

**(1940) 09 AHC CK 0003**  
**In the Allahabad High Court**  
**Case No : Misc. Appeal No. 20 of 1940**

|                                                         |            |
|---------------------------------------------------------|------------|
| Messrs. Dinshaw and Co. (Bankers) Ltd. (in liquidation) | APPELLANT  |
| Vs                                                      |            |
| Mst. Krishna Piary                                      | RESPONDENT |

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**Date of Decision :** 20-09-1940

**Acts Referred:**

Companies Act, 1956 — Section 230  
Evidence Act, 1872 — Section 106  
Trusts Act, 1882 — Section 77

**Citation :** (1940) 09 AHC CK 0003

**Hon'ble Judges :** Zia-ul-Hasan, J;Yorke, J

**Bench :** Division Bench

**Advocate :** S.S. Nigam Official Liquidator, for the Appellant; J.K. Tandon, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Zia-ul-Hasan and Yorke JJ.

1. This is a miscellaneous appeal from the judgment of the Hon'ble Chief Judge, sitting as Company. Judge, ordering the Official Liquidator of the Dinshaw Bank to pay to the respondent Mst. Krishna Piari a sum of Rs. 5,854-6-10 plus interest from the 20th August 1935, up to the date of payment at 3 1/2 per cent per annum in preference to the other creditors and 1 shareholders within 30 days and directing that the parties should bear their own costs.

2. The facts out of which this matter has arisen do not, with one exception, admit of any doubt. The Dinshaw Bank had two branches one at Lucknow and one at Cawnpore. One Nanak Chand Kapur applied for the post of cashier of the Bank at Cawnpore, and was asked By the Bank to furnish security for Rs. 10,000. Mst. Krishna Piari furnished security for him. On the 26th April, 1933, she deposited with the Bank 100, 3 1/2 per cent Government Promissory Notes of the face value of Rs. 10,000, but valued by her at that time at Rs. 8,700. On the following day she deposited a sum of Rs. 1,00 in cash, which was kept in fixed

deposit. This fixed deposit matured on the 27th April, 1934, and the amount was then repaid to Mst. Krishna Piari, the Bank apparently remaining satisfied to have security for Nanak Chand to the extent of Rs. 8,700, only, or whatever amount the promissory notes might from time to time represent.

3. As a result of this deposit made by Mst. Krishna Piari in April, 1933, Nanak Chand was appointed cashier with effect from the 1st May, 1933, and continued to be cashier upto the 15th October, 1935, when compulsory liquidation of the Bank was ordered. Prior to, the compulsory liquidation the Bank had gone into voluntary liquidation on the 12th July, 1935. On the 20th May, 1935, Mst. Krishna Piari served a notice on the Bank stating that she did not wish to continue as surety for Nanak Chand Kapur any longer and demanding back from the Bank her promissory notes. These notes were, however, never forthcoming and never returned to her. On the 4th July Mst. Krishna Piari in the course of correspondence with the Bank agreed that a sum of Rs. 2,166 due from Nanak Chand to the Bank on over-draft should be set off against her claim and she further agreed on the 12th July, 1935, to accept from the Bank transfer of a promissory note for Rs. 1,175/6/6 due from one Raj Narain. She thus agreed to set off Rs. 3,341/6/6 against her claim stated in Exh. 2 at the time of this voluntary liquidation as Rs. 9,500, the value of the G. P. Notes at the date of notice, that is the 20th May, plus Rs. 495 odd interest due less Rs. 3,341 odd, making the net claim Rs. 6,654 odd. Subsequently in the compulsory liquidation proceedings Mst. Krishna Piari claimed Rs. 10,000 full face value of the promissory notes or the notes themselves and she allowed a set off of Rs. 2,166 only. The further amount of Rs. 1,175 odd has, however, since that date been admitted. The official liquidator admitted her claim only for Rs. 8,700 value of the promissory notes at the date of their deposit with interest Rs. 495 odd up to the 20th May, 1935, making a total of Rs. 9,195 odd, from which be deducted Rs. 3,341 odd as above, leaving a net claim of Rs. 5,854 odd. The Official Liquidator did not include Mst. Krishna Piari's name in the list of preferential creditors u/s 230 of the Indian Companies Act. He did, however, include her name in a list of persons said to be entitled to preference u/s 234 by which apparently he only meant that he asked the Court to sanction his paying Mst. Krishna Piari in full, vide Section 234 (1) (i) of the Indian Companies Act.

