) ((19 A..L..J 555**) which was also a case of a suit on a tradesman's account and where it was held that for each item, time would run separately from its date. The learned Judges appear to have proceeded on the literal text of Article 52 of The Limitation Act without considering the effect of there being a continuous course of dealings and the intention, if any, that outstanding items shall go on being amalgamated.

21. Speaking for myself, I can see no reason why the principle of Bonsey v. Wordsworth (23) (supra) should not apply at least to the case of a current account, carrying with it an arrangement for an overdraft. It is true that all the principles laid down by English Judges from time to time cannot be fitted into the framework of the. Indian limitation Act, particularly in view down by English Judges from time to time cannot be fitted into the framework of the. Indian limitation Act, particularly in view of specific provisions made as to starting points. In the case of price of goods sold and delivered, the starting point for a suit is, in the absence of a fixed period of credit, the date of the

delivery of the goods, but the decision in **Kedar Nath Mitra v. Dinabandhu Saha (22) (supra**) can be explained on the ground that, there, goods of the same kind viz., pieces of timber, were supplied from time to time under a standing arrangement and therefore the date of the delivery of the, goods was the date of the last supply-when delivery was completed, the several supplies combining with one another so as to form, is effect, but one transaction the case of a current account, with an arrangement for an overdraft, is clearer. The dealing is intended to be continuous and each item of advance, if not paid, is according to the ordinary banking practice, to be united with another. Besides where there is a standing arrangement for an overdraft up to a particular limit, there is really but one loan and each advance within the limit is not a separate loan, but an instalment of the total amount agreed to be lent. When at the same time the current account remains open and both the advances and the deposits are carried in the same account, as in the present case, and the deposits are appropriated from time to time to the reduction of the debt, it is clear that the several transactions are but the several steps in the carrying out of a single main transaction which is calculated to lead to but one result of debit or credit. The diversity lies only, in the process of carrying out the transaction but the unity of the transaction is fundamental, although it is continuous and has, like all loan transactions, an aspect of duality in that there are advances and payments. The singleness of the loan appears even more clearly from the fact that there is a provision for interest and monthly rests, so that the successive advances are added to one another and the interest accruing on the debit balance of each month is added to the principal, if not paid, and the two together become a consolidated new principal. In my opinion, it is clear that the balance due on such an account at any time is 3 single debt.

22. If there was a single debt outstanding on the 8th October, 1948, there is little difficulty in holding that the putting in of the cheque on that date operated as a payment towards that debt under section 20 of the Limitation Act. Such payment must be payment of interest “as such” or part-payment of the principal in fact, even if not “as such”. In my opinion, the payment in the present case was both. On the 1st October, 1948, the principal due had become Rs. 17,222-14 as., with interest up to the 30th September added. It stood at the same figure on the 8th October, when the interest which had accrued since the 1st of the month was about Rs. 31. When on that date the debtor paid a sum of Rs. 100, he may be presumed to have paid the interest due and paid the balance, left after such payment, towards the principal. It was held by the Privy Council in the case of **Raman Shah v. Lalchand (26) (L.R 67 I.A 160 : 44 C.W.N 625)** that the intention of the debtor may appear from the circumstances of the case and that the character of the payment as intended to go towards Interest or towards the principal need not appear in writing or at the time of the payment. In the case of **Hingu Miah v. Heramba Chandra Chakrabarti, (27) [(1910) 13 C.L.J 139]**, where there were several debts, the intention of the debtor to pay the amount paid by him as interest towards the interest on all the debts was inferred from the state of the accounts. Besides, it appears in the present case that a balance was next struck on the 30th October, 1948, and that balance, which included a sum of Rs. 116-7 as as interest, was shown as reduced by Rs. 100, which means that the same had been appropriated towards interest. According to the plaintiff's witness, the debtor had been given a Pass Book in which the transactions were entered. In the case

of **National Bank of Upper India v. Bansidhar, (28) [(1929) L.R 57 I.A I : 34 C.W.N 145]**, the Bank appropriated an amount paid by the debtor to the interest due on several accounts and informed the debtor cf such appropriation upon which he entered the same in his books and it was held by the Privy Council that there had been payment of interest, as such, for all the debts. On the same principle it may be said that there was a payment of interest as such in the present case. In any event, payment of a part of the principal is not required to be payment as such **Raman Shah v. Lalchand (26) (L.R 67 I.A 160 : 44 C.W.N 625).** In my opinion, the case of Ram Prasad...(Plaintiff); v. Binaek Shukul...(Defendant).*, (20) [(1933) I.L.R 55 All. 632] on which the appellants relied, cannot be held to be good law after the decision of the Privy Council. Whether the amount of Rs. 100 be taken as appropriated on the 8th October, 1948, when it was paid or on the 30th October, 1948, when the next balance was struck, there was a part-payment of the principal in either case, by a part of the amount in the first and by the whole in the second, if the appropriation be taken as made after the interest for October had been added to the principal. In my opi nion, as against the principal debtor, limitation was saved by payment as well, of interest as such and of a part of the principal or, in any event, by a part-payment of the principal. As already stated, the claim is for advances made after the 28th June, 1946 and the payment made on the 8th October, 1948, which is referable to the whole debt was, even leaving aside prior payments, “before the expiration of the period prescribed” by Article 57 or 59 if one or other of them applied, as contended.

