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**(1962) 10 KL CK 0013**

**In the High Court Of Kerala**

**Case No :** B.C.C. No's. 194, 408, 1003, 1105 of 1961 in B.C.P. No. 11 of 1960

Palai Central Bank Ltd., (in liquidation)

APPELLANT

Vs

Jacob P. Cherian and Others

RESPONDENT

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**Date of Decision :** 31-10-1962

**Acts Referred:**

Banking Companies Act, 1949 — Section 45D

Companies Act, 1956 — Section 528, 529

Transfer of Property Act, 1882 — Section 130, 134

**Citation :** AIR 1963 Ker 128 : (1963) 33 CompCas 144

**Hon'ble Judges :** P.T. Raman Nayar, J

**Bench :** Single Bench

**Advocate :** K.V. Surianarayana Iyer and C.M. Devan, in B.C.C. Nos. 194, 408, 1003 and 1105/61, for the Appellant; T.K. Kurian in B.C.C. 196/61, P.A. Francis in B.C.C. 408/61, Manual T. Paikaday in B.C.C. 1003/61 and Meni J. Meenattoor in B.C.C. No. 1105/61, for the Respondent

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## Judgement

P.T. Raman Nayar, J.—Nine hundred and twenty five claims brought u/s 45D of the Banking Companies Act have been heard together on the common question whether the respondent debtors, whose borrowings from the banking company in liquidation were against their deposits with it, are entitled to set off the one against the other u/s 529 of the Companies Act read with Section 46 of the Provincial Insolvency Act, the company being un-disputedly an Insolvent company. (Actually the insolvency law in force in this State is the (Kerala) insolvency Act, 1955 Section 47 of which corresponds to Section 46 of the Provincial Insolvency Act. However the provisions of this Act are, for all material purposes, identical with those of the Provincial Insolvency Act, and it is more convenient to refer to the provisions of the latter Act.) Four of them, B. C. C. No. 194 of 1961, B. C. C. No. 408 of 1961, B. C. C. No. 1003 of 1961 and B. C. C. No. 1105 of 1961, have been chosen, more or less as test cases, on the understanding that the decision in them will govern the remaining cases; and, although all the cases have been heard, this order is in terms confined to these

four cases.

2. (Both the borrowings from the bank and the deposits with it create debts, the one due to the bank and the other from the bank. For the sake of clarity I shall hereafter refer to the debts due to the bank as loans and to the debts due from the bank as deposits.)

3. The company was ordered to be wound up on 5-12-1960 on a petition presented on 8-8-1960 on which date a provisional liquidator was appointed. The provisional liquidator was in charge until the winding-up order was made.

4. The respondent in 8. C. C. No. 194 of 1961 borrowed Rs. 10,000/- from the bank on 30-1-1960 on a promissory note, against his fixed deposit of Rs. 12,000/- due for payment on 30-1-1961, The respondent in B. C. C. No. 408 of 1961 had an overdraft on current account against his fixed deposit for Rs. 15,000/- which was due on 23-2-1961, and at the commencement of the winding-up, he owed the bank Rs. 14,535.85 on this over-draft. . The respondent in B. C. C. No. 1003 of 1961 borrowed Rs. 7300/- from the bank on a demand promissory note on 26-7-1960 against his savings bank deposit amounting to Rs. 8135.85. The respondent in B. C. C, No. 1105 of 1961 borrowed Rs. 10,000/- on 23-6-1959 on a promissory note against his fixed deposit of Rs. 13,500/- due for payment on 13-1-1961. Had these borrowings been not on the security of the deposits but independent borrowings, there can be little doubt that the one would have to be set off against the other as demanded by respondents. But the case of the liquidator is that the transaction by which each of these deposits was given as security for the loan taken against it, amounted to a transfer of the deposit as an actionable claim to the bank for the purpose of securing the loan advanced by it as contemplated by sections 130 and 134 of the Transfer of Property Act.

Even if the transaction did not amount to a transfer, there was a binding agreement between the bank and the depositor by which the depositor was not entitled to claim the deposit until he had actually repaid his loan. At the commencement of the winding-up, the loans remained unpaid, and, therefore, in either view of the matter, there was nothing due or payable by the bank to the depositor to be set off against the loan taken by him. The cross-claim necessary for the application of Section 46 of the Provincial Insolvency Act is absent. It is not that the deposits had not become repayable when the winding-up intervened that is the Impediment. For the deposit would nevertheless be something due from the bank to the depositor though not yet become due, and therefore something to be set off against the loan due from the depositor to the bank. It is that nothing at all is due from the bank to the depositor in respect of the deposit until the latter has repaid the loan taken by him from the bank; and that event not having occurred when the winding-up intervened there is nothing to be set off against the bank's claim on the loan.