4. In the Court of the Company Judge Mst. Krishna Piari claimed that she was entitled to priority as a beneficiary on the view that this money had been entrusted to the Bank for her ultimate benefit and that the Bank was therefore in the position of a trustee. The learned Company Judge framed four issues:

1. Is Mst. Krishna Piari entitled to the return of G.P Notes? If not, what is the exact amount to which she is entitled?
2. Whether she is entitled to priority over other creditors and share-holders?.
3. Is she entitled to any interest?
4. Is the liquidator entitled to deduct the sum of Rs. 1,175/6/6 without handing

over the G P. Note for Rs. 1,000 with the accrued interest thereon?

5. The last issue no longer arises as the G.P. Note has been handed over to Mst. Krishna Piari.

6. On the first issue the learned Company Judge held that as the notes could not be traced, the Official Liquidator could not "return those notes. - It was remarked that the notes had disappeared from the Bank and nobody knew what had happened to them, hence "their return was impossible. He went on to consider the amount to which Mst Krishna Piari was entitled in replacement of the Notes, and he held that the notes were valued at Rs. 8,700 at the time when they were deposited and the present market value at the date of his order was only very slightly different from the value then stated, and he accordingly allowed the claim for Rs. 8,700 less Rs. 3,341 odd.

7. On the second issue reliance was placed upon a decision of the Madras High Court : In the matter of Travancore National & Quilon Bank Ltd. AIR 1939 Mad. 337 in which it was held, with reference to cash amounts deposited with the Bank by certain employees as security for the good behavior of those employees, that:

as the amounts were received by the Bank on a specific understanding to be applied by the Bank for a specific purpose, such amounts constituted trust money in the hands of the Bank and did not form part of the assets of the Bank divisible among its creditors and the fact that these "amounts were to carry interest did not alter its character.

8. The learned Company Judge held that the present case was upon the same footing. These promissory Notes were entrusted to the Bank for the ultimate benefit of Mst. Krishna Piari herself, the Bank as trustee only having a specific right to realise from these promissory Notes or the proceeds thereof in case of any defalcation on the part of Nanak Chand Kapur. That is a conclusion from which it is quite impossible to differ, considering the facts upon the record.

9. Before the learned Company Judge the defence put forward by the Official Liquidator was that at the time of the compulsory liquidation the only assets in the hands of the Bank amounted to a few rupees only. He contended that the charge in respect of these trust monies of Mst. Krishna Piari could extend only to this sum, and that the subsequent realizations of assets of the Bank were replenishment of the bank's funds, but not necessarily of the trust funds as in the case of James Roscoe (Bolton), Ltd. v. Winder (1916) 1 Ch. D. 62. We are in agreement with the learned Company Judge that the principles laid down in that case have no application to the present case. In order to induce the application of that case it would have been necessary to- show that there was some distinction between the subsequent realizations and the funds previously present in the Bank's strong rooms. The subsequent realizations in the present case are really only the previously existing assets changed into a different form, and not as in the case quoted fresh funds which were not part of the previous assets.

10. In the grounds of appeal relating to this matter of trust the first ground taken was that the learned Company Judge erred in holding that the appellant Bank held the money as a trustee on the date of liquidation, but some attempt has been made to suggest that the Bank did not hold these Notes as a trustee at all. We have already stated our view that there is no room for doubt that the money was held by the Bank as a trustee. We understand that by this ground the appellant was seeking to contend, as he originally began to contend in argument, that although the money was held by the Bank as a trustee up to the 25th May, 1935, the trust was terminated and the Bank was no longer a trustee on the date of compulsory liquidation. Learned Counsel appears to have lost sight of the provisions of Section 77 of the Indian Trust Act. That section provides that :

A trust is extinguished-

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfillment of its purpose becomes impossible by destruction of the trust-property or otherwise, or
- (d) when the trust, being revocable, is expressly revoked.

