

(1959) 05 CAL CK 0009
In the Calcutta High Court
Case No : A.F.O.D. No. 46 of 1954

Mani Bhusan Malik

APPELLANT

Vs

Pioneer Bank Ltd. (In Liquidation)

RESPONDENT

Date of Decision : 28-05-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Contract Act, 1872 — Section 126, 128

Citation : AIR 1959 Cal 746 : (1960) 30 CompCas 473

Hon'ble Judges : K.C. Das Gupta, C.J.; H.K. Bose, J

Bench : Division Bench

Advocate : Sukumar Mitra, for the Appellant; S.K. Mukherji, for the Respondent

Final Decision : Dismissed

Judgement

Das Gupta, C. J.

1. The appellant, opened an overdraft account with the plaintiff bank, the Pioneer Bank Ltd., which is now in liquidation, at its Benaras branch on 19-8-1947. Prior to this he had already a current account with the bank. Before the overdraft account was opened the plaintiff bank had received from the appellant's father-in-law, Sibakali Sarkar, a letter by which the latter requested the bank to make an overdraft arrangement "unto the limit of Rs. 5,000/- (Rupees five thousand) only" with this appellant. In this letter Sibakali Sarkar further said, "I hereby allow you lien up to the said amount of Rs. 5,000/- (Rs. Five thousand) only on my fixed deposit of Rs. 5,500/- with you (under your F/D Receipt No. B/286). You shall be entitled to adjust the said overdraft allowed to Mr. Moni Bhusan Mallick in his said O/D A/c with you upto the said limit of Rs. 5,000 from my said fixed deposit amount with you." The bank stopped payment sometime in October 1948. Before that date the debit balance in his account, as a result of drawings on the basis of overdraft arrangement, stood on 26th of July at Rs. 5116-8-1P. There were no drawings by the appellant thereafter but after credit of Rs. 220/- on account of interest on Sibakali's fixed deposit account and debit of interest on

the debit balance, the debit balance, on 15-1-1952 stood at Rs. 5796-0-9P. The bank brought this suit through the Liquidator for recovery of this sum of Rs. 5796-0-9. The main defence taken by the defendant was that the defendant is entitled to set off against the amount due from the plaintiff bank on account of the fixed deposit standing in the name of Sibakali Sarkar. It was alleged that Sibakali Sarkar had, in fact, duly endorsed & discharged the fixed deposit receipt in favour of the plaintiff bank and authorised the plaintiff to treat the said fixed deposit as part of the said overdraft account & specifically instructed the plaintiff to appropriate against the dues of the defendant the proceeds under the said fixed deposit as soon as the same matures. It was said that the fixed deposit having matured on 11-8-1948, the plaintiff had wrongfully failed and neglected to adjust the dues of the defendant out of the amount payable under the said fixed deposit. In paragraph 3(b) of the written statement the defendant further stated "on or about August 1946 at the request of Sri S.K. Sarkar, the father-in-law of the defendant and the defendant, the plaintiff through S. K. Mukherjee, agent of the Benares Branch of the plaintiff agreed to allow the defendant overdraft facilities in his said Account on inter alia the following terms and conditions:

(i) That the said Sri S.K. Sarkar, would stand as a Surety for the repayment of the dues of the defendant in the said account.

(ii) That the said Sri S.K. Sarkar would deposit with the plaintiff Rs. 5,500 in fixed deposit of 4 per cent. per annum and that he would duly endorse and discharge in favour of the plaintiff the said Fixed Deposit receipt authorising the plaintiff to adjust against the dues of the defendant the amount that would be payable under the said Fixed Deposit as soon as the same matures and that the said Fixed Deposit would form a part of the said Overdraft Account until the dues of the plaintiff are fully paid." The following issues were raised in the trial Court:

1. Was there any arrangement as alleged in paragraph 3(b) of the written statement?
2. Was there any deposit endorsement, discharge and authorisation as alleged in paragraph 4 of the written statement?
3. Is the defendant entitled to credit in his account of the sum of Rs. 5,500 mentioned in the written statement or any other sum out of that sum of Rs. 5,500?
4. To what relief, if any?