5. The contention of the respondents is that the deposits were never made

security for the loans in the strict sense of the word as involving a transfer of the deposits or creating a charge upon them. The documents relied upon by the liquidator as affecting a transfer, or a contract depriving the depositor of the right of repayment so long as his loan is outstanding, amount to nothing more than a written affirmation of a banker's well-known right to combine accounts, the banker's lien as it is sometimes called. The agreement evidenced by the document; only expressly authorises (by way of abundant caution, in order to negative any plea of a contract to the contrary and in order to dispense with the necessity for notice) what the bank was even otherwise entitled to do, namely, recover the loan by adjustment from the deposit. In the case of the loans against the fixed deposits, the bank took the additional precaution of taking back the deposit receipt with an endorsement of discharge, thus acquiring a lien over that paper, and, for all practical purposes; preventing the depositor from dealing with the deposit or obtaining repayment, the production of the receipt being necessary for the purposes.

The deposits were given as security for the loans only in the wide sense of the word, "security" as including any form of assurance; and, notwithstanding that the deposits were given as security in this sense, money was due from the bank to the depositors in respect of the deposits whether or not the loans taken from the bank had been repaid, and the liquidator was therefore bound to set off the deposits against the loans outstanding. The agreement between the depositor and the bank was that the loan was to be repaid from out of the deposit, in other words, set off against it. This is the very thing that the depositors now demand and which the statute allows them; and it is strange that an agreement which requires the same thing as the statute does should be relied upon as making the statutory right unavailable.

6. it is necessary to examine in some detail the machinery by which the deposits were made security for the loans. Regarding the procedure followed there is no dispute. It is set out in Chapter 7 of the bank's Book of Instructions which has been marked as Ext. P7. The liquidator has also filed an affidavit detailing the procedure, and the documents appertaining to some instances of borrowings against deposits have been marked by way of illustration.

7. When a loan is taken on the security of a fixed deposit, the procedure adopted is the same whether the loan be on a promissory note or by way of overdraft on current account. That in the one case there is a promissory note executed by the borrower, and, in the other, an overdraft agreement (usually in the form of an application by the borrower setting out the terms which, on being accepted by the bank, concludes the agreement, makes no difference for the present purpose). The fixed deposit receipt -- Ext. P11 is the receipt marked by way of Illustration--is handed over to the bank with an endorsement of discharge on the reverse,

"Received payment, viz. : -

Principal

Rs.

Interest

Rs.

Total

Rs. ... "

Signed by the depositor on the requisite revenue stamp. At the same time, the depositor hands over two letters like Exts. P9 and P10, one called a delivery letter and the other an instruction letter. Ext. P9, the delivery letter runs as follows :

" Always 30-1-1960 No. 28/6.

The Manager, Palai Central Bank Ltd. Alwaye.

Dear Sir,

Please take delivery of your Alwaye Branch Fixed Deposit Receipt No. 28/27 dated 30-1-1960 for Rs. 12000.00 (Twelve thousand only) favouring Jacob P. Cherian which has been duly discharged by me and hold it as security for an advance of Rs. 10000.00 which I request you to grant to me.

On maturity the proceeds of the above Fixed Deposit Receipt should be credited to my loan account with you.

Yours faithfully, Sd/- Jacob P. Cherian".

And Ext. P10, the" instruction letter as follows :.--

" Always 30-1-19\*60

The Manager, Palai Central Bank Limited, Alwaye.

Dear Sir,

With reference to your Fixed Deposit Receipt No. 28/27 dated 30-1-1960 for Rs. 12000.00 which I have discharged and delivered to you to be held as security for Demand Loan No. 28/6 for Rs. 10000.00 granted to me by you on 30-1-60 kindly credit all interest on the above deposit receipt as and when it accrues to my Demand Loan Account No. 28/6.

This letter cancels any previous instructions I may have given regarding disposal of interest earned on my above Fixed Deposit Receipt.

Yours faithfully, Sd/- Jacob P. Cherian".

8. Exts, P9 and P10 are the delivery letter and instruction letter in a case of a loan on a promissory note. Exts. P16 and P17 are the letters in a case of a loan

by way of overdraft on current account. They are in the same terms as Exts, P9 and P10 excepting that the instruction letter refers to the overdraft limit instead of to the demand loan and authorises the bank to withhold payment of interest on the fixed deposit until the overdraft is cleared. Thereafter, the interest is to be credited to the current account.

9. A loan is granted against a fixed deposit only for the unexpired term of the deposit and the caution, "Care -- Lien" is written against the entries in the bank's books relating to the deposit.