23. The next question is whether on account of the deposit of the 8th October, 1948, limitation was saved as against the surety. In my opinion, it was not, either by acknowledgment of liability or by payment and if the case against the surety were to rest on saving of limitation by the deposit, it would be bound to fail. 1 ought to make it clear that what I am considering at the present moment is the general question of the effect of an acknowledgment or payment by the principal debtor on a claim against the surety apart from what provisions or principles of limitation apply to a claim against the surety in a case of the present kind.

24. The case of on acknowledgment of liability appears to me to be plain. section 19 of the Limitation Act requires that there must be an acknowledgment of liability in respect of the right “made in writing sign ed by the party against whom such right is claimed” and Explanation II to the section provides that the signature may be of a person duly authorised in that behalf. In relation to a claim against the surety, an acknowledgment by the principal debtor is obviously not an acknowledgment by the party against whom the right is claim ed. Nor is there any implied agency in the principal debtor, because there is no thing in the relation of principal and surety itself which makes payment by the principal a payment by or on behalf of the surety. The only case in which an acknowledgment made by the principal debtor can give a fresh period of limitation as against the surety is a case where the surety authorised the principal to make the acknowledgment. Even in such a case it may perhaps be said that the right claimed against a surety is not the same as the right claimed against the principal and therefore the section will be satisfied only if the surety authorises the principal to make an acknowledgment of not his own but the surety's liability and the principal makes such an acknowledgment. However, for the purposes of the present case it is

enough to point out that there is no evidence that the surety at all authorised the principal to make the payment and sign the paying-in-slip.

25. The case of a part-payment by the principal debtor came to be directly considered by this Court in the case of **Bro-Jendra kishore Roy Chowdhury v. Hindustan Cooperative Insurance Co., Ltd. (30) [(1917) 21 C.W.N 482],** where it was held by Sanderson, C.J, and Mookerjeo, J., that even if interest was paid by the principal debtor with the knowledge and consent of the surety, such payment would not start a fresh period of limitation against the latter, unless the payment was proved to have been made on his behalf. The reason given was that the debt of the principal debtor and that of the surety were two distinct debts and, therefore, since the saving of limitation under section 20 by payment of interest could only be in respect of the debt on which the interest was paid, such payment of interest by the principal debtor could not extend the remedy in respect of the surety's debt. That reason met the argument that the ??? of section 20, viz., "a fresh period of limitation shall be computed were perfectly general and, accordingly, once a payment was made by a "personaliable to pay the debt", limitation would be saved as against all. The view taken in the majority of the reported decisions is the same as that in the Calcutta case which was an appeal from the Original Side.

26. But the decision was disapproved in **Ranjit Ray v. Kaviraj Kishori Mohan Gupta (31) [(1940) 44 C.W.N 985]** by Lort Williams, J., although the learned Judge was sitting singly and he held that a payment of principal or interest by either the principal or the surety would create a fresh period of limitation in respect of the common debt as against both. The learned Judge was sitting on the Original Side and was clearly bound to follow the decision of the Appeal Court. If he found himself unable to accept it, the utmost he could do was to make a reference wide Chapter V, rule 2, of the Original Side Rules, but it is greatly to be regretted that instead of following even that procedure, he took upon himself the responsibility of going against the decision of the appellate Court. However that may be, the learned Judge based the view taken by him mainly on four English cases. In **re Frisby Allison v. Frisby (32) [(1889) L.R 43 Ch.D 106]**; In re **Powers, Lindsell v. Phillips, (33) [(1885) L.R 30 Ch.D 291]; Coope v. Cresswell (34) [(1866) L.R 2 Eq. 106]**; and **Lewin v. Wilson (35) [(1886) 11 A.C 639]** The first two cases were cited in **Gopal Daji v. Gopal Bai Sonee (36) [(1903) I.L.R 28 Bom. 248],**-but Jenkins, C.J, dismissed them with the short comment that they were based on special provisions of English statutes which had no place in India. The opinion of Cotton, L.J, in the second case furnished the basis for the view taken in **Bro-Jendra kishore Roy Chowdhury v. Hindustan Cooperative Insurance Co., Ltd. (30) (supra)**, but Lort Williams, J., observed that that was not a complete statement of the position in law. With great respect, it appears to me that the statement of law given by the learned Judge himself is open to the same criticism that he offered on the earlier case. Cotton, L.J, was one of the Judges in both In re Frisby (32) (supra), and In re Powers (33) (supra), which might put one on enquiry as to how his observations in the latter case could stand alongside the decision in both. The explanation of the cases relied on by Lort Williams, J., is that the first, the second and the fourth of them related to suits for monies charged on land to which Section 8 of the Real Property Amendment Act of 1874 applied, but section 14 of the

