

(1942) 08 CAL CK 0005
In the Calcutta High Court

Kshetra Mohan Dass

APPELLANT

Vs

D. Basu C.A. Official Liquidator of East Bengal Sugar Mills
Ltd. and Others

RESPONDENT

Date of Decision : 28-08-1942

Acts Referred:

Citation : AIR 1943 Cal 105

Hon'ble Judges : Sen, J; R.C. Mitter, J

Bench : Full Bench

Judgement

R.C. Mitter, J.—The appellant Kshetra Mohan Dass became the sole selling agent of the East Bengal Sugar Mills, Ltd., a company registered under the Companies Act. The contract of agency (EX. A) was signed on 6th October 1937, but it became operative from 28th October following. The agency was to be for a fixed period of four years. The first party to the contract was the company and the second party the agent, Kshetra Mohan Dass. It is not necessary to set out all the terms of the contract. Clauses 6, 14 and 15 to 17 are the only clauses relevant for the determination of the question raised in this appeal. We reproduce them but in a different order:

15. For abiding by all the terms, etc., of this agreement and for the aforesaid sole agency business of sugar the second party keeps a security deposit with the first party for a period of four years a sum of Rs. 10,500 carrying interest at the rate of 3 per cent, per annum. The first party shall pay to the second party, to his satisfaction, the aforesaid deposit money of Rs. 10,500 with interest within a month after the adjustment of the accounts of the sale of the sugar on the expiry of the term of four years mentioned in this deed of agreement.

16. The first party shall pay to the second party at the end of each year the amount of interest on the sum of Rs. 10,500 deposited by the second party at the rate of 3 per cent, per annum.

17. If the aforesaid agency is cancelled for any reason, then the first party shall

remain bound to pay to the second party the aforesaid amount of security deposit together with the unpaid amount of interest within one month from the date of adjustment.

6. The second party will remove for sale from the godown of the mill of the first party, according to the terms of this agreement, twice a week, i.e., at intervals of three days; in default, the second party shall be liable for damages to the first party. Be it distinctly stated that the first party will be always competent to take the amount of damages due to them on deducting the same from the security money deposited with the first party.

14. The second party shall remain bound to pay to the first party the money on account of the price of sugar after deduction of the commission in accordance with the above rule (which was 2 1/2% on all sales) within 9 days of the taking out the sugar from the godown of the mill of the first party. In default, the first party will be competent to cancel the agency of the second party once for all, by notice, according to their will, and the first party will be entitled to realise the outstanding money from the second party with interest thereon at the rate of Re. 1 per cent. and the second party would remain bound to pay adequate compensation to the first party. The first party will be competent to take the amount of the aforesaid compensation on deducting the same from the amount of the security deposit of the second party.

2. These are all the relevant terms relating to the said security deposit. The mill worked for a few days of January 1988 and then stopped. The plaintiff, Kshetra Mohan Dass, made a written demand of the amount of his security deposit on 9th February 1939 and thereafter filed his suit against the company for its recovery on 16th February 1989. The company was wound up by an order "of Court dated 26th June 1939. The cause title of the suit was thereafter amended and the Official Liquidator was added as a party defendant with leave of the Court. The question that has been raised is whether the plaintiff can get a decree for the sum of Rs. 10,500 with a preferential right to get the same first out of the assets of the company or should he be classed as an unsecured creditor of the company for that amount and take rateably with its other unsecured creditors. The learned Subordinate Judge has taken the last mentioned view.

3. The principles in cases of this kind seem to us to be clear and settled, but the application of those principles to concrete cases is often a matter of some difficulty. If the security deposit can be regarded as impressed with a trust, or the deposit can be regarded as being held by the depositee in a fiduciary capacity the depositor would in a competition with the creditors of the company get the whole of his money. If it is trust money or is so held the right of the depositor would not be affected simply because it has not (been kept by the company as an ear-marked fund but has been mixed up with other funds of the company and on the liquidation of the company, the depositor would be entitled to get it back from the assets before any creditor, secured or unsecured, of the company, can participate in the assets. The consequences would, in our

judgment, follow from the principles laid down in *In re Hallet's Estate*; *Knatchbull v. Hallet* (1880) 13 Ch. D. 696 and our view accords with what has been expressed by this Court in *In Re: Alliance Bank of Simla, Ltd.*, where the case in *In re Hallet and Co. Ex parte Blane* (1894) 2 Q.B. 237, was discussed and distinguished. If, however, the security deposit money cannot be regarded as being trust money or held by the deposittee in a fiduciary capacity, the relation between the depositor and the deposittee would be that of creditor and debtor and the former would have no preference over the creditors of the company in liquidation but must share the assets pro rata with them. Whether the security deposit will be considered as trust money in the hands of the company or as a loan to it would depend upon the facts and circumstances of each case, and where there is a written contract, the question would have to be decided on a construction of that instrument.