10. When a loan is taken on the security of a savings bank deposit, apart from the promissory note or other document on which the loan is taken, a letter like Ext. P13 called a lien letter is obtained from the depositor. Ext. P13 runs thus : --

" Place : Trivandrum) Date 30-7-60.

The Manager, Palai Central Bank Ltd., Trivandrum.

Dear Sir.

Kindly grant me a Demand Loan for Rs. 8850/- in terms of the p. P. Note for Rs. 8850/- dated 30-7-1960 executed by me in your favour.

As security for repayment of principal and interest which will accrue on the Loan, please earmark the sum of Rs. 9875.83 in my savings bank account. The Demand Loan granted to me by you will be repaid by .

19. If on that date or on previous demand by the Bank, I fail to repay the outstanding balance of the above Demand Loan Account plus interest due, kindly close my Demand Loan account by debiting the amount due to the Bank to my Savings Bank Account.

Yours faithfully, Sd/- P. Paraineswara Pillai".

The sum thus earmarked is a sum sufficient to cover the amount of the loan plus the interest that will accrue during its currency. Against entries in the books of the bank relating to the deposit, the caution, "Lien" with the amount earmarked is written.

11. The maximum withdrawal permissible from a savings bank deposit is Rs. 1000/- in a calendar week and a month's notice is required for closing an account so that the amount in deposit is payable only to the extent of Rs. 1000/- a week or on expiry of one month's notice of closure. The lien letter is regarded as such notice and the date fixed for repayment of the loan allows for the expiry of the period of notice. It would appear that, in the majority of cases, a loan against a savings bank deposit is in truth a device for premature withdrawal, the bank getting by way of recompense a higher interest on its advance than it pays on the deposit. And, although this is not contemplated by the instructions in Chapter 7 of the Book of instructions, a practice seems to have grown of obtaining cheques from the depositor in favour of the bank for the maximum

weekly withdrawal of Rs. 1000/-. The proceeds of the cheques are credited week by week to the loan account and after the loan is thus discharged, the balance if any, left is paid to the depositor. This practice seems to be only for the purpose of effecting the adjustment of the deposit towards the loan as early as possible without waiting for the expiry of the term fixed for the loan and only emphasises the real nature of the transaction.

12. it will be convenient at this stage to refer to the relevant statutory provisions, Sections 528 and 529 of the Companies Act are as follows --

"528. In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of insolvency), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reasons may not bear a certain value.

529. (1) in the winding up of an insolvent company the same rules shall prevail and be observed with regard to--

(a) debts provable.

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of Insolvency with respect to the estates, of persons adjudged Insolvent.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section :

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor".

Section 46 of the Provincial Insolvency Act is as follows -

"46. Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealing, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more, shall be claimed or paid on either side respectively."

And sections 130 and 134 of the Transfer of Property Act are as follows --

"130. Transfer of actionable claim -- (1) The Transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, Whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim shall (save where the debtor or other person is party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name Without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception -- Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the "provisions of Section 38 of the Insurance Act, 1938 (IV of 1938)".

"134. Mortgaged debt -- where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same."

13. if the transactions in question effect a transfer of the deposits, there can be little doubt that no set off is admissible, for, once a debt has been transferred, even if it be only by way of security, it is no longer due to the transferor. It is due only to the transferee; he alone can give a discharge; he alone can recover; and he can. do so without the conjunction of the transferor -- see Section 130(2) of the Transfer of Property Act. That the transfer is subject to a right, of redemption, that the transferee is subject to all the liabilities and equities to which the transferor was subject on the date of the transfer, that the transferor has still an interest in the proceeds of the debt once it is recovered (but not, be it noted in the debt itself) since u/s 134 of the Transfer of Property Act, the residue, if any after satisfying the secured debt and the costs of the recovery belongs to him and that the transferee is bound to make over this residue to the transferor, do not alter the position.

Under Sub-section (1) of Section 130 of the Transfer of Property Act, the transfer is to be complete and effectual upon the execution of the instrument of transfer, and thereupon all the rights and remedies of the transferor vest in the

transferee, whether notice of the transfer be given or not. Thereafter, the transferor has no right or interest in the debt; all rights and remedies vest in the transferee; and, although in the absence of notice any payment by the debtor to the transferor would be valid as against the transferee, it is to the transferee and not to the transferor that the debtor is bound to pay the debt. Thus, in the present cases, if there has indeed been a transfer to the bank, the deposits are no longer due to the respondents, and there is therefore nothing to be set off against the loans taken by them. That the bank is itself the debtor in respect of the deposits, and that the transfer is to it, would not, to my mind, result in an extinguishment of the debt due under the deposit by confusio, so as to make the bank accountable to the depositor for the consideration for the transfer (whatever that might have been), that being available for being set off against the loan. For the transfer to the bank would be in a capacity different from its capacity as the debtor in respect of the deposits.