Mercantile Law Amendment Act of 1856 did not and the third case, which turned on section 5 of the Limitation of Act, 1623, expressed more or less in the same terms as section 8 of the Act of 1874, was actually reversed in appeal on the identical point—see (1866) 2 Ch. Appeals, 112. Section 14 of the Mercantile Law Amendment Act correspondes to Section 21(2) of the Indian Limitation Act except that it includes the further term 'co-debtors' and is limited to part-payment. section 8 of the Real Property Amendment Act of 1874 combines in one sections the provisions of section 19 and 20 of the Indian Limitation Act and while applying to suits for monies charged on land or rent or legacies, is not subject to the exception contained in Section 14 of the Mercantile Amendment Law Act. I am leaving aside the case of acknowledgment to which another Act, the Statute of Frauds Amendment Act, 1828, commonly called Lord Tenterden's Act, applies in the case of suits for certain types of debts. As regards part-payment, section 14 of the Mercantile Law Amendment Act applies to actions for simple contract debts, i.e, debts under contracts not under seal and to those for specialties, i.e, debts under contracts under seal and the effect is that, in the case of such debts, of several co-contractors or co-debtors or executors or administrators of a contractor, one is not chargeable by reason only of payment of any interest or principal by any other or others. But this provision did not affect section 40 of The Real Property Amendment Act, 1833 which has since been replaced by section 8 of an Act of the same name of 1874. The result therefore is that in the case of suits for monies charged on land or rent or legacies to which section 8 of the Real Property Amendment Act, 1874, applies, but section 14 of the Mercantile Law Amendment Act, 1856, does not, the former section, which is a combination of section 19 and 20 of the Indian Limitation Act, has full play and its effect is not qualified by any proviso such as is contained in section 14 of the English Act of 1856 and section 21(2) of the Indian Act [see Halsbury, 2nd Edition, Vol. 20, pp. 626, 629, 653, note (s) and 667, note (g) where the very cases relied on by Lort Williams, J., are cited]. With great respect, Lort Williams, J., seems to have overlooked the distinction between actions for different types of debts and based his conclusion on decisions in actions to which no exception of the nature of section 21(2) of the Indian Act applied. In regard to the case of **Coope v. Creswell (34) [(1866) L.R 2 Eq. 106]**. the learned Judge seems to have been strangely misled. That also was a case to which section 14 of the Mercantile Law Amendment Act did not apply but on the very construction of section 5 of the. Limitation Act on which the case turned and which was in all material respects the same as section 8 of the Act of 1874, Kindersley, V.C, on whose opinion the learned Judge relies, was reversed on appeal by Chelmsford, L.C The learned Judge confirmed himself to the report in (1866) L.R 2 Eq. 106, but overlooked (1866) 2 Ch. Appeals, 112, which contains the decision of the appellate Court.

27. In **Bradford Old Bank Ltd. v. Sut-Cliffe (37) [(1918) 2 K.B 833]**, which was a case of an action to which section 14 of the Mercantile Law Amendment Act applied, it was held by the Court of Appeal that a payment of interest by the principal debtors could not save limitation against the surety. Pickford, L.J, merely referred to the section, but Scrutton, L.J, appears to have regarded the principals and the surety as co-debtors. The English section contains two expressions, 'co-contractors' and 'co-debtors', whereas the Indian section contains only the expression 'joint contractors'. Lort Williams, J., did refer to section 21(2), but disposed of it by saying that a surety

was not a joint contractor with the principal and was therefore outside the section. Assuming he is, the fact that a person is excluded from section 21(2) does not involve that he is included in section 20 and in order that the latter section may be successfully pleaded, it must be established that the person who made the payment relied on, satisfies its terms. Lort Williams, J., observed that where there was a principal debtor as also a surety, it was not that there were two debts, but there were two contracts in regard to the same debt. Assuming that even that is so, the language of section 20 which is "paid..... by the person liable to pay the debt or by his agent duly authorised in this behalf" has still to be reckoned with. It is clear that even if the principal and the surety be both persons liable to pay "the debt", it cannot be said, when the payment was made by the principal but the section is pleaded against the surety, that "the person liable to pay the debt" made the payment. Dealing with section 5 of the Statute of Limitations where the language is "by the party liable.....or his agent", Chelmsford, L.C, observed in the case of Coope v. Creswell (34) (supra) that the words of the section were appropriate only to the case of a single obligor but were ill-adapted to a case of several obligors and he proceeded to hold that there was no good reason to construe the section as if it read "by the party or parties liable or any of them or him or her or their agent". The literal meaning of the section, he added, was a sensible meaning, for it was proper to look only to the acts of the party whose liability was sought to be enforced. In my opinion, those considerations apply to the construction of section 20 and limitation cannot be saved under the section as against a surety by a payment made by the principal. The observation in Halsbury, Vol. 20, p. 653, note (q), that Coope v. Creswell (34) (supra) is no longer regarded as good law relates only to the distinction made in that case between acknowledgment and part-payment but does not affect the present point.

28. I may add that it is perhaps not possible to state it as a universal proposition that a surety can never be a joint contractor. Contracts of guarantee take various forms. Principal and surety may join in the same deed and even covenant jointly and at the same time severally to pay the debt, as in In re, **J. Brown's Estate Brown v. Brown (38) [(1893) 2 Ch. 300]**. Or, the surety may guarantee repayment of the loan separately, either by an endorsement on the principal's deed or by a separate deed or writing. But since the definition of a contract of guarantee in the Indian Act is that it is a promise to discharge the liability of a third person in case of his default, it is perhaps more accurate to say that the surety's contract is a distinct contract and not a joint contract by him and the principal. In any event, in the present case, the surety did not join in the debtor's contract to repay the loan, but merely guaranteed its repayment on his own account. Besides, if the surety is not a joint contractor, the difficulty of regarding him as a "person liable to pay the debt" in the same sense as the principal debtor increases rather than decreases, because although, in case the debtor defaults, he has to pay the same amount that the debtor was liable to pay, it is not the same debt that he pays but a debt of his own arising out of a liability created by his own debtor was liable to pay, it is not the same debt that he pays but a debt of his own arising out of a liability created by his own contract. In that sense, there are certainly two debts. But apart from these refinements, it is sufficient to say, as was said by Mookerjee, J., in **Brojendra Kishor Roy Chowdhary v. Hindustan Cooperative Insurance Society , Ltd. (30) [(1917) 21 C.W.N 482]**, that if a surety is 1 joint contractor,

