

(1944) 03 PAT CK 0001
In the Patna High Court

Radha Raman Choudhary and Another	APPELLANT
Vs	
Chota Nagpur Banking Association Ltd. and Others	RESPONDENT

Date of Decision : 31-03-1944

Acts Referred:

Contract Act, 1872 — Section 171, 76

Citation : AIR 1944 Patna 368

Hon'ble Judges : Fazl Ali, C.J.;Beevor, J

Bench : Full Bench

Judgement

Beevor, J.—Rai Bahadur Radha Gobind Choudhury, father of the plaintiff-appellants, had certain transactions with the Chota Nagpur Banking Association Ltd., respondent 1. He had a fixed deposit account with that association (hereinafter referred to as the bank) though the account was kept in the name of one of his sons who is plaintiff appellant 2. He also executed jointly with other persons certain handnotes in favour of the bank. Thus in 1913 he executed one such handnote jointly with defendant 2 for a principal sum of Rs. 1500. In 1927 he executed a handnote jointly with defendant 3 for a principal sum of Rupees 500. In 1927 he executed such a handnote jointly with defendant 4 for a principal sum of Rs. 225 and in 1928 he again jointly with defendant 4 executed a handnote for a principal sum of Rs. 40. He died on 24th December 1931. The plaintiffs then claimed to have the deposit account transferred to their names. There was some correspondence between them and the bank and on 19th April 1932 the fixed deposit account was transferred to the names of the plaintiffs on their agreeing to undertake all the liabilities of their father which, it appears, they had actually done on 1st April 1932. On 18th May 1935, the pass book of the fixed deposit account was presented to the bank for the purpose of cashing a cheque and when it was returned plaintiff 2 found that entries had been made therein adjusting the account by debiting against the date 1st May 1935 the amounts of principal and interest still outstanding up to that date on "account of the above mentioned handnotes.

2. Protests were made to the bank and after failing to get satisfaction by correspondence the plaintiffs on 2nd May 1938 instituted the present suit claiming a sum of Rs. 2489-9-3 from the bank in respect of the amounts which, they alleged, had wrongfully been deducted by adjustment of the fixed deposit account as on the date 1st May 1935 and claiming in the alternative that if the Court held that the adjustments made by the bank were legal, a decree be passed against the other defendants who were the joint executants of the handnotes or their legal representatives for different portions of the amount adjusted. The plaintiffs pleaded that their father was merely a surety for the other executants of the handnotes and not a principal debtor on those handnotes. The defence of the bank with which alone, we are now concerned, was that the plaintiffs' father was not merely a surety but was a principal debtor on the handnotes. They did not admit the plaintiffs' claim that the debts due on the handnotes were barred by limitation either on 18th May 1935 or on 1st May 1935, and they claimed a right to retain the money deposited as security for a general balance of account and to make such adjustments as were necessary for the realisation of their dues, and contended that the adjustments actually made were valid.

3. The suit was originally tried by Mr. R.N. Ghose, Special Subordinate Judge of Ranchi, who held that the plaintiffs' father was a principal debtor in respect of the handnote executed by him and defendant 2 in 1913, but was a surety in respect of the transactions by the handnotes of 1927 and 1928 executed by him jointly either with defendant 3 or defendant 4, and he overruled the contention of the plaintiffs that the bank was not entitled to recover its dues by adjustment of the fixed deposit account on the ground that the debts in question were time barred. On these findings he dismissed the suit as against the bank and gave a decree against defendants 3 and 4 in respect of the full sum claimed against them and as against defendants 2 to 2 (g) a decree for half of the amount claimed by the plaintiffs as against them. The plaintiffs appealed to the Judicial Commissioner of Chota Nagpur who upheld the findings that the plaintiffs' father was a principal debtor on the handnote of 1913. He overruled a contention on behalf of the plaintiffs that the fixed deposit account was a trust account, and then held that the bank's right of a general lien was applicable to the adjustment in question, that it was not a case of set off but a case of lien, that in any case the plaintiffs could not have claimed a decree for money as against the bank but would have been entitled at best to a decree for re-adjustment of the fixed deposit account, and that the bank could not have claimed in this case an equitable set-off, and on these findings he dismissed the appeal.