It would be a transfer in trust for the purpose of realising the deposit and applying the proceeds in discharge of the secured debt, namely, the loan, in the manner contemplated by Section 134 of the Transfer of Property Act, making over the residue, if any, to the depositor. However that might be, there can be no doubt whatsoever that if the deposits in question have been transferred to the bank, even if the transfer be not absolute but only by way of security, nothing would be due to the respondents in respect of the deposits until the loan is repaid and the security, namely, the deposits, redeemed. Therefore, at the commencement of the winding up, nothing would be due to the respondents, either present or future, certain or contingent, ascertained or sounding in damages, which could be admitted to proof u/s 528 of the Companies Act, and which could be set off against the loans u/s 529 of the Act read with Section 46 of the Provincial Insolvency Act.

14. So much seems to me clear from a mere reading of sections 130 and 134 of the Transfer of Property Act. There is also ample authority for the position that, once a debt is transferred, nothing is due to or can be recovered by the transferor -- a comparatively recent decision on the point discussing the matter with reference to the English law is to be found in *Santuram Hari Vs. Trust of India Assurance Co.,* .

15. I do not, however think that the transactions in question effected a transfer of the deposits. Taking first the case of a fixed deposit given as security, it can scarcely be contended that the mere handing over of receipt to the bank with an endorsement of discharge amounts to an assignment of the deposit. At best this can only amount to appointing the bank as an agent for the collection of the deposit when it becomes due. What is contended is that this handing over of the fixed deposit receipt, taken in conjunction with the delivery letter and instruction letter, Exts. P9 and P10, passed to the bank at the same time, spells a clear intention to transfer the deposit to the bank by way of security. But I can find nothing in these two letters making out any such intention. They do not go any

further than the handing over of the fixed deposit receipts duly discharged by way of security. They merely affirm in writing that the handing over is by way of security for the loan taken by the depositor; and, all that they make out, is an authority conferred on the bank, by way of security, to realise the money due on the deposit when it becomes payable.

It seems to me significant that according to both letters what is to be held as security against the loan is not the deposit itself -- in which case perhaps an intention to transfer the deposit may be made out though it could still be contended that the holding is only as an agent and not as a transferee -- but the deposit receipt. On maturity, the bank is to collect the deposit ("the proceeds of the above fixed deposit receipt," in the language of the delivery letter) and credit the money to the loan account. That, of course assumes that the loan is then still outstanding. For, the moment the loan is repaid, the authority given only by way of security must determine, and, without anything further, the deposit becomes something due and payable to the depositor.

16. That, it seems to me, is the effect of the transaction. And the instruction letter seems to make it quite clear that the transaction does not amount to a transfer for, if it did, the interest accruing on the deposit would be payable only to the transferee and not to the transferor. It would have been entirely at the disposal of the bank and it would not be for the transferor, namely, the depositor, to say what should be done with the interest. The direction given in the instruction letter that the interest should be credited to the loan account or that it may be withheld for the currency of the loan would be quite unnecessary, and that direction seems to me to be entirely incompatible with the transaction amounting to a transfer.

17. Turning next to the loans against savings bank deposits, what the so-called lien letter, Ext. P-13, requires or authorises the bank to do, is to earmark a certain sum standing in the savings bank account as security for repayment of the loan. If the loan is not repaid by the due date the bank is to repay itself by adjustment from the deposit. (The particular mode of book-keeping suggested in Ext. P-13, namely, that the demand loan-account is to be closed by debiting the amount due to the bank to the depositor's savings bank account, really amounts to this, namely, that the required sum is to be paid out of the savings bank account, into the loan account and the loan thus repaid). Here again I see nothing to suggest that the deposit or any part thereof is transferred to the bank. All that the lien letter says is that a certain sum is to be earmarked as security. That does not mean that to that extent the deposit is transferred to the bank. All it can mean is that the deposit being, to that extent, earmarked for securing the loan, to that extent the deposit is not due or payable to the depositor unless and until the loan is repaid. If the loan is not repaid within the time promised, then the bank is given the authority to recover the sum earmarked, and, with that money, repay the loan due to it.