The learned Judge held on the evidence that while it was established that it was a part of the arrangement between the plaintiff and the defendant that Sibakali Sarkar shall endorse and discharge in favour of the plaintiff the fixed deposit receipt, it was not proved that it was a term of the agreement that the fixed deposit would form a part of the overdraft account until the dues of the plaintiff are fully paid off, and that it was not proved that the plaintiff treated the fixed

deposit as part of the overdraft account. As regards issue No. 2 the learned Judge held that Sibakali Sarkar did not endorse and discharge the fixed deposit receipt nor gave any authorisation or instruction except the instructions contained in the letter dated 19-8-1947. As regards issue No. 3 the learned Judge held that the defendant was not entitled to a set-off.

2. Accordingly he gave a decree for the amount claimed and interest on decree but made no order for interim interest. He made an order also that each party will bear his own costs.

3. It is against this judgment that this appeal has been preferred.

4. When opening his case the learned counsel for the appellant submitted that Sibakali's keeping money fixed deposit and the opening of the overdraft account in favour of the appellant was in essence one and the same transaction, but he ultimately did not press this.

5. It is abundantly clear from Sibakali's own evidence that when he wrote the letter on 19-8-1947 requesting the bank to make an overdraft arrangement upto the limit of Rs. 5,000/- and allowed the bank lien upto this amount on his fixed deposit and added that the bank shall be entitled to adjust the overdraft, he did not consider the overdraft account to be his account. In answer to question No. 7 he said that his first son-in-law informed him that there would be business facilities for Mani if the money was kept in the Pioneer Bank. In answer to question No. 27 he says "Yes, Mani was with me; he told me "father-in-law do like this; if this thing is done there will be facility with regard to my business"." All these make it clear that neither Mani nor Sibakali considered the fixed deposit account and the overdraft account parts of one and the same transaction with the bank. The transactions were independent--one was between the bank and Sibakali in which Sibakali kept a sum of money in fixed deposit with the bank, the other was between the bank and the appellant by which the bank allowed him overdraft facilities to the extent of Rs. 5,000/-. The fact that Sibakali offered his fixed deposit account as security for the appellant's overdraft facilities, does not make the two transactions one and the same. The transactions being independent, there is obviously no case of a set-off.

6. It is urged, however, that the arrangement between the bank and Sibakali was that the dues on the overdraft should be adjusted against the fixed deposit account and that as soon as the account matured, the bank was bound to do so in law. It is further urged that apart from this Sibakali gave specific instructions to the bank after the fixed deposit account matured on 11-8-1948 and before 24-8-1948, to adjust the dues on the overdraft account against the fixed deposit account and the bank was bound to carry out those instructions. It is said that the legal effect of the bank not making this adjustment which it was bound to do, is that the bank cannot now recover the debt.

7. I am unable to agree that by the letter of 19-8-1947 any arrangement was made under which the bank was bound to adjust the overdraft dues from the

appellant against the fixed deposit account of Sibakali. The language is "I hereby allow you lien up to the said amount o? Rs. 5,000 (Rupees Five thousand) only on my fixed deposit of Rs. 5,500 with you You shall be entitled to adjust the said overdraft allowed to Mr. Moni Bhusan Mallik in his said O/D A/C with you upto the said limit of Rs. 5,000 from my said fixed deposit amount with you". There is no justification for reading the words "you shall be entitled to adjust" as "you shall adjust". On a reasonable interpretation of the words used, this letter merely gives an option to the bank to make the adjustment and does not compel the bank to adjust.