11. It is clear that (b) and (c) have no application in the present case. It is not shown that the trust property has been destroyed. Learned Counsel would suggest that clause (d) applies and that by her notice of the 20th May, 1935, Mst Krishna Piari expressly revoked the trust, but a trust can only be revoked in the circumstances mentioned in Section 78 of the Indian Trusts Act, and learned Counsel has not sought to show that any of the provisions of that section is applicable to the present case. It is clear that there is no express revocation of the trust by the demand for the return of the money. On the contrary the demand made by Mst. Krishna Piari seems to be a demand for the performance of the trust. The trust created by the deposit of these Notes with the Bank for the ultimate benefit of Mst. Krishna Piari could not, in our Opinion, be extinguished until the purpose of the trust was completely fulfilled by the return of the trust property to her subject to the lawful claims of the Bank against that property. In our opinion there is no force in the contention that the Bank, though holding the money as a trustee up to the 20th May, 1935, was not holding it as a trustee on the date of liquidation.

12. The second point argued by learned Counsel, for the appellant was that stated in ground 2, namely, that the learned Company Judge having held that the " G, P. Notes were untraceable erred in allowing the respondent priority in respect of the price of these Notes. It was in this connection that learned Counsel contended that there was no evidence that these notes were disposed of by the Bank, that is the directors or managers of the Bank, and the proceeds included in the Bank's accounts, and he contended that the lady could not claim any priority unless there was either admission or proof that the proceeds of the Notes were

so mixed with Bank's money. He suggested that the Notes had disappeared, presumably due to fraud on the part of the employees of the Bank, and he went on to argue that a Bank in liquidation represents the general body of the creditors and is not liable for torts committed by the former employees. Learned Counsel conceded that had the promissory notes been present in the Bank, Mst. Krishna Piari would certainly have been entitled to follow them, but his contention was that in the absence of evidence to show that they had been disposed of by the Bank and the proceeds included in the Bank's assets, the respondent was not entitled to follow them as against the Bank's other assets. On behalf of the respondent it is argued that this position is untenable on a number of grounds. In the first place it is clearly impossible for Mst. Krishna Piari to trace the subsequent disposal of these Notes after they were put in the possession of- the Bank. That is a matter which is within the special knowledge of the Bank, and with reference to which therefore the burden of proof is specifically upon the Bank, that is upon the Official Liquidator. Section 106 of the Indian Evidence Act provides that:

when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

13. It follows that if the Bank has not produced its accounts in Court, it cannot be heard to say that there is no evidence as to what has become of these Promissory Notes.

14. Learned Counsel for the respondent referred in this connection to Chidambaram Chettiar v. Ayyappa Cheitiar AIR 1936 Mad. 162, in which it was held that:

If a defendant suppresses his accounts or has falsified them, the Court will presume everything most unfavorable to him consistent with the established facts.

15. Learned Counsel for the respondent has further pointed out that it is not open to the appellant to contend that the respondent was not entitled to follow these sums on the ground that they are not shown to have been included in the Bank's monies, because in the list of debts and claims prepared by the Official Liquidator and supported by his affidavit dated the 24th February, 1938, he has described Mst. Krishna Piari's claim on page 26 in the following form : he includes her claim in the list of preferential claims u/s 234 of the Indian Companies Act and the entry in the list is as follows:

S. No. I.

No. of the list 218.

Name. Mst. Krishna Piari.

Particulars of debt or claim-Security deposit.

Amount claimed-Rs. 6, 654-5-10.

Amount proper to be allowed- Rs. 5,854-6-10.

Reasons for belief that amounts are proper to be allowed

From account books and receipt.

