

(1936) 04 CAL CK 0012
In the Calcutta High Court

Bank of Dacca, Ltd.

APPELLANT

Vs

Gour Gopal Saha

RESPONDENT

Date of Decision : 07-04-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1936 Cal 409 : 166 Ind. Cas. 855

Judgement

1. This appeal has arisen out of an application u/s 47, Civil P. C. made by a person in the position of a judgment-debtor being a share-holder of a Bank, the Bank of Dacca, in liquidation against whom there were orders for recovery of money passed in favour of the Bank in liquidation in respect of unpaid calls for shares allotted to him. The applicant raising objections u/s 47, Civil P. C., respondent in this appeal, had an account with the bank of Dacca and as security against overdraft, had deposited Government Promissory Notes. These notes were deposited by the Bank of Dacca with the Bengal National Bank, and were sold by the Receiver appointed by the Court for the Bengal National Bank, and the sale-proceeds after certain deductions made therefrom on account of dues of the Bank of Dacca to the Bengal National Bank, were sent to the Liquidator of the Bank of Dacca. The amount received by the Liquidator exceeded the sum realisable from the appellant under the balance order put into execution. The objections to execution raised by the appellant related to the position that the Liquidator of the Bank of Dacca seeking to execute the balance order should meet the decretal dues out of the amount recovered from the Receiver of the Bengal National Bank which was the objector's property, being trust money which could not be applied for any purpose other than that for which the Government Promissory Notes were deposited. The contention of the debtor under the balance order was that money in the hand of the liquidator would fully satisfy their liability under the balance order and the execution should not therefore be allowed to proceed.

2. The Liquidator of the Bank of Dacca on the other hand, asserted that the applicant u/s 47, Civil P. C. was only a creditor of the Bank, and his objection by

way of set off was not maintainable. The learned District Judge in the Court of Appeal below, in affirming the order passed by the Court of execution, held that on the facts and in the circumstances of the case, the Bank of Dacca was trustee in respect of Government Promissory Notes deposited by way of security for advances; that the debt of the Bank could be squared without taking the matter into Court at all, that the case was not one of set off or of a contributory claiming a deduction before a share out among the creditors. The respondent was not, according to the Judge, in the position of a creditor, but was entitled to enforce his ownership of the Government Promissory Notes deposited with the Bank. It appears that on 13th August 1931, the respondent addressed a letter to the Liquidator of the Bank of Dacca mentioning the Government Promissory Notes deposited by him as security for advances and claiming the amount covered by the same with interest up-to-date. There is a note on the letter showing that Rs. 5,601-7-10 was the amount the respondent was entitled to get from the Bank. It may be noticed that in view of the use of the word trustee in the judgment of the Courts below, which appears to us to have been used in a very general way, a great deal of time was taken by the learned advocates representing the parties to this appeal, for explaining the position created by the deposit of Government Promissory Notes as security for advances or overdrafts. The position was debated before us with a reference to some decisions of Courts in England, practically without reference to the facts of the case before us, and without consideration for a position which may be taken to be well established now. The relationship of banker and customer is generally that of agent and principal, of debtor and creditor or of pledger and pledges; there are however cases where the banker stands in the relation of trustee as well as agent for his customer, as for example in the case of securities lodged for safe custody, the banker is not entitled to sell or pledge them, and must be prepared to hand back the identical securities deposited; should he convert them to his own use, he becomes criminally liable. (See Sykes on Banking, Edn. 6, pp. 126-127). As has been mentioned in Paget's Law of Banking the relation of banker is primarily that of debtor and creditor, and observations of Jessel, M.R. in *Re Hallett's Estate* (1879) 13 Ch D 696 do not affect the general rule. The banker is not a trustee for the customer in respect of money paid in or responsible for him for the use he makes of it, but the position is not the same where, as in the case before us, the banker uses the securities deposited with him for his own use, and where there is conversion of the securities for the purposes of the Bank and not for the purpose of the customer.

3. In the circumstances of the case before us where securities were deposited as cover for advances, and for the purpose of securing overdrafts or advances, the transaction was strictly of the nature of a pledge, (Paget, p. 242), and this rule must be taken to be the rule guiding the relationship of a banker and a customer in the position of the respondent in this appeal in view of the decision of their Lordships of the Judicial Committee in *Neikram Dobay v. Bank of Bengal* (1892) 19 Cal 322 On the principles adopted in *Neikram Dobay v. Bank of Bengal* (1892)

19 Cal 322 and on the facts and circumstances of the case before us, the bank became liable for the value of the G. P. Notes as for conversion. The bank had converted the G. P. Notes to its own use, and was liable for the value of them including interest on them. The customer was of course bound to pay the loans for which the G. P. Notes were security: see *Neikram Dobay v. Bank of Bengal* (1892) 19 Cal 322 at pp. 67-68. The position taken up by the respondent in his letter to the bank in liquidation dated 13th August 1931, mentioned above, was justifiable on principle and authority to which reference has been made, and the Judge in the Court below is right in holding that the respondent was entitled to enforce his ownership to the amount in the hands of the liquidator, after the sale of the G. P. Notes deposited in the Bank of Dacca as security to cover overdrafts or advances after payment of loans from the bank for which they were security.