8. It seems to me, however, that even the option was not as clear as might seem at first sight. The defendant's own case in the written statement is that part of the arrangement was that Sibakali Sarkar "would duly endorse and discharge in favour of the plaintiff the said Fixed Deposit receipt authorising the plaintiff to adjust against the dues of the defendant the amount that would be payable under the said Fixed Deposit as soon as the same matures". This, the learned judge says, was admitted by the plaintiff and must be said to have been proved. I have no hesitation in saying that the learned Judge was right. That being the arrangement it would have been difficult, if not, impossible for the bank to exercise its option of making the adjustment until and unless the fixed deposit receipt had been duly endorsed and discharged or fresh authority was given. The learned Judge has found that the fixed deposit receipt was not endorsed and discharged. That finding is not challenged before us and indeed Sibakali Sarkar admits that the fixed deposit receipt was with him and thereafter he could not find it out. Whether or not the receipt is missing, the position remains that it has not been duly endorsed and discharged in favour of the plaintiff bank and so the bank could not, in the absence of further authority from Sibakali make the adjustment.

9. I am also unable to believe the story that after the fixed deposit matured on 11-8-1948, any instructions were given by Sibakali to the bank to make such adjustment. It is reasonable to think that such instructions would be given in writing specially in view of the fact that the fixed deposit receipt had not been endorsed. Admittedly no written instructions were given. It is further to be noticed that no story of such specific instructions having been given after the date of maturity was made or hinted at in the written statement. If instructions had been really given, the appellant, who from the answers given by him in the witness box appears to be a clever man, was sure to have informed his lawyer about those facts and a definite case of instructions given to the bank after the date of maturity would have found place in the written statement. It is equally noteworthy that in the letter written by the bank on 24-8-1948, Sibakali is being asked to send the F/D receipt by registered post duly endorsed and discharged so that adjustments might be made, but no reference is (made?) to any instructions, received after the date of maturity. When all these circumstances are considered, it is impossible to believe the oral testimony given by the bank's agent, Sunil Chandra Mukherjee and Sibakali and Moni Bhusan about such verbal

instructions.

9A. I have, therefore, come to the conclusion that at no point of time was the bank bound to adjust its dues on the overdraft account against the fixed deposit of Sibakali.

10. It was next argued that in any case as the position on the date of the suit and thereafter, is that the plaintiff bank is not in a position to return the security which was furnished by the appellant for its loan, the plaintiff cannot in equity recover the debt. That as between mortgagor and mortgagee the mortgagee is not entitled to recover the debt on the mortgage until he is in a position to return the mortgaged property, is a well-settled principle of law. This principle is limited not only to real property but has been extended to cases of other securities on which loans are taken. In *Ellis and Company's Trustee v. Dixon-Johnson* (1925) A. C. 489, the rule was stated thus by Viscount Cave, L. C. :

"I have always understood the rule in equity to be that, if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security; and if having improperly made away with the security, he is unable to return it to his debtor he cannot have judgment for the debt."

In that case the defendant had deposited as security for any debit balance which might from time to time be owing by him on his account with Ellis and Company, a firm of stockbrokers, certain shares. The firm sold the shares without the knowledge or authority of the defendant in 1920. The firm was adjudicated bankrupt in 1922. In the action brought by the trustee in bankruptcy of the firm for the amount due--after giving credit to the defendant for the proceeds of the sale of the shares--the House of Lords held that

"the firm could not have maintained an action for their debt if they were not in a position to hand over the shares against payment, and the trustee in bankruptcy had no higher rights..."

Relying on this decision of the House of Lords, Leach, J., of the Rangoon High Court held in a case where an Official Assignee filed his suit to recover an amount due on overdraft drawings that the Official Assignee could not get a decree inasmuch as he was not in a position to pay up in full the amount standing to the credit of one Chagganlal in his deposit account, which was the security of the overdraft.