he comes under the express exception contained in section 21(2) and if he is not, a payment by the principal not made under his authority does not bring him within section 20, as it was not a payment by him or an agent authorised by him. Indeed; if the Legislature considered it proper to make payment by one ineffective against others in the case of even joint contractors and partners, it is hardly reasonable to think that it intended to make payment by the principal effective against the surety. The fact that the provision regarding a fresh period of limitation is expressed in section 20 in general terms does not, in my view, indicate that the section intends to extend limitation against any person other than the person who actually made the payment, except where such payment can be regarded as payment by the person against whom the section is sought to be applied.

29. I have so far dealt with the argument as advanced on behalf of the Appellants, viz., that as against the principal debtor, the Article applicable is either Article 57 or Article 59, that time began to run in his favour in respect of each advance as soon as such advance was made, that it began to run against the surety at the same time and that limitation was not saved as against either the principal debtor or the surety by the deposit of the 8th October, 1948. I have already disposed of the case of the principal debtor by holding that even on the footing that Article 57 or 59 applies to his case and the cause of action in respect of each advance arose at its date, no part of the claim is barred as against him because of the deposit of the 8th October, 1948, but in the case of the surety, I have held that if there was any question of limitation being saved as against him, it was not saved by the deposit. The further argument addressed to us on behalf of the surety makes it necessity to examine the assumptions made in the case of the principal debtor and see what the true position is.

30. It was contended on behalf of the surety that if the deposit was of no use to the plaintiff Bank so far as he was concerned, the claim was barred as against him except as regards advances made within three years of the suit. The argument was based on the theory, also put forward in the case of the principal debtor, that each of the advances constituted a separate loan. The reasoning was that it was the repayment of those separate loans which the surety had guaranteed and, consequently, even as against him, each loan furnished a separate cause of action, so that he would be liable only for such of the debts as were not barred and not for any general balance outstanding at the date of the suit. The question whether one loan was advanced to the principal debtor or several and the question whether the surety guaranteed repayment of a single or several loans are obviously inter-connected. I have found it unnecessary to consider the question of one or several loans in the case of the principal debtor, except incidentally in connection with the question of part-payment, because I have found a valid acknowledgment of liability by him and because all the advances claimed in the suit were made within three years from the date of the acknowledgment. But the question is one of importance in the case of the surety against whom no acknowledgment or payment of interest or principal is available. The contention of the surety has certainly the support of the decision in **Parr's Banking Co. Ltd. v. Yates (18) [(1898) 2 Q.B 460]**, where Rigby, L.J, observed that the effect of a continuing guarantee was only to extend the guarantee beyond the first sum advanced to sums subsequently advanced so long as the guarantee continued and not to operate as a continuing promise to pay the amount which might from time to time be due from the

debtor, if not paid. It was thus held that the guarantee was of a distributive character, attaching separately to each advance made to the debtor. In the case of **Wright v. New Zealand Farmer's Cooperative Association of Canterbury Ltd. (39) [(1939) A.C 439],** an exceptionally strong Board of the Judicial Committee had occasion to consider Parr's case (18) (supra) but their Lordships preferred not to express any opinion on the correctness of the view taken therein. In the case before them., the guarantee was a continuing guarantee which was to apply "to the balance that is now or may at any time hereafter be owing" and they held that what had been guaranteed was the repayment of every debit balance that might be constituted from time to time by the excess of the total debits over the total credits and that, therefore, for purposes of limitation, the material date was the date when the balance sued for had been constituted and not the date on which any individual debit had been incurred. In Parr's case (18) (supra) there was a current account, with an arrangement for an overdraft and the guarantee was for "due payment and satisfaction of all moneys and liabilities that may have been or may from time to time be owing to or incurred by you in account with the guaranteed party," subject to a limit of £1,000, together with interest thereon. That undertaking, the Judicial Committee say in Wright's case (39) (supra), contained in terms no guarantee of every debit balance existing from time to time, a view hardly warranted by the language used, but they also point out that even the last debit in the account was beyond the period of limitation, though there had been subsequent credits within the period. In my opinion it is impossible to escape the conclusion that Parr's case (18) (supra) does construe a continuing guarantee as distributive and not attaching to the general balance at any given point of time. But the decision in that case appears to have been based on a construction of the guarantee rather than on the view that the several advances made to the debtor were separate loans, though the same appears to be implied. There is, however, one distinction which appears to be material and which is that in that case the arrangement with the debtor was not for an overdraft up to the limit of a specific sum but a general arrangement so that it can be said that what were advanced to the debtor from time to time were not instalments of a single larger sum which had been agreed to between the Bank and the customer and the repayment of which had been guaranteed, but separate loans of an occasional character which had been guaranteed up to the specified limit. Be that as it may, Parr's case (18) (supra) has never received any approval and it has been pointed out with good reason that its effect is to defeat the whole intention and utility of a continuing guarantee which is to extend a real working credit to the principal debtor. "There could be no right of action against the guarantor un less there was also one against the principal debtor and the guarantee would be meaningless if the creditor could demand and enforce re-payment of every overdraft within twenty-four hours or less from the time it was granted"— Paget's Law of Banking, Fifth Edition, p. 422: see also **Rouse v. Bradford Banking Co. (21) [(1894) A.C 586**, at p. 596, per Lord Herschell]. A more workable view has been taken in other cases, particularly **Hartland v. Jukes Siore (20) [(1863) 1 H. & C. 158 R.R 1053]**; In re **J. Brown's Estate, Brown v. Brown (38) [(1893) 2 Ch. 300]**; and **Bradford old Bank Ltd. v. Sutcliffe, (37) [(1918) 2 K.B 833]**. The principle emerging from these cases is that whether a guarantee is a continuing guarantee or not is a question of construction, but if it is a continuing guarantee, the effect is not to secure the amounts advanced on the different occasions