4. The question for consideration next is whether the respondent against whom execution was levied for realization on unpaid share call moneys, in pursuance of a balance order made under the Companies Act, was entitled to take up the position that the Liquidator applying for execution should meet the decretal dues out of the amount in his hands, representing the sale-proceeds of the G. P. Notes, which is the respondent's own property. The Court of execution expressed the opinion that as soon as the respondent asserted as he did, that the money in the hands of the Liquidator was to be applied to the satisfaction of the decretal debt, the Liquidator should have entered satisfaction of the decree, as the money in the hands of the Liquidator was far in excess of the decretal amount. There was no question of set off in the case. The Judge in the Court of appeal below agreed with the Court of execution in the above view of the case and observed that the respondent simply sought to utilise his own property in the hands of the Liquidator for the purpose of meeting dues decreed against him as a contributor. It was urged before us in support of the appeal by the Liquidator that the question of a set off not having been raised in the liquidation proceedings, the respondent was not entitled to raise the question in the proceedings in execution started by the Liquidator. There is no question that the provisions contained in Order 21, Rule 19, Civil P. C., relating to cross-claims, have no application to the case before us; but in our judgment those provisions cannot and should not be taken to be exhaustive in regard to questions arising for consideration u/s 47, Civil P. C., relating to execution, discharge or satisfaction of decrees. Their Lordships of the Judicial Committee of the Privy Council in *Prosanna Kumar Sanyal v. Kalidas Sanyal* (1892) 19 Cal 683 prohibited placing a narrow construction on the language of the statute, and expressed the opinion that an enactment of which the scope was to provide for expeditious procedure for trial of question without recourse to separate suit, should be used for the beneficial purpose of checking needless litigation and disposing of objections to execution as speedily as possible. In this connection we desire to express our entire agreement with the position indicated by this Court in *Krishna Chandra Bhowmik v. Pabna Dhanabhandar Co. Ltd.* 1935 Cal 225 that on general principles and in the exercise of its inherent power, an executing Court can entertain and give

effect to a claim to set off even in cases which do not come strictly under Order 21, Rule 19, Civil P. C.

5. The result of the conclusion we have arrived at, as mentioned above, is that the order passed by the Courts below, against which this appeal is directed is affirmed; and this appeal is dismissed with costs. The hearing fee in this Court is assessed at two gold mohurs.

6. The connected Rule, Rule No. 206 (M) of 1936 is discharged. There is no order as to costs in this Rule.

Miscellaneous Appeal No. 3 of 1936.

7. The question arising for consideration in this case is similar to those decided by us in appeal from Appellate Order No. 2 of 1936. The point of difference as between this case and the other is that in a letter to the Liquidator, Bank of Dacca (in liquidation) the respondent mentioned that he was laying his claim to G. P. Notes deposited by him with the bank as security against overdraft, as creditor. There was also an endorsement on the letter showing that the respondent's claim was admitted. The G. P. Notes deposited by the respondent as security were made over to the Bengal National Bank by the Bank of Dacca. The National Bank sold these notes, and after deduction of the major portion of the sale proceeds in respect of the dues of the Bank of Dacca, the Receiver of the National Bank sent the remainder of the sale proceeds to the Liquidator of the Bank of Dacca. The respondent, raising objection to the proceedings in execution for realization of amounts due from the respondent in respect of unpaid share call moneys, sought to use the amount in the hands of the Liquidator towards the payment of the decretal dues, as shown in a balance order made in liquidation proceedings.

8. The questions arising for consideration in this appeal have been decided in our judgment in the other appeal No. 2 of 1936, and for the reasons stated in that judgment, this appeal must be dismissed as in our opinion the learned District Judge in the Court of appeal below is right in holding that the mere use of the words "as creditor" in the letter referred to above, could not reasonably be taken to mean that the respondent abandoned his rights of ownership in respect of property held by the Bank of Dacca for him. The word "trust" used by the Judge in this connexion, may be strictly accurate in view of the legal position created by the deposit of G. P. Notes as security for advances or overdrafts, and by the sale of the notes at the instance of the Bank. It may also be noticed as has been mentioned by the District Judge in his judgment-the words "claim admitted" appearing on the letter addressed to the bank proves nothing, and could not result in the respondent's surrendering his right of ownership in the amount recovered in respect of his G. P. Notes from the Receiver of the National Bank by the Liquidator of the Bank of Dacca, or that the respondent had chosen to rank as a creditor. The respondent was not on the facts and circumstances of the case, and on the decision given by us in Appeal No. 2 of 1936, mentioned above,

entitled to enforce his right of ownership and defeat the Liquidator's claim in the proceedings in execution giving rise to this appeal.

9. The appeal is dismissed with costs; the hearing fee in this Court is assessed at two gold mohurs.