4. Before us an attempt was made on behalf of the plaintiff-appellants to urge that there was neither on 1st April 1932 nor on 19th April 1932, any acknowledgment which would keep alive any debts of their father on the handnotes in question or give a fresh starting point for limitation. This matter however does not seem to have been disputed before the learned Judicial Commissioner and I have no doubt that the terms on which the plaintiffs

obtained mutation of their names in respect of the fixed deposit account included an acknowledgment by them, through plaintiff 2, of their liability for the amounts then out-standing on the hand-notes in question. This point however is quite unimportant because the bank has not contended before us that there was any acknowledgment or other trans, action after 19th April 1932 which would give any further extension for the purposes of limitation had the bank been compelled to sue on the hand-notes, and, therefore, it was conceded on behalf of the bank that if the bank had brought a suit on those hand-notes on 1st May 1935 the date of adjustment of the account, such suit would have been barred by limitation. The contention of the bank, which has been accepted by both the lower Courts, is that the bank by making the adjustment on 1st May 1935 was exercising a right of lien which could be exercised even in respect of debts which were time-barred in the sense that a suit for recovery of those debts would have been barred by the law of limitation at the date of the adjustment. In dealing with the question whether this was a case of lien or set off the learned Judicial Commissioner started with the proposition that in India the general lien of bankers is provided for by Section 171, Contract Act, 1872, and referred to the terms of that section. He rightly overruled a contention that the word "goods" in that section must be restricted in accordance with the definition in Section 76, now repealed, because that definition was expressly confined to the chapter in which it occurred which did not include Section 171.

5. Then, after referring to certain passages in Halsbury's Laws of England, he considered the case in *In re Morris; Coneys v. Morris* (1922) ILR 1 81 Rule 811 from which he quoted the dictum of Molony C.J.:

What is popularly called the banker's lien is nothing more than the right of the bank to set of the amount due by you to them in respect of an actionable debt;

and a passage from the judgment of Ronan L.J. in that case to the same effect. He then pointed out that there was really nothing new in what was said in that case but continued:

This does not alter the fact that in a large number of authorities cited in Halsbury in support of the pro positions mentioned by me above, it has been held that general lien does apply to money. This anomaly is recognized by the learned author of the title "Bankers and Banking" in Halsbury's Laws of England, when he speaks of the banker exercising "his lien or set off" for the resulting balance from a combination? of all the accounts kept in the same right by a customer, and of the power of a banker, "by right of lien or set of to retain enough of an account in credit to satisfy a debit on another kept m the same right.

6. He then referred to certain Indian decisions in which the words "lien" or "banker's lien" have been used with reference to sums of money though he noted that those decisions were not directly in point in the present circumstances. Then follows the following passage in his judgment:

I have remarked above that the term lien is somewhat inappropriate, because

money is by its nature unidentifiable and is not retained in specie. In the case of other goods the bank would retain them until its dues were paid and, on this being done, would return them to the customer. Retention in the case of money practically amounts to a set-off, because the question of the subsequent paying up of the dues and the return of the money retained would not arise. Such subsequent payment would in fact be to the disadvantage of the customer, since the future interest on the bank's dues would make the dues exceed the amount retained. The effect of the retention is for all practical purposes to wipe out the debt due to the bank, and the adjustment made by the bank in the accounts merely records this fact. It is possible therefore to regard the transaction as merely a retention of the deposit in exercise of the lien, the adjustment of the accounts being treated merely as a matter of book keeping.

7. He declined to follow the case in *In re Morris; Coneys v. Morris* (1922) 1 Ir. R. 81. The importance of this question whether the bank could in this case claim a lien, or merely a right to set off, is due to the fact that where there is strictly speaking a lien that lien may be exercised in respect of the time-barred debt as is shown by the case in *Higgins v. Scott* (1831) 2 B&Ad. 413, a case of an attorney's lien exercised over the proceeds of goods recovered by a sheriff under *fiери facias*, and *Spears v. Hartley* (1800) 3 Esp. 81 a case of a wharfinger's lien over a log of mahogany. Now I think it is unnecessary to consider in the present case whether the word "goods" in Section 171, Contract Act, may include money because that section applies only to "goods bailed." u/s 148 of the Act "bailment" is defined as follows:

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor" and the person to whom they are delivered is called the "bailee".

8. Money deposited with a bank on current account or fixed deposit certainly does not come within this definition. Whatever criticism may have been offered of the decision in *In re Morris; Coneys v. Morris* (1922) 1 Ir. R. 81 on other points, there can be no criticism of the dictum of Molony C.J. that

the relation of banker to customer is that of debtor and creditor; when you lodge money on current account you give it to the bank subject to the right to draw against it a sum equal to what you have lodged.