separately, but to secure the floating balance which may be due from time to time and it is the date of the accrual of that balance which is relevant for purposes of limitation, when it is sued for. I would prefer to follow that view which appears to me to be the better view and more widely held. In particular, it appears to me, for reasons I have already stated in connection with the question of part-payment, that when there is an arrangement for an overdraft in a current account up to a specified limit and several advances, not exceeding that limit in their totality, less the credits, are made, such advances are not each a separate Joan but are component parts of a single loan; and it appears to me to follow that when a guarantee is given in respect of such an overdraft, it is a continuing guarantee, covering the running and fluctuating account and securing the general debit balance at any time, subject, however, to the limit specified. I am therefore unable to accept the argument that, in the present case, limitation is to be computed as against the surety separately from the dale of each of the advances sued for.

31. While the surety wanted to retard the starting point of limitation the Bank wanted to advance it. It was contended that in the case of a continuing guarantee given in respect of loans granted in a running account, time did not begin to run against the surety till a demand was made. Particularly was that the position, so it was said, in cases where the surety promised to the surety till a demand was made. Particularly was that the position, so it was said, in cases where the surety promised to pay 'on demand'. That proposition has the support of English cases, though this also has often been regarded as a question of construction. Thus, in **Hartland v. Jukes (20) (supra)**, where there was a promissory note executed jointly by the principal and the surety in favour of a Bank and there was also a memorandum stating that it was a collaeral security for the banking account, it was held in an action against the executors of the surety that the promissory note and the memorandum were to be read together and that although in the case of a simple bond, payable on demand, time would run from its date under the note and the memorandum, the mere existence of a debt unaccompanied by any claim by the Bank, would not have the effect of making the statute run. In, In re J. Brown's Estate, Brown v. Brown (38) (supra), it was held that in the case of a present debt or a promise to pay on demand, no demand was necessary and limitation would start at once from the making of the note, but in the case of a covenant or promise to pay a collateral debt, such as a covenant by a surety, a demand had to be made before an action could be brought. So it was held in **Bradford Old Bank Ltd. vv.. Sutcliffe** (37) (supra), in ap action against the surety that the provision "on demand" in a collateral promise to pay some one else's debt was a real provision and not a mere matter of words and therefore a demand was necessary in such a case to give a start to limitation. The principle laid down in these cases appears to be grounded in good sense,. particularly in the case of a running account with constant debits and credits where it is necessary to ascertain whether a debit balance has really arisen. But there must be a term in the surety's contract providing for a demand, whether express or implied, or there must be "circumstances rendering a demand upon the surety a legal obligation"—per Nasim Ali, J., in Kumar Krishna Mitter v. The Karnani Industrial Bank Ltd. (41) [(Appeal from Original Decree, No. 51 of 1941: Derbyshire, C.J, and Nasim Ali, J., decided on the 6th January, 1942), unreported]. The doctrine of demand can easily be fitted into the English law, because, under the Act of 1623, time runs from the date when

the cause of action arises. So far as the Indian limitation Act is concerned, suits upon contracts of guarantee are not specifically provided for, but the Article applicable must be either Article 65 or Article 115, though there is some conflict of opinion as to which of them applies. The relevant starting point under Article 65 is “when the contingency happens” and that under Article 115 is “when the contract is broken”. Where a demand on the surety can be insisted on, it is not difficult to adjust it to Article 65 or Article 115, because the contingency which is the starting point under the former would be the making of the demand, whereas, under the latter, the contract would be broken when, even after a demand, the surety did not pay the debt. Put, as I have already pointed out, a provision for a demand or a duty to make it must exist. There is no such provision in the present case, as the surety did not stipulate for a demand. So was there no such provision in Brojendra Kishore Chowdhury v. Hindustan Cooperative Society Ltd., (30) (supra), where it was held that the starting point of limitation under either Article 65 or Article 115 was the date of the principal's default and nothing was said about a demand, apparently because on the facts of the case, the question did not call for decision. The general proposition laid clown in English cases that a promise by a surety to pay the original debt is a collateral promise, creating a collateral debt, in regard to which no cause of action arises till a demand is made, was not accepted or acted upon either in Brojendra Kishore Chowdhury's case, (30) (supra), or the unreported case, above cited. On the facts of the present case, I am of opinion that after a cause of action had otherwise arisen against the surety, the commencement of the running of time was not further postponed till the making of a demand.

