

(1953) 12 CAL CK 0012
In the Calcutta High Court
Case No : Suit No. 4539 of 1951

Nath Bank Ltd. (in Liqn.)

APPELLANT

Vs

Sisir Kumar Sarkar

RESPONDENT

Date of Decision : 11-12-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Companies Act, 1913 — Section 229
Contract Act, 1872 — Section 45
Presidency Towns Insolvency Act, 1909 — Section 47
Provincial Insolvency Act, 1920 — Section 46

Citation : AIR 1954 Cal 303 : (1954) 24 CompCas 306 : 58 CWN 385 : (1956) 1 ILR (Cal) 102

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : P.K. Sen, for the Appellant; P. Choudhary, for the Respondent

Judgement

Bachawat, J.—This is a suit to recover the balance due on an overdraft account and a declaration of charge and for all consequential reliefs. The only defence is a defence of set-off. The other contentions raised in the written statement are not pressed. The allegations in the plaint are admitted by the defendant's counsel.

2. The following issue was raised-

"Is the defendant entitled to a set-off as alleged in para. 6 of the written statement?"

3. The plaintiff (sic. defendant) is admittedly a debtor of the plaintiff for the sum of Rs. 10,406-10-6 before the winding up. The order for winding up of the plaintiff bank was made on 8th May, 1950.

4. There was a fixed deposit by Benode Benari Sarkar and the defendant. The fixed deposit receipt issued by the plaintiff bank is as follows;

"No. 30736 Date of Expiry the 30th March 1350. Not transferable.

Nath Bank Ltd. No. Bg. 1184, Nath Bank Ltd., Ballygunge Branch office Ballygunge, dated the 30th March 1949. Nath Bank Ltd. Received from M/s. Benode Behari Sarkar and Sisir Kumar Sarkar Paid Rs. 400/- on account of 1st dividend

Sd/- Illegible 6-12-51.

Rupees Four thousand only as a Deposit repayable 12 (Twelve) months after date with interest at the rate of three (3 per cent.) per cent, per annum to Either or Survivor.

Rs. 4000/- Cashier Sd/- Pravash Mazumdar

Accountant for Nath Bank Ltd. Sd/- Illegible Manager

Interest will cease at the expiration of 12 months when this receipt must be sent in for payment or renewal endorsed by the Depositer. No notice will be served by the Bank."

The fixed deposit was repayable 12 months after date to either or survivor.

5. The defendant and his wife Ava Sarkar had two accounts Nos. 60 and 61 called Provident Fund Pass Book Accounts with the plaintiff bank. It is admitted that in accordance with the rules of the Fund these two accounts had been made repayable to either or survivor. The total sum due in these two accounts is Rs. 1360/-.

6. There is no evidence that either Benode Behari Sarkar or Ava Sarkar is dead. There is also no evidence that any demand was made by the two sets of depositors asking for repayment of the moneys in the two accounts to the defendant specifically.

7. The question therefore is whether in a suit by X against A to recover a separate debt due from A to X, A can set off a debt repayable under a contract with A and B to either or survivor.

8. There is no doubt that if the debt is a debt jointly due to A and B, A cannot set off such debt. See -- "Bowyear v. Pawson" (1881) 6 QBD 540 (A). The debt due to A and B is not legally recoverable by A alone from X and cannot, therefore, be set off under Order 8, Rule 6, Civil P. C. In this respect in the absence of special circumstances equity follows law (Storey, Equity Jurisprudence, Article 439). The set-off is also not permissible u/s 47, Presidency Towns Insolvency Act read with Section 229, Indian Companies Act because there is no mutual credit between A and X in respect of such debt.

9. Lindley L. J. in -- "Wolstenholme v. Sheffield Union Banking Co." (1886) 54 LT 746 (B), at p. 748 observed:

"Prima facie a separate debt cannot be set off against joint debt either at law, in equity or under the mutual credit clauses of the Bankruptcy Act. There is no authority for the bankers having a general lien in such a case as the present."

10. It is however contended on behalf of the defendant that the debt repayable under a contract with A and B to either or survivor is a joint and several debt. Reliance is placed upon -- "McEvoy v. Belfast Banking Co. Ltd" 1935 AC 24 (C). That case decided that where A deposits money with the bank in the name of himself and B, payable to either or survivor, B's right to claim the deposit and to sue the bank depends on whether A purported to make B a party to the contract. Lord Atkin held that B by his conduct had represented to the Bank that he did not intend to ratify the contract and that having so acted he could not afterwards ratify it and that consequently he had never become a party to the contract. Lord Thankerton held that on the evidence it was not made out that A purported to act as the agent of B. Lord Warrington and Lord Macmillan held that as between B and the executors of A the latter was entitled to retain the assets.

11. In course of his Judgment Lord Atkin observed at p. 43 as follows:

"The contract on the face of it purports to be made with A and B and I think with them jointly and severally."

12. Learned counsel for the defendant relies very strongly upon this opinion. It is to be observed that this opinion was not necessary for the decision in that case nor do the other Law Lords express their concurrence with it.

(13) "1935 AC 24 (C)" was followed in -- "Sm. Sm. Shantimoyee Debi Vs. Bengal Central Bank (D)", where the deposit was repayable to either A the husband or B the wife or the survivor. On the death of A leaving behind sons B claimed the deposit from the bank and it was held that B was entitled to recover the amount of the fixed deposit. Chatterjee J. observed at p. 685 following Lord Atkin that the contract was a joint and several contract.