18. The argument advanced on behalf of the liquidator is this; u/s 134 of the

Transfer of Property Act a debt can be transferred for the purpose of security. So the moment a debt is given as security there is necessarily a transfer of the debt. I do not think that, because a debt can be transferred by way of security, it necessarily follows that a transfer is the only means by which a debt can be given as security. The word, "security" is a word of "general import meaning nothing more than an assurance "Anything that makes the money more assured in its payment or more readily recoverable", is how Stroud defines it -- and may range from a mere personal bond or promissory note or guarantee, or even a mere pledge of something of no intrinsic value, to a mortgage of property from out of which the money can be realised. A mortgage is a transfer. The marginal note to Section 134 is, "Mortgaged debt", and what the section means is that the mortgage of a debt is effected by a transfer thereof. The section does not say that the only way in which a debt can be given as security is by mortgaging it, and therefore, it cannot be said that the very giving of a debt as security necessarily implies a transfer thereof. In the wide sense of the word, "security", anything which disables the owner of a debt from recovering it until he has repaid a loan taken by him, or authorises the adjustment of the debt towards the loan, makes the debt security for the loan since it makes the loan more assured in its payment or more readily recoverable.

19. it is true that the instrument in writing contemplated by Section 130 of the Transfer of Property Act need not be in any particular form and need not employ any particular words or any set formula. It is not even necessary that there should be a document which is the repository of the whole transaction. All that is required is that there should be something in writing from which the intention to transfer the actionable claim can be gathered. But, as I have shown no such intention can be gathered from the documents in these cases. To say that the deposit receipt is to be held as security and that the money, when it becomes due is to be applied in a particular way, to say that a particular sum in deposit is earmarked by way of security and that if a loan is not repaid in time it may be repaid from out of the deposit when the deposit becomes payable, does not to my mind manifest an intention to transfer the deposit itself.

In the cases relied upon on behalf of the liquidator, namely, *Rama Iyen v. Venk'atachalam Pattar* ILR Mad 75, *Ardesir Bejonji Surati v. Syed Sirdar Ali Khan* ILR 33 Bom 610 at p. 627, *Muthukrishnier v. Veeraraghava Iyer* ILR Mad 297 : AIR 1915 Mad 1031 (FB), *Navajee and Another Vs. The Administrator General of Madras and Others*, , *Seetharama Ayyar v. Narayanaswami* Filial 47 Ind Cas 749 : AIR 1919 Mad 1076, and *Offi. Liquidator, Hanuman Bank v. Thangavelu Nadar* (1956) 26 Com Cas 81 (Mad), the writing said more than this and indicated an intention to transfer the debt. In the first and last of these cases there was a direction to a third party debtor to pay the debt to the supposed assignee, not a direction to the debtor to pay himself on a contingency when the debt becomes repayable. In the third there was a mortgage of the debt which necessarily implied a transfer, and in the second and fourth there was a charge or lien created on the debt itself and hence a payment directed out of the fund,

not merely when the fund becomes available. And in the fifth, an entry in a statement of account signed by the persons entitled to transfer the debt showed a payment by assignment of the debt. Even if it be that these cases are not really distinguishable, I am unable, with great respect, to accept them as authority for holding that the transactions we are now considering effect a transfer of the deposits concerned.

20. if indeed the transactions do effect a transfer, I am afraid the documents embodying them would be liable to stamp duty under Article 23 of Schedule I of the Indian Stamp Act (or the corresponding law in force in the State concerned, in this State Article 21 of schedule I of The Kerala Stamp Act) and would be inadmissible for being unstamped. (It is by reason of this objection taken on behalf of the respondents that the documents have been marked only by way of illustration and not as evidence of the transaction in any particular case). For u/s 130 of the Transfer of Property Act,

"the transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent",

and I am quite unable to see how a document or documents, the execution whereof effects such a transfer (such a document being necessary for a valid transfer), can fall to be an instrument within the definition in Section 2(14) of the Indian Stamp Act, and how the instrument can fail to be a conveyance within the definition in Section 2(10). I am wholly unconvinced by the argument, that there can be an instrument in writing the execution whereof effects a transfer u/s 130 of the Transfer of Property Act but which is nevertheless not an instrument within the meaning of Section 2(14) and not a conveyance within the meaning of Section 2(10) of the Stamp Act.

I can see nothing in 47 Ind Cas 749 : AIR 1919 Mad 1076, or in Ananda Namdeo v. Pundalik Tukaram, AIR 1936 Nag 225 which have been cited on behalf of the liquidator that lends the least support to this argument. (I might add that of the six cases referred to in the preceding paragraph, the question of stamp duty appears to have been considered only in the first. And in that case the necessary stamp duty and penalty were levied before the Instrument, which was unstamped, was received in evidence -- see the last paragraph of the Subordinate Judge's finding at page 77 of the report). I have been invited to compare the, "can be made only by a registered instrument" of Secs. 54 and 107 of the Transfer of Property Act and the, "can be effected only by a registered instrument signed by the mortgagor" of Section 59 with the, "shall be effected only by the execution of an Instrument in writing signed by the transferor" of Section 130. Having done so, I can see no difference whatsoever regarding the part to be played by the Instrument in these different transactions.