32. But when did time commence to run? A contract of guarantee is, under the definition contained in the Indian Contract Act, “a contract to perform the promise, or to discharge the liability, of a third person in case of his default”. The surety's obligation to pay would therefore arise immediately on a default occurring on the part of the principal debtor. If Article 65 applies to a suit upon a contract of guarantee, such default would be the contingency contemplated by the Article, on the happening of which time would begin to run, in cases where there is no question of a demand. If Article 115 applies, the date of the breach of the contract contemplated by the Article would also be the date of the principal debtor's default, because of the breach of the contract contemplated by the Article would also be the date of the principal debtor's default, because such default would immediately give rise to the surety's obligation to pay and if he does not pay, there would be a breach of contract. It is therefore necessary to ascertain when a default occurs in such a case on the part of the principal debtor.

33. In the unreported decision cited above it was held that in the case of a continuing guarantee in respect of a cash credit loan account, the date of the principal debtor's default was the date on which the balance due was ascertained. “That was the date”, observed Derbyshire, C.J, “on which the company, the principal debtor .....clearly made a default under its contract with the bank. The sum payable by the guarantors under the terms of the guarantee was at that time qualified”. Nasim Ali, J., though he made a reference to the surety's default upon a demand by the creditor, also observed that limitation could not begin to run against the creditor before the date when the

ultimate balance was ascertained and both the learned Judges held that the suit having been brought against the surety within three years from that date, was not time-barred. Applying that principle to the present case, the date of default would be the 30th October, 1948, when the balance upon the transactions was struck, the subsequent entries in the account being only items of interest. Those subsequent items present no difficulty, for they accrued within three years of the suit and even in Parr's case (18) (supra), a decree for similar items was passed. On the basis that the debtor's default occurred on the 30th October, 1948, the suit, brought on the 20th November, 1950, is clearly not barred as against the surety, although the deposit of the 8th October, 1948, cannot operate against him, either as an acknowledgment or as a payment of interest or principal.

34. In the case of the principal debtor, I have found it unnecessary to consider when in fact time began to run in his favour, because the deposit of the 8th October, 1948, was sufficient to save limitation, even if time began to run in respect of each advance on the date the advance was made. 1 may point out, however, that if a default occurred on his part on the day the balance due was ascertained and if it is Article 57 or 59 which applies to a suit against him, the starting point of limitation in his favour would not be the date of his default, but another date, the date “when the money was lent”. While pointing out that the debt under a combined current and overdraft account would always be a single sum constituted by the debit balance of the day, when such a balance arose, I have already pointed out the difficulty of adjusting that concept to the starting point of limitation under Articles 57 and 59. But if one or other of those Articles has to be applied, because there is no other appropriate Article, unless the account can be said to be an open, current and mutual account and if they are applied by holding that the several loans are but instalments of a single larger loan so that “money is lent” when the last advance within the stipulated limit is made, the starting point of limitation would still not be the date when the balance is ascertained. If Articles 57 and 59 state the starting point of limitation as the date of the loan on the footing that even on that date there is an obligation to repay and therefore a de fault; there would seem to be a conflict between the concept underlying the Articles and the date of default, as indicated in the unreported case or, to put the matter in another way, there would be one date of default for a suit against the principal debtor and another date for a suit against the surety. I think the answer is that obligation to pay is one thing but default in paying is another and that Articles 57 and 59 put the starting point of limitation at the accrual of the obligation, while default, i.e, failure to pay, arises subsequently. I concede that the explanation is not very satisfactory, but the difficulty arises out of the absence of any wholly appropriate Article and cannot be avoided altogether. For the purposes of the present case, I am content to rest the decision regarding the principal debtor on the deposit and that regarding the surety on the unreported case.

35. But there is a firmer ground on which the suit must be held to be not barred as against either defendant. It was contended on behalf of the Respondent Bank that the account of the principal debtor was a mutual, open and current account and since the last admitted item was in the year 1948, and the suit had been brought in 1950, no question of limitation could possibly arise. In view of the conclusion I have already arrived at, it is really not necessary to consider thelimitation could

possibly arise. In view of the conclusion I have already arrived at, it is really not necessary to consider the question, but as it was argued at great length and as it bears on limitation, I shall briefly indicate my views. In my opinion, the contention of the Bank is correct.

36. The importance of the account being a mutual, open and current account is that if it was of that character, a suit for the balance due on it would be within time under Article 85 of the Limitation Act, if brought within three years from the close of the year in which the last item admitted or proved was entered in the account. The item of the 8th October, 1948, is admitted and consequently if Article 85 applies, there is no question of limitation in the case. The effect of Article 85, as explained by Rankin, C.J, in his illuminating judgment in **The Tea Financing Syndicate v. Chandra Kamal Bezboruha (42) [34 C.W.N 1175 : I.L.R 56 Cal. 649]**, is to exempt the plaintiff in a suit for the balance due on a mutual, open and current account from the operation of the principle that limitation runs against each item from its date and to provide that if the last item is within time, it will draw the previous items after it, however old they may be, although there has been no acknowledgment sufficient to comply with the conditions of section 19 In other words, it substitutes for the kind of acknowledgment specified in section 19 an acknowledgment furnished by the conduct of the parties, each time there is a transaction, and when there is such an acknowledgment, it authorises a claim for the general balance due on the account in stead of a separate claim for each individual item in favour of the plaintiff. An acknowledgment arises from conduct, because when there is an open and unliquidated account between two parties, credit is given on either side on the faith of such an account, that is to say, on the basis that, under the unsettled account, the other party has a claim against the party who gives credit.