16. Reasons for belief From account that amounts are pro books and reaper to be allowed.

17. This would seem to be an admission that the claim had been allowed by reason of verification from account books and from the receipt given by the Bank to Mst. Krishna Piari ; therefore an admission that the proceeds of those notes were included in the Bank's moneys. Learned Counsel for respondent further points out that the effect of the Madras decision relied upon by the learned Company Judge, a decision which is founded on a number of previous cases which it is not in our opinion necessary to quote, is that trust monies are really entirely outside the liquidation and do not vest in the liquidator as assets. Trust monies in fact never become assets of the Bank. It follows that if this money had been misappropriated as is now suggested, the Bank should have disclaimed liability from the very start and that is not the position which has ever been taken up. In our opinion it is correct to say that it is no longer open to the official liquidator to disclaim all responsibility, and the only question which can still be disputed is the proper amount to be allowed to the claimant respondent.

18. In ground 3 it is contended that the Hon'ble Court erred in allowing interest to the respondent beyond the time admitted by the appellant. Learned Counsel contends that interest should only have been allowed up to the date of the winding up, that is the order for compulsory liquidation, vide sub-Rule 51, Rule 279, Chapter VI of the Oudh Civil Rules which provides as follows:

Creditors whose debts and claims carry interest and are allowed shall be entitled to receive dividends upon what was due for principal and interest at the date of the winding up. In the event of there being a surplus, the dividends payable to such creditors shall be applied, firstly, towards payment of the interest, and, secondly, in reduction of the principal due to them.

Interest may be allowed on all claims in respect of which it is recoverable as damages.

19. In our opinion this rule has really no application. The claim of Mst. Krishna Piari is a claim for a sum due under a trust and governed by Section 23 of the Indian Trusts Act. The Bank paid Mst. Krishna Piari the interest which accrued on the promissory notes for some period and then ceased paying. Had the promissory notes been in the hands of the Bank, as they should have been, Mst. Krishna Piari would have been able to recover the interest" accruing right up to the date on which she got the promissory notes" back. She is not an ordinary creditor, and she is in our opinion entitled to recover interest up to the time of payment of amount due to her, as held by the learned Company Judge.

20. The last point urged is that the learned Company Judge should not have directed payment of the amount due to Mst. Krishna Piari within 30 days. It is contended that there are a number of similar cases and that all these will have to be paid simultaneously, and if the assets are not sufficient they will have to be paid pro rata. Learned Counsel has, however, to admit that the Official Liquidator has money available to pay both this and all other preferential claims as was stated orally to the learned Company Judge. In these circumstances we can find nothing wrong with the order made by the learned Company Judge.

21. A "cross-objection has been filed on behalf of the respondent Mst. Krishna Piari in which it is urged (1) that the G. P. Notes should have been valued to the full extent of their face value and the respondent's claim therefore be further allowed to the extent of Rs. 1,300,(2) that the learned Company Judge should have directed the Official Liquidator to purchase G.P. Notes of the same denomination and face value and hand them over to the respondent, and (3) that in the alternative the learned Company Judge should have ordered that the respondent is entitled to such amount as would enable her to purchase 3 1/4 per cent G.P. Notes of the face value of Rs. 10,000 on the date the money is handed over to her. It is clear that by his order the learned Company Judge intended to put Mst Krishna Piari in the same position as she would have been at the date of his order had she been able to recover possession of the Notes themselves. The learned Company Judge discounted the extra 12 annas about Rs. 87 at which each 100 rupee note was said to be valued in the market at the date of his order. Learned Counsel for the respondent says that the market value to day of each note is Rs.90. It is clear to us that owing to the filing of the present appeal and the consequent noncompliance with the order to pay up the full amount of Mst. Krishna Piari's claim within 30 days, Mst. Krishna Piari has been caused a very definite loss. We are therefore of opinion that we should add to the amount decreed by the learned Company Judge a further sum of Rs. 300 only, that being the difference between the rate on which the learned Company Judge's order was calculated and the market rate. In order to avoid any danger of further loss we direct that the payment shall be made within 10 days of the date of this order.

22. The effect of this order is that we dismiss the appeal of the Official Liquidator with costs. We allow the Cross-objection on behalf of the respondent to the extent of Rs. 300 only but make no order as to costs of the cross-objection.