4. In *In Re: Bengal Zemindary and Banking Co. Ltd.*, the facts were clear, for, in the affidavit filed on behalf of the employee who had deposited the money with company as security for his good behaviour it was stated that it was an express term of the agreement that the company would keep the money as trustee. That affidavit was believed and it was held by Lord-Williams J. that the employee was entitled to get back the whole of his money and was not bound to share rateably with the creditors of the company, which had gone into liquidation, notwithstanding the fact that the company had agreed to pay him interest during the time that the money would remain with it. On appeal (No. 10 of 1937 (O.S.) unreported) the view expressed by Lord-Williams J. was affirmed by a Division Bench.

5. Cases of the type which we have before us, however, present difficulties and on them there is a divergence of judicial opinion. The type is represented by the following features : (1) money is deposited with the company either by an employee or by a selling agent as security for good behaviour, or as guarantee for due performance of obligations undertaken by the contract of agency, as the case may be; (2) there is a promise to return the money on the discharge of the employee or on the termination of the agency, as the case may be; (3) the company agrees to pay interest, and (4) the company has the right, in certain contingencies to appropriate it or a part thereof in satisfaction of its claim against the employee or the selling agent. Some of the leading cases in which the view that the employee or the selling agent ranks as an ordinary creditor of the company are *In Re: Annapurna Co. Ltd* ; *Maheshwari Brothers Vs. Official Liquidators, Indra Sugar Works Ltd.*, (which was affirmed on appeal, the judgment of the appellate Court being reported in *Maheshwari Brothers v. Liquidators Indra Sugar Works* AIR 1942 All. 119, *In re Manekji Petit Manufacturing Co. Ltd.* AIR 1932 19 Bom. 311; *National Petroleum Co. Ltd. v. Popatal Mulji* AIR 1936 23 Bom. 344 and *Ram Chand v. Mohd. Akram Khan* AIR 1937 Lah. 444. Some of the leading cases in which the other view has been taken, namely, that the company held the deposit money" in a fiduciary character are, *In the matter of Hindustan Commercial Bank (India) Ltd.* Madras

AIR 1938 Mad. 651 and In the matter of Hindustan Travancore National and Quillon Bank Ltd. AIR 1939 Mad. 337. In the last mentioned case, all the important cases have been reviewed and though the judgment is that of a Single Bench Judge, it contains a clear, exhaustive and valuable exposition of the law. The cases in In Re: Alliance Bank of Simla, Ltd., and In re Fazalbhai Mills Ltd. AIR 1936 23 Bom. 296 though relating to deposits in provident funds contain observations relevant on the point. The Lahore High Court in Ram Chand v. Mohd. Akram Khan AIR 1937 Lah. 444 refers with approval to the decision of the Bombay High Court in In re Manekji Petit Manufacturing Co. Ltd. AIR 1932 19Bom. 311 without discussion and gives an additional reason, namely that there was "no object of the trust and the so-called trustee, Gurudas Mal, (the employer) was not expected to carry out any trust". None of the cases which had taken the other view were noticed. The additional reason given does not commend itself to us. The test which has been formulated in the cases where the view has been taken that the relationship would be that of creditor and debtor is whether it was a term, either express or to be necessarily implied, that the employer or the company as the case may be, had the right to utilise the deposit money for his or its own purpose. In re Manekji Petit Manufacturing Co. Ltd. AIR 1932 19 Bom. 311 the matter is put thus:

The mere fact of the deposit of Rs. 3,00,000 does not create a trust. The further fact that it was to be held as a security by the company for the due discharge by the claimants of the terms of their agreement does not create a trust. On the other hand the fact that interest was agreed to be paid shows that the money was to be used by the company for its general purposes.