In each case, it seems to me that the transaction is effected by the instrument, and the only difference I can see is that while the Instruments in Sections 54, 59 and 107 have to be registered, that in Section 130 need not be registered. (It is

not the execution of any instrument whatsoever that effects a transfer u/s 130, but of an instrument which manifests an intention to transfer. And if it is the execution of strch art Instrument that effects the transfer, I think it would be quite correct to say that the transfer is effected by the instrument). Excepting perhaps that the draftsman was in a more ex-pansive mood when he came to Section 130, for aught I can see he might as well have said, "shall be effected only by an Instrument signed by the transferor" instead of saying "shall be effected only by the execution of an Instrument in writing signed by the transferor" -- the additional words are mere verbiage. There is nothing in the comparison suggested which induces me to think that the instrument contemplated by Section 130 is any the less an Instrument within the meaning of Section 2(14) of the Indian Stamp Act than the Instruments contemplated by Sections 54, 59 and 107.

21. While I am unable to accept the contention Of the Liquidator that the transactions in question effected a transfer of the deposits concerned, I am equally unable to agree with the respondents that the documents relied upon by the Liquidator are no more than letters of set off affirming by way of abundant caution, against a possible plea of want of notice or of a contract to the contrary, the bank's already existing right to combine accounts, the well recognised right of a banker to set off at any time what is due to him from the customer against what is due from him to the customer. (In England the practice of taking such letters seems to have grown since the decision in *W. P. Greenhalgh and Sons v. Union Bank of Manchester* (1924) 2 KB 153). For, as we have seen, in the case of loans against fixed deposits, the deposit receipt is handed over to the bank with an endorsement of discharge. Thereafter it is Impossible for the borrower to claim the deposit. The receipt is to be held by the Bank as security for the loan, and this means that the money held on deposit is not due or payable to the depositor until he has repaid his loan unless, of course, the bank chooses to give up the security.

What the delivery letter and Instruction letter say are not that the bank may combine accounts at any time without notice, adjusting the deposit against the loan, but that the deposit receipt has been duly discharged and delivered to the bank to be held as security, that Interest accrued on the deposit is to be credited towards the loan, or withheld till the loan is repaid, and that on maturity the proceeds of the deposit receipt are to be credited to the loan account, unless -- and this is necessarily implied by the circumstance that the deposit receipt is held only as security -- the loan be repaid earlier. And, in the case of loans against savings bank deposits, what the lien letter says is that a particular sum is to be earmarked as security for repayment of the loan and that if the loan be not repaid in time it is to be paid from out of the deposit. The earmarking of the particular sum by way of security is certainly something more than holding that sum liable to adjustment at any time.

A letter of set off only affirms the banker's right jto make an adjustment when

he chooses without notice to the customer. But, until the adjustment is made, the money in deposit is due to the customer and can be withdrawn by him in accordance with the rules governing withdrawals. But, if a certain sum in deposit is earmarked: by way of security for a loan given by the bank to the customer, it means that, until the loan is repaid, to the extent of the sum earmarked, nothing is due or can be paid to the customer from the deposit unless the bank gives up the security. As I have said, the documents evidencing the transactions, both in the cases of loans against fixed deposits and of loans against savings bank deposits, amount to much more than mere letters of set off even if they do not effect a transfer of the deposits.

22. To my mind the transactions amount to this: in consideration of, and as security for, the loan advanced by the bank, the bank and the customer enter into an agreement (evidenced by the handing over of the fixed deposit receipt duly discharged and the delivery order and instruction letter in the case of loans against fixed deposits, and by the lien letter in the case of loans against savings bank deposits) by which nothing is due or payable to the customer in respect of the deposit until he has repaid the loan. On failure of the customer to repay the loan within the time stipulated, the bank is to repay itself from out of the proceeds of the deposit when the deposit becomes repayable. That time had not expired in the present cases when the winding-up commenced, and, the loan remaining unpaid at the commencement, there was nothing due to the customer on the deposit to be set off against his loan. The bank is no doubt bound to adjust the proceeds of the deposit against the loan, but the proceeds are now only the dividends paid in the winding-up and not the amount of the deposit itself.

23. I would say that the transactions created an agency in respect of the deposits, by way of security for the loans, an agency which, being coupled with an interest, is irrevocable until repayment of the loan in full has been effected. As security for the loan he was taking the customer authorised the bank to receive the amount due on the fixed deposit or to hold back the amount due on the savings bank deposit, and, if the loan remained unpaid on the expiry of the stipulated period to apply the proceeds in discharge of the loan. The authority enures till the repayment of the loan, and is irrevocable, and, therefore, since the loan remains unpaid, there is nothing due to the customer on the deposit to be set off against the loan. In this connection the following extract from the Law of Contract by Cheshire and Plfoot (Fifth Edition, page 414) is illuminating : it appears against the marginal note, "Authority coupled with an interest is irrevocable".