37. Therefore every new transaction implies acknowledgment of the prior existing debt and each item on one side is at once a part-payment of a claim on the other side, an admission of the other party's right to an account and a promise to pay any balance that may be still due [per **Lord Kenyon, Catling v. Skoulding (43), (1795) 6 Term Rep. 189 : 101 E.R 504]**.

38. If Article 85 is to apply, the account must be a mutual, open and current account and there must have been reciprocal demands between the parties. If that condition is satisfied, time for a suit for the balance due will, as already stated, run from the close of the year in which the last item admitted or proved was entered in the account. It has been held in certain cases that the last item contemplated is the last item on the defendant's side, i.e, the last payment made by him, apparently on the ground that since the basis of the rule is acknowledgment, an acknowledgment by the defendant can be inferred only from an act done by him and not from any act done by the other party. The correctness of that view has been doubted, on grounds which appear to me to involve a confusion between the requirements of columns 1 and 3 of the Article but since the last item in the present case is in fact an item on the defendant's side and the plaintiff is not claiming any advance made by it thereafter, it is not necessary to decide which is the correct view. The primary requirements of the Article are a mutual, open and current account and reciprocal demands.

39. An open account is one which has not been closed, whether by settlement or otherwise, and

which is open for further transactions. A current account is an account which is running. A mutual account is an account in which there are two parallel sets of dealings by which each party gives credit to the other and which therefore give each party a right to an account against the other on the basis of his own dealings and which carry an understanding, express or implied, that the items on one side will be set off against those on the other and both sets of items being brought into account, a balance will be produced. But, "there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations" [per Holloway, A.C.J, in **Hirada Basappa v. Gadiji Mudappa, (44) (1871) 6 Mad. H.C.R 142]**. In other words, payments on one side must not be merely repayments of a debt due to the other side, but payments in the course of words, payments on one side must not be merely repayments of a debt due to the other side, but payments in the course of independent transactions, intended to create credits against the other party, so that those credits, when brought into account and set off against credits on the other side, will either reduce the debt or wipe it off or produce a favourable balance. The dealings must be such as to enable each party to say to the other that he has an account against him, which means not that he has a credit balance, but that he has a number of credits in the course of a running series of transactions which gives him a right to an account. The transactions being of that nature, there will generally be a shifting balance between the parties, sometimes in favour of the one and sometimes in favour of the other, but the absence of a shifting balance cannot be conclusive, because it may well be that although the transactions are independent, the credits on one side can never catch up those on the other, but are always behind. The requirement that there must be reciprocal demands does not mean that actual demands for payment must have been made, but only that there must be reciprocal claims arising out of the respective credits on the two sides.

40. These principles, in my view, are well-established and the problem in each case is only to apply them to the special facts and come to the proper conclusion. Applying the principles to the present case, I am of opinion that the account was a mutual, open and current account. It was quite clearly open and running between the 25th July, 1944, and the 8th October, 1948: the Bank was making advances from time to time and the principal debtor was making deposits. Credits on both sides were going into the same account. The advances made by the Bank were undoubtedly loans. The deposits made by the principal debtor in the current account were also loans, in respect of which the Bank was a debtor, as was finally decided in **Foley v. Hill (45) [(1848) 2 H.L Cases 28].** See also **Joacbimson v. Swiss Bank Corporation (46) [(1921)** 2 K.B, no at 127]. There was no separate loan account in respect of the advances made by the Bank, as was the case in **Bradford Old Bank Ltd. v. Sutcliffe (37) [(1918) 2 K.B, 833]**, but those advances were made in the current account and he deposits were being set off against the advances and a balance was being struck from time to time. The account did not become a mere cash credit loan account but continued to be, on the principal debtor's side, a current account in which he was making deposits, exceeding at least on two occasions the advances received. That it remained a current account and did not become a mere loan account, is also shown by the fact that cheque drawn on other Banks in the principal debtor's