If money lodged with a bank on current or deposit account amounted to a bailment, it would follow by reason of Section 163, Contract Act, that in the absence of any contract to the contrary the banker was bound to deliver to the customer any profit which accrued from use of the money deposited. Although Section 171, Contract Act, does in terms cover the case, it does not follow that the banker has no other right of lien or set off because Section 1 of that Act provides:

Nothing herein, contained shall affect the provisions of any statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act.

9. It was held by the House of Lords in *Brandao v. Barnett* (1846) 12 Cl. & F. 787 that the general lien of bankers is part of the law of merchant and is to be judicially noticed. Before considering the extent of this lien, I may mention that bankers have also a right to combine one or more accounts of the same customer (1873) 8 Ex. 106 but this right will not help the plaintiffs in the present case because the Bank could not combine an account which belonged either to the plaintiffs' father or to the plaintiffs alone with another account which was the joint account of the plaintiffs' father and defendants 2, 3 or 4. Now it is certainly true that in some cases the words "banker's lien" have been used in a wide sense which would apparently include the rights of set off; but not so far as I have ascertained in any case in which any distinction between lien and set-off was material.

In *Roxburghe v. Cox* (1881) 17 Ch. D. 520 Becon V.C. gave a decision in favour of a bank on the basis that they had a lien on a sum of money paid to them as regimental agents by Government, as the amount payable in respect of the army commission of Lord Charles Ker on his retirement, for satisfaction of a debt due to them from Lord Charles Ker to the extent of ? 647. The Court of Appeal, however, while expressing no dissent from the view of Becon V.C., regarding lien, dealt with the case on the basis of set off and held that the bank was entitled to such set off. I think that in this connection a valuable clue to the true principle is given by Note (a) to Para. 1366 at page 842 of Halsbury's Laws of England, vol. I. That paragraph states that the general lien of bankers attaches to money paid in by or to the account of a customer and the note refers to the decision in *Roxburghe v. Cox* (1881) 17 Ch. D. 520 and then states:

Money is, however, not usually the subject of lien, not being capable of being earmarked and the banker's claim in such cases is probably more rightly referred to as set off.

10. When money is paid into a bank I apprehend that it is largely, if not entirely, a question of fact whether it remains an earmarked sum of money or whether the money as such is merged in the general balances of the bank, and is represented by a balance of account due from the bank to some other person. In *Roxburghe v. Cox* (1881) 17 ChD 520 it was possible to find the facts either way and as the same legal result followed from either finding it was not important to decide which view of the facts was correct. I think, however, that the banker's right of lien can only attach to money so long as it remains such an earmarked sum of money; while after it has ceased to be such a separate earmarked sum of money and is represented, only by a balance of account or debt due from the bank no lien can continue to attach to it, though [the rights of the bank by way of set off will "not thereby be affected.

11. In this view of the case, it is quite clear that in the present instance there, was no separate earmarked sum of money over which the bank hold any lien on 1st May 1935 but merely a balance of account due from the bank to the plaintiffs to which no lien could attach. This is in accordance with the decision in *In re Morris; Coneys v. Morris* (1922) 1 Ir. R. 81. I may mention here that no question has arisen in this case of any right or claim on the part of the bank to appropriate any sum paid in by the plaintiffs on general account towards satisfaction of any time barred debt. For the reasons given above, I hold that the bank had no lien on the balance of account standing to the credit of the plaintiffs in the fixed deposit account, and their right of set off, whatever it may have been in the past, was clearly barred by limitation on 1st May 1935, the date on which the bank made adjustment of the account. The plaintiff-appellants claimed a decree for money against the defendant bank, but the learned Judicial Commissioner of Chota Nagpur has rightly pointed out that in any case the plaintiff-appellants are not entitled to receive money otherwise than in accordance with the terms of the fixed deposit account. They, therefore, cannot be given a decree for payment of money as against the bank.

12. In these circumstances the plaintiff-appellants, will be given a decree for a declaration that the bank was not entitled to make the deductions and adjustments in the fixed deposit account as actually made on 1st May 1935 and for a further declaration that the plaintiffs are entitled to credit in the fixed deposit account in respect of the sums so deducted with effect from that date, viz., 1st May 1935. It follows that the decree of the trial Court for payment of separate sums by other defendants must be set aside. The plaintiff-appellants will be allowed their costs throughout as against the Chota Nagpur Banking Association Limited.

Fazl Ali C.J.

13. I agree.