6. In National Petroleum Co. Ltd. v. Popatal Mulji AIR 1936 23 Bom. 344, there was an express term in the contract that "the company shall be entitled to utilise and use the deposit whether in cash or Government securities" and that term was relied upon by Beaumont C.J. in coming to the conclusion that the obligation to return the deposit by the company on the termination of the agency was a mere obligation in contract and not in trust, that is to say, the deposit money was a loan to the company. In Maheshwari Brothers v. Liquidators Indra Sugar Works AIR 1942 All. 119 the appellate Court applied the same test, though the phrase was couched in a negative way:

They leave no room for doubt that the parties never intended that this money was to be kept aside in trust for the appellant or that it was not to be utilised by the company for any purpose.

7. Proceeding on the view that that is the test, these decisions have given great weight to the stipulation for the payment of interest by the company, in cases where there is no express term in the contract that the latter would be entitled to use the money for its own purposes. The reason that is employed is that a stipulation for payment of interest necessarily implied that the company was to employ the deposit money for its own purposes, or in such manner as it may choose. In our view the fact that has been overlooked is that it would not be the

necessary or the only implication. A trustee, when authorized, can use the trust fund and can be required by express terms to pay interest. That is what has been laid down in *Gee v. Liddell* (1866) 35 Beav. 629. The decision of the Judicial Committee of the Privy Council in AIR 1933 148 (Privy Council) shows that a stipulation for payment of interest on money deposited would not necessarily militate against the case that a trust was created. Before the Judicial Committee it was no doubt admitted by the learned Counsel for the appellant that a trust had been created, but that admission was made after the Madras High Court had in that case overruled the contention of the Official Assignee, to the effect that the stipulation by Messrs. T.R. Tawker & Sons (with whom the money had been deposited), to pay interest was destructive of the case of trust, as that stipulation indicated that that firm was to utilise the money. The judgment of the original Court is reported in *T. Krishnajeet Bhat Vs. Sadasiva Tawker and Others*, , and that of the appellate Court in *Official Assignee v. Krishnaji Bhat* AIR 1930 Mad. 693. The admission made by the learned Counsel before the Judicial Committee under these circumstances can only be taken to mean that in his opinion the point was not worth arguing. It is not and cannot be contended that there cannot be a trust without the use of that word. The definition of a trust given in the Trusts Act (2 of 1882) runs thus:

A trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

8. The fact therefore that a company has rights over the deposit money and to appropriate it in certain contingencies would not by itself be a material factor, if the money deposited as security can be regarded from other considerations as trust money. This leads us to consider whether money deposited as security for good behaviour or for the performance of other obligations can be regarded as impressed with a trust. It is a principle which has been established by many decisions in England, some of which are noticed in *In the matter of Hindustan Travancore National and Quillon Bank Ltd.* AIR 1939 Mad. 337 that where money is placed by a customer even in the hands of a bank with a specific purpose a trust is impressed. He places confidence on the bank that the latter would act to his instructions. That creates the trust and makes the bank a trustee for the money so sent, in spite of the fact that the ordinary and normal relation between a customer and a banker is that of creditor and debtor. That principle in our judgment applies with greater force to security deposits in cash made by an employee or by a selling agent of a company. The money would be regarded as trust money in the hands of the employer or the company, unless there are other terms and conditions which would make the relation between them to be that of creditor and debtor. As we have already pointed out, the mere fact that there is a stipulation for payment of interest on the deposit money, or the fact that in certain contingencies the employer or the company, as the case may be, would be entitled to liquidate his or its claim from out of it against the employee or the selling agent would not establish the relationship of creditor and debtor. The

money deposited as security would still be regarded as trust money in the hands of the employer or the company. We accordingly agree with the view taken in Hindustan Commercial Bank (India) Ltd. Madras AIR 1938 Mad. 651 and In the matter of Hindustan Travancore National and Quillon Bank Ltd. AIR 1939 Mad. 337. On the terms of the contract which was made in this case between Kshetra Mohan Dass and the East Bengal Sugar Mills Ltd., the former is entitled to have the sum of Rupees 10,500 together with interest in terms of his contract out of the assets of the company in the hands of the liquidator in priority of all other claims, against the company. The result is that this appeal is allowed with costs to the appellant throughout.

Sen, J.

9. I agree.