favour were being deposited in it and the Respondent Bank was collecting their amounts and crediting them in the account as the debtor's banker. The entries in favour of defendant No. 1 were thus not entries of mere repayment but entries of deposit in the current account, intended to create credit in his favour. These facts, in my view, make it clear that the Bank had a loan account against defendant No. 1 in the course of which it was making advances and giving credit and so had defendant No. 1 a loan account against the Bank in the course of which he was making deposits which were loans in law and in fact intended to create credits, so that there was a dual contractual relationship, creating independent obligations on each side, and the credits on one side were intended to be applied and in fact applied to the reduction of the credits on the other, as is shown by the account itself which is admitted and also by the fact that defendant No. 1 was given a Pass Book in which the necessary entries were made from time to time. Had these been two separate accounts, a current account and a loan account, as in Bradford Old Bank Ltd. v. Sutcliffe (37) (supra), sums paid by the customer into the current account could not have been applied by the Bank to the discharge of the loan account without the special consent of the customer, as pointed out by all the Lord Justices in that case; but, in the present case, there was a combined account. It was not, however, a mere loan account. It was not as if on the overdraft arrangement being made and a guarantee obtained, a debit entry of Rs. 30,000 was made in the account and subsequent deposits all went to the satisfaction of that debit, nor as if a credit entry of the same amount was made in the current account and that credit was exhausted by subsequent withdrawals. The passage quoted from Wood on Limitations in **Uma Shankar Prasad v. Bank of Bihar Ltd. (47) [A.I.R (1942) Pat. 201]**, which says that where a depositor borrows money from a bank by means of overdrafts and occasionally deposits money which is applied to those overdrafts, there is no mutual account, obviously contemplates a case where after the commencement of overdrawals, there are only repayments and seems also to overlook, in the case of the deposits, their legal character of loans. There is also nothing to show that the writer had in mind a case where the current account was kept alive as such an account, receiving credits which at times exceeded the withdrawals and operated for the collection of cheques drawn in the depositor's favour. It is true that in the present case, the depositor was in credit only on two occasions, but so long as the nature of the account is that of a mutual, open and current account, the frequency or scarcity of credits is, in my view, immaterial. Nor, I think, is there any meaning in saying that an account ceases to be mutual when one of the parties begins to be always in debit. It is also true that there was not merely an overdraft arrangement, but also a promissory note and a guarantee, but the fact that the dealings are so arranged as to afford security to one party or the other does not take a case out of Article 85: **The Tea Financing Syndicate Ltd. v. Chandra Kamal Bezborouah, (42) (34 C.W.N 1175**, at p. 1189). In my opinion, the combined account in the present case was a mutual, open and current account up to the last. If so, the suit was plainly not barred.

41. A large number of decisions were cited at the Bar, but I do not consider it necessary to discuss them.

42. Of the cases cited on behalf of the Respondent Bank, **R.N Kapur v. The Travancore National and**

Union Bank (48) [I.L.R (1946) Mad. 325] and **Mansa Ram v. Hiralal Sanon (49) [I.L.R (1940) All. 147]**, are exactly in point and were, in my opinion, rightly decided. The account in none of the other cases was exactly of the same character as that in the present case, and some of them were not cases of accounts with a Bank at all. Some relate to mortgage suits and the question was discussed only in connection with the unsecured part of the claim. Among cases decided by other High Courts, the surety relied on **Gopal Rai v. Harchand Ram Anand Ram (50) [A.I.R (1922) Pat. 364]**; **Ums Sankhar Prasad v. Bank of Bihar Ltd. (47) [A.I.R (1942) Pat. 201]**; and **Basanta Kumar Mitra v. Chota Nagpur Banking Corporation Ltd. (51) (I.L.R 26 Pal. 231).** The Respondent Bank relied on **Fyzabad Bank Limited...Plaintiffs v. Ramdayal Marwari...Defendant . (52) [A.I.R (1924) Pat. 107]** and the Madras and the Allahabad decisions, already referred to. Of cases decided by this Court, the Bank relied on **The Tea Financing Syndicate Ltd. v. Chandra Kamal Bezborouah (42) (supra)** which has already been mentioned. The surety relied on **Ram Pershad v. Harbans Singh (53) (6 C.L.J 158)** and **Hajee Svud Mahmood v. Mussamat Ashrufoonnissa (54) (I.L.R 5 Cal. 759).** Of those two cases, the first is not a case of an account with a Bank and the conclusion appears to have been influenced to a large extent by the observation of Turner, V.C, in **Phillips v. Phillips.* (55)) [(1852) 9 Hare 471]** that in order to be a mutual account, each party must have "received and paid on the other's account". That (observation, as "pointed out by Rankin, C.J, in the Tea Financing Syndicate case (42) (supra), was made in quite a different context and the type of account contemplated by it is not the only type within Article 85. The second case cited was a case of an account with a private banker. Some of the observations contained in the judgment are no longer regarded as correct and besides that, on a construction of the dealings, the customer was held to have had no account against the banker, the case really decides nothing, because while saying at one place that the account was never a mutual, open and current account, the learned Judges yet compute limitation alternatively from the date of the last credit balance and that of the last deposit, but not from the dates of the individual items of credit in claim. It should be borne in mind that the Limitation Act then in force was Act IX of 1871, Article 87 of which corresponded to Article 85 of the present Act, with this difference that the starting point of limitation was the date of the last item and not the end of the year in which the last admitted or proved item was entered in the accounts. The last deposit in the case was in fact the last item in the account and since limitation was computed from that date as well, it would appear that in fact the account was treated, alternatively at least, as a mutual, open and current account. [See observations on the case in Fyzabad Bank Limited...alternatively at least, as a mutual, open and current account. [See observations on the case in **Fyzabad Bank Limited... Plaintiffs v. Ramdayal Marwari...Defendant . (52), A.I.R (1924) Pat. 107, at p. 109].** In my opinion, there is nothing in the cases relied on by the surety which can rightly induce one to hold that the account in the present case was not a mutual, open and current account.

43. For the reasons given above, the appeals fail they are accordingly dismissed with costs, but there will be one set of costs against the two appellants in the two appeals, each being liable for one-half. Certified for two Counsel.