"One clear case in which an authority cannot be unilaterally revoked by the principal is where it is coupled with an interest held by the agent. If, for instance, a borrower, in consideration of a loan, authorizes the lender to receive the rents of Blackacre by way of security, the authority remains irrevocable until repayment of the loan in full has been effected."

The borrower in that case is not entitled to receive the rents of Blackacre until repayment of the loan in full has been effected; the borrower in the present cases is not entitled to any money in respect of the deposit made by him until repayment of his loan in full has been effected.

24. Another way of looking at the matter might be to regard the bank as a receiver appointed in respect of the deposit, by way of security for the loan, holding the deposit in that capacity for until the loan is repaid and bound to apply the proceeds of the deposit in discharge of the loan in case the loan is not repaid in time. The result is the same. The loan remaining unpaid at the commencement of the winding-up, nothing is due upon the deposit to the customer and there is nothing to be set off against the loan taken by him. But it is really not necessary to find a name for the position occupied by the bank in relation to the deposits; it is, I think sufficient to show, as I believe I have done, that there was a binding contract by reason of which nothing was due to the customer in respect of the deposit at the commencement of the winding-up.

25. It was the practice of the bank to grant a loan to one person against a fixed deposit by another on the other handing over the deposit receipt duly discharged and passing a delivery letter and instruction letter similar to Exts. P-9 and P-10, the only difference being that the borrower (which in such a case would not be the depositor) would be mentioned as the person in whose favour the loan was granted. The Book of Instructions provides for this and claims have been filed before me in respect of such cases. In such a case, could a depositor who has given his deposit as security for a loan granted to a third party demand that the deposit be set off against a loan he himself owes the bank? In other words, supposing, in the present cases the respondents had given their deposits as security not for their own loans, but for the loans of third parties. Could they have demanded that the deposits should be set off against their loans, depriving the loans granted to the third parties of the security even of the dividends payable on the deposits? The answer, it is obvious, should be in the negative. But why? The only reason I can think of is that, by the very act of giving his deposit as security, the depositor disabled himself from making a demand. He became disentitled to the deposit, and hence there is no cross-claim to be set off against his loan. I do not think that the circumstance that, in these cases, the respondents gave their deposits as security for their own loans and not for the loans of third parties, makes any difference.

26. Another way of testing the matter occurs to me. Supposing the deposits were not security for the loans taken by the respondents but had been attached in execution of decrees obtained against them by third parties. Or, that a receiver had been appointed in respect of them in such execution. Could the respondents have demanded a set off? The answer is again obviously in the negative, and the reason for the answer, namely, that the depositors had become disentitled to demand repayment of the deposits, would apply equally to the present cases. That in the present cases the bank itself is the creditor and that what it has

obtained as security, by a process similar to an attachment or the appointment of a receiver in execution, is a debt due by itself can make no difference in principle.

27. Even if I am wrong in thinking that, by reason of the deposits being given as security in the manner described above, nothing is due to the respondents on the deposits and that the true position is that the deposits are debts payable on a contingency, the contingency being their release from the security arrangement, and are therefore admissible in proof u/s 523 of the Companies Act, a just estimate of the value of the deposits, subject to the contingency of release from the security, would be only the dividends payable in respect of the deposits and not their face value. The dividends alone would therefore be available for being set off. That it was by reason of the insolvency of the bank that the value of the deposits fell can make no difference, for, as explained by Venkataramana Rao, J. In *re Travancore National and Quilon Bank Ltd.* AIR 1941 Mad 622 at p. 624 and by myself in *Popular Bank v. Kumaraswami Reddiar* ILR (1961) Ker 304, paragraph 29 at p. 324 the decision in *Official Assignee v. M. C. Harikrishna* AIR 1935 Rang 201, in effect allowing a set off of the face value in such a case, proceeds on a misapplication of the rule stated by Viscount Cave L C. In *Ellis and Co's. Trustee v. Dixon Johnson* 1925 AC 489.