11. It has to be noticed that while the rule as stated by the Lord Chancellor Viscount Cave is; it is when the creditor has improperly made away with the security and so he is unable to return it that he cannot have judgment for the debt, Leach, J., refused to give a decree because the plaintiff was not in a position to return the security, even without a finding that this inability was due to any improper conduct on his part. It seems to me that if the view taken by Leach, J. is right, the plaintiff in the present case would not be entitled to a decree inasmuch as here also he is unable to return unimpaired the security that

was furnished in the shape of a fixed deposit account belonging to his father-in-law. It is true that the father-in-law Sibakali himself wrote that he was offering that security and the defendant himself did not set that out in so many words. The substance of the matter, however, is that Sibakali's fixed deposit account was offered as security and the bank accepted it as security. The fact that this security was offered by Sibakali and not in so many words by the appellant would not, in my opinion, make any difference.

12. Assuming for the purpose of the present case that the rule of equity that the creditor is not entitled to sue for his debt if he is not in a position to return the security furnished for the same applies even though this inability is not due to any improper conduct on the part of the creditor, I am unable to agree that this principle would be applicable to securities like fixed deposit accounts with a Banking Company after liquidation.

13. As was pointed out by Venkataramana Rao, J. in *In Re; Travancore National and G. Samuel Vs. Cyril Gill and John Stanley Goodwin, Official Liquidators*, in such a case the owner of the security cannot claim the full amount and there can be no cause of action against the bank for any diminution in the value of the security, and it is not possible to understand how a person who has taken a loan on security of such an account, can claim the full amount of the security. The position may be looked at from another stand-point. Suppose A and B are two persons having fixed deposit accounts with a bank. X takes a loan from the bank on the security of A's fixed deposit account, B's fixed deposit account remains unencumbered. To say that in such a case the bank would not be able to recover its dues from X would really mean that A by offering his account as security will be in a more favoured position than B who has not in any way encumbered his property. It would, in my opinion, be inequitable to make such a distinction between a person who has offered his fixed deposit account as a security and one who has not, and to allow the depositor full credit in respect of his account to the extent of the loan for which the security was furnished while limiting the other depositor in law to the dividend that ultimately be declared. It will be inequitable, in my opinion, to make such a distinction in favour of a fixed deposit account which has been offered in security. In this clash of equities--one equity being in favour of the plaintiff and the other in favour of the defendant--I am of opinion that a person having borrowed money would be liable to repay it, should prevail.

14. *G. Samuel Vs. Cyril Gill and John Stanley Goodwin, Official Liquidators*, the defendant Mr. Samuel had borrowed a sum on the security of a fixed deposit account in the name of his mother-in-law, which she had offered to give as security. Set-off was claimed by the defendant. The claim was disallowed as the mother-in-law was not under any personal liability to repay the debt. Reliance was then placed on the rule recognised in *Ellis and Co.'s* case and it was urged that the creditor was unable to return the security by reason of the liquidation and so the plaintiff could not get a decree. This contention was rejected and the

learned Judge said:

"There is no question here of the bank improperly making away with the security or its inability to return it. The moment the debt is paid, it will release its security. The contention is, not that the security cannot be had but the value of the security has been diminished by the conduct of the bank. It seems to me that the rule of Viscount Cave L. C. will not be applicable to cases of liquidation or insolvency. The security in this case takes the form of a debt due by the bank. If that debt is owing to the debtor it will be a case of cross-demand and a case for a set off. But the security in this case was given by a third party and by reason of the liquidation the owner of the security cannot have any cause of action against the bank for any wrongful conversion. Under the law he cannot say that the value of his debt is impaired; he is only entitled to receive the dividend and cannot claim the full amount."

As the case before the House of Lords was itself a case where the creditor firm has been adjudicated bankrupt, I am unable to agree with the learned Judge that the rule will not be applicable to the cases of liquidation and insolvency. I respectfully agree with him, however, that the rule will not apply to a case where the security is a debt due by the bank for which debt the bank's creditor would, by reason of the liquidation, have no cause of action against the bank.

15. I have, therefore, come to the conclusion that the last contention of Mr. Mitra that the bank not being in a position to return the security unimpaired, cannot be sustained. The suit was, in my opinion, rightly decreed and the appeal should be dismissed.

16. Each party will bear his own costs.

Bose, J.

17. I agree.