14. Section 45, Contract Act is as follows:

"45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

Unless a contrary intention appears from the contract a promise in favour of two or more persons is a joint promise to them all to perform the contract. Where a contrary intention appears a promise in favour of two or more persons may be a several promise to one of them to perform the whole or a severable part of it. But a promise cannot be made to two or more persons both jointly and severally (Halsbury, 2nd Edn., Vol. VII Article 95 at p. 76. "Ahinsa Bibi v. Abdul Kader" 25 Mad 26 at p. 35 (E)). One and the same covenant cannot be made both joint

and several with the same covenantees ("Bradburne v. Botfield" (1845) 14 M&W 559 at p. 573 (F)). An interest cannot be granted jointly and severally (See --"Slingsby's case" (1587) 5 Co. Rep. 186 (G)). The same promise cannot be a joint promise to two or more and at the same time a promise to one of them.

In -- Mahamed Ishaq and others Vs. Sheikh Akramul Huq and others (H), Sir Ashutosh Mukherji J. observed thus:

"A promise by two or more persons to perform an act is a promise that they or some or one of them will perform it, (-- "Addison v. Gibson" (1847) 10 QB 106 (I)); but a promise to two or more persons to perform an act is not a promise to them or some or one of them but a promise to them all to perform it, ("Rolls v. Yate" (1611) Yelverton 177 (J)).

* * * The case of an agreement by one person to pay a sum to two is very different, for this does not imply an obligation to pay the sum to the separate account of any, payment to two persons and payment to one are different and inconsistent things, and a promise to two and a promise to one are equally different and inconsistent. It is obvious therefore that a right may belong to individuals severally but not to two or more jointly severally but it may belong to two or more jointly."

15. In my judgment a debt repayable under a contract with A and B to either or survivor cannot at one and the same point of time be a debt jointly payable to A and B and also a debt severally payable to A. If Lord Atkin has expressed a contrary opinion I respectfully dissent from that opinion.

16. In this case the debt is payable under a contract with A and B to either or survivor. The normal meaning of "either" is "one or other" Per Rigby L. J. in -- "Re. Pickworth", (1899) 68 LJ Ch 324 (K). The debt, therefore, is payable under a joint contract with A and B to one or other of them during their joint lives and thereafter to the survivor.

17. It may be that either on the death of B or upon due demand for payment of the money severally to A during the joint lives of A and B the debt becomes severally due to A. It is not necessary to decide that question. I am however firmly of the opinion that during the joint lives of A and B at least until due demand for payment of the money to A is made the debt is not due severally or to the separate account of A and that at least until then it continues to be a debt jointly due to A and B. At least until such demand it is not certain that the debt is payable to either A alone or to B alone. The debt cannot be due to A severally as also to B severally at one and the same point of time.

18. The case of -- "Hirschorn v. Evans (Barclays Bank Ltd., Garm'shees)" : (1938) 2 KB 801 (L) is instructive. In that case, a joint deposit account was opened by A and B and the Bank was authorised to accept the signature of either A or B or of the survivor as a sufficient discharge for the re-payment of the moneys deposited. This debt was attached in execution of a decree against A,

the husband. , It was held that the judgment-creditor of A had no right to attach the debt. The Court of Appeal was unanimous in allowing the appeal brought against the decision of the county court judge. The Court unanimously held that there was 110 evidence upon which the county Court judge could find that the money in the joint account belonged solely to A.

Both Slessor and MacKinnon L. JJ. held that the right of either to demand the money and the obligation of the bank to pay to either did not make the account a joint and several account (see pp. 812 and 814 of the report). Greer L. J., however, held that if the money in the account belonged solely to A, on demand or what was equivalent to a demand by A, the money became repayable to him solely.

19. In -- "Simla Banking and Industrial Co. Ltd. v. Bhagwan Kuar" AIR 1928 Lah 316 (M) the bank had issued a fixed deposit receipt in favour of A and his wife B payable to either or survivor. In a suit by B against the bank to recover the deposit, the bank claimed to retain the moneys and asserted a lien thereon on the ground that A was severally indebted to the bank. This defence was negatived and it was held that the bank could not appropriate the amount of the fixed deposit against the debt severally due from A either in law or in equity.

20. In my judgment, during the joint lives of A and B at least until due demand for repayment of the money to A specifically is made, the debt continues to be a debt jointly due to A and B and the bank cannot set off a debt due from A alone against such debt nor can A set off this debt against a separate debt due from him to the bank.

21. In this case admittedly no demand for repayment of the moneys to the defendant was made at any time and the debt was not due to the defendant severally at any relevant point of time. In my judgment it is not made out that the defendant is entitled to set off the debt against the claim of the plaintiff.

22. This appears to be a hard case. There will be a decree for the sum of Rs. 10,406-10-6 pies and there will be a declaration of charge in terms of prayer (d). Mr. S. K. Sanyal, one of the joint Liquidators, is appointed Receiver without security and without remuneration of the assets and stock-in-trade of the defendant's business of Annapurna Atta and Oil Mills. Filing of separate accounts by the Receiver is dispensed with. The Receiver will, however, keep and maintain separate accounts and file the same along with the liquidation papers. There will be no order for interim interest. There will be interest on decree.

23. I direct that the decretal amount will be paid in the following instalments:

(a) The defendant will pay the sum of Rs. 500/- on or before 3rd January, 1954.

(b) The defendant will pay to the plaintiff the sum of Rs. 500/- each month thereafter, the first monthly to be paid on or before 3rd February 1954.

24. The Receiver will not take possession under this order unless and until a

default in payment of two instalments is made. In default of payment of any two instalments, the entire decretal amount will become immediately payable and the Receiver will be at liberty to sell the said assets and the stock-in-trade and appropriate the sale proceeds pro tanto in satisfaction of the claim.

25. Each party will pay and bear the costs of the suit throughout. The liquidator will be at liberty to retain the costs of the suit as between attorney and client out of the assets.