28. The decision in AIR 1941 Mad 622, was followed by a Division Bench of the Calcutta High Court in *Mani Bhusan Malik Vs. Pioneer Bank Ltd. (In Liquidation)*, and by me in ILR (1961) Ker 304. This is how I then looked at the matter in paragraphs 27 and 28 of my judgment:

"(27) in AIR 1941 Mad 622, Venkataramana Rao, J. held in similar circumstances that a set off was not permissible, and that decision has recently been followed by a Division Bench of the Calcutta High Court in *Mani Bhusan Malik Vs. Pioneer Bank Ltd. (In Liquidation)*, (That the set off in those cases was claimed by the debtor makes no difference -- in fact, in both cases, the owners of the pledged deposits also asked for a set off). Venkataramana Rao, J., viewed the matter thus : if A owes money to B and B to C and C has stood surety for A, then C being, severally with A, personally liable to pay A's debt there is against C's demand on B, B's cross-demand on C on account of A's debt. Therefore there are mutual dealings between B and C, and, in A's insolvency, C's surety debt to B could be set off against B's debt to C u/s 46 of the Provincial Insolvency Act, (Even so, it occurs to me that since B could at any time have released C from his surety obligation and looked solely to A for payment the receiver could do likewise in which case there would be nothing to set off against the debt due to C. But that, in such circumstances, C can get a set off seems well settled). But supposing C has not made himself personally liable to pay A's debt but has only given his property as security, then B cannot call upon C to pay the debt but can only realise the security and pay himself. There is no mutuality since nothing is due from C, and hence no question of set off. Moreover, B could at any time have given up the security. So can the receiver if that is beneficial to the administration; and in that case there would be no question of even C's property

being liable.

(28) With great respect I agree. And I might add that the fact that the property given by C as security is a debt due to him from B makes no difference to the position, for, that circumstance does not make for a demand by B against C. Moreover, I should think that, when C pledges the debt to B, he transfers it to him. Nothing is due to him from B until A's debt is paid and the security returned. Only, when that contingency has occurred can C ask for repayment of his debt and, in that event, if B has become insolvent, C cannot get the entire sum due to him but must be content with a dividend. Nor has C any cause of action against B for the diminution of the value of the security by reason of B's insolvency, and any premature payment to him of the entire sum (albeit by adjustment against the debt due from A) would be a fraudulent preference."

29. On further thought it seems to me now that the real reason why there are no cross-demands between the insolvent B and the surety C in a case where C has not made himself personally liable but has given only the debt due to him from B as security, and therefore no mutual dealings between B and C so as to attract Section 43 of the Provincial Insolvency Act, is not what is stated in paragraph 27 of judgment extracted above, but what I have indicated in paragraph 28. Can it be said that nothing is due from C to B merely because B cannot realise the debt due to him from A, in respect of which debt C has given security, from C personally but can only realise it from the property given by C as security. I think not. In the ultimate resort, even in cases where there is what is commonly known as a personal liability, the recovery of a debt can be only from the debtor's property. And, is a person any the less a person from whom money is due because a particular property belonging to him has been earmarked for its payment and the money can be recovered only from that property and not from any other property belonging to him?

I am of the view that, in the illustration given, there is a demand by B against C even though that demand can be enforced only against the property given by C as security and not against C personally. The real reason why there is no mutuality and therefore no scope for the application of Section 46 of the Provincial Insolvency Act is that there is no cross-demand by C against B in a case where the property given by C as security is a debt due to him from B since, as a result of that debt having been given as security, nothing is due to C upon it until the security is released.

30. in the case decided in AIR 1941 Mad 622, the security given was a debt due by the Bank to a third party not, as in the present cases, to the debtor himself. But, at page 624 of the report there appears the following observation :-

"The security in this case takes the form of a debt due by the bank. If that debt was owing to the debtor it will be a case of cross-demand and a case for a set off."

This observation is no doubt in favour of the present respondents, but, it was

obiter, and, for the reasons already slated, I am with great respect unable to accept it.

31. The following cases have been cited on behalf of the respondents as supporting their demand for set off. Chennai Purasai Hindu Jananokula Saswatha Nidhi v. Soobra-manya Mudali 15 MLJ 230, National Benefit Assurance Co., Ltd., in re (1924) 2 Ch 339, City Life Assurance Co., in re (1926) 1 Ch 191 , and H. Naik, Official Liquidator, Puri Bank Vs. Panchanon Das, . None of them considers the effect of the transaction by which the deposit was given as security on the title of the depositor to the money due under the deposit. All of them proceed on the assumption that, when a person has given a debt due to him as security he can still recover on the debt, an assumption which, I think I have succeeded in showing, is not warranted at any rate so far as the present cases are concerned.

32. it is said that it is illogical and unjust that the respondents should be the worse off for having given security for their loans and that they should be denied a set off when borrowers who gave no security are allowed that advantage. I see nothing illogical or unjust in this--the very purpose of taking security from a debtor is to place him at a disadvantage in the matter of evading repayment of the debt.

33. I hold that the respondents are not entitled to the set off claimed by them.