

(1945) 02 MAD CK 0005
In the Madras High Court

The Chettinad Mercantile Bank Ltd.

APPELLANT

Vs

PL.A. Pichammai Achi and Another

RESPONDENT

Date of Decision : 21-02-1945

Acts Referred:

Citation : AIR 1945 Mad 447 : (1946) ILR (Mad) 200 : (1945) 58 LW 509 : (1945) 2 MLJ 100

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The second defendant in the suit appeals against the decree of the District Judge of Ramnad making it liable to pay a sum of

Rs. 4,000 and interest thereon to the plaintiff. The plaintiff-respondent had two cheques given to her by the Harvey Mills, Madura, both drawn on

the Imperial Bank, one for Rs. 20,900 and another for Rs. 18,682-8-0. The plaintiff endorsed both these cheques in favour of the first defendant.

We are not concerned with the cheque for Rs. 20,000. As regards the cheque for Rs. 18,682-8-0, the plaintiff's case is that she gave definite

instructions that the first defendant should pay a sum of Rs. 5,000 odd due to the second defendant Bank by the plaintiff in respect of some pledge

of jewels made on her behalf by the first defendant, that he should take Rs. 3,000 as a loan and execute a promissory note for that sum to the

plaintiff, that a draft for Rs. 3,000 should be taken in the plaintiff's name payable on the Kulitalai Bank to be utilised for her own purposes, that Rs.

3,000 odd should be paid to the plaintiff in cash and lastly that a draft for Rs. 4,000 should be obtained from the appellant Bank in the name of the

plaintiff payable in Madras. The first defendant cashed the cheque in the appellant Bank on the 10th August, 1937. Of the directions given by the

plaintiff to the first defendant, all but the last were duly fulfilled. The sum due to the appellant Bank was paid and the jewels redeemed. A sum of

Rs. 3,000 was taken by the first defendant and a promissory note executed for that amount. A draft for Rs. 3,000 odd was obtained in plaintiff's

name payable on Kulitalai Bank and Rs. 3,000 odd was obtained and paid in cash to the plaintiff. But the direction that a draft for Rs. 4,000

payable at Madras should be obtained in the name of the plaintiff was not complied with. The first defendant admittedly got a draft for Rs. 4,000

payable at Madras but it was obtained in his own name. The plaintiff alleges that when the defendant paid her Rs. 3,000 in cash and returned her

jewels he gave also the draft for Rs. 4 000, that being illiterate she did not then know that it had been taken in the name of the first defendant, that

later on when she attempted to present it and get the money on it, she discovered that it had been taken in the name of the first defendant", that she

thereafter made demands on the first defendant to endorse it over to her and that he refused to do so. The plaintiff then gave notice of her claim to

the appellant Bank, which however gave no reply. Thereupon the present suit was filed for a declaration that the plaintiff was entitled to the

beneficial interest in the draft and for such other relief as the Court may think fit.

2. Various defences were raised by the appellant who is the second defendant in the suit. The main defence is that the first defendant owes large

sums of money to the appellant Bank and that the appellant is entitled to adjust the sum represented by the draft against the sums due by the first

defendant. This claim was presented in the arguments before me as either one of banker's lien or a right of set off. The trial Court dismissed the

suit but on appeal the District Judge of Ramnad granted a decree against the appellant. Elaborate arguments have been addressed to me by the

learned advocates on the question of when the banker's lien and right of set off come into existence and how they can be exercised.

3. It would appear that the first defendant became indebted to the appellant Bank in respect of four hundis dated the 29th December, 1938. The

total value of these hundies was Rs. 5,000. The amount was not paid and a suit O.S. No. 69 of 1940 on the file of the Subordinate Judge's Court

of Ramnad was filed in 1939 by the appellant Bank against the first defendant for recovery of Rs. 5,180-7-6. This is the principal and interest due

in respect of these hundies. Before that the plaintiff had issued the notice Ex.P-2 stating that the first defendant had obtained a draft on the 10th

August, 1937, for Rs. 4,000 in his own name, that the amounts represented by the said draft belonged to her and not to the first defendant and that

the Bank should not pay the amount to the first defendant. In the appellant's suit against the first defendant just referred to, the first defendant

applied for leave to defend as the suit was under the summary chapter. In the affidavit filed in support of that application, the first defendant said

that the sum of Rs. 4,000 represented by the draft now in question should be adjusted as against the amount claimed in the suit. The appellant, who

was the plaintiff in the suit, filed a counter-affidavit resisting the first defendant's claim that the amount represented by the draft should be adjusted

and claimed a decree for the full amount. Though leave to defend was given and a written statement was filed once again claiming that the amount

of the draft in question should be set off, the Court held that it could not be done and granted a decree for the full amount of the suit. The chief

reason put forward by the appellant in justification of its refusal to adjust the amount was that the first defendant had stated that the draft had been

lost, that the Bank was afraid that later on some one might turn up with a valid claim to be paid the amount of the draft and that until the draft was

produced or security given for the amount, the adjustment or set off could not be consented to by the appellant Bank. This was a very proper

position to take and a decree for the full amount was passed in that suit.

4. On these facts is the plaintiff entitled to demand that the appellant Bank should pay her the amount of the draft? It may be mentioned that the

draft was drawn on the appellant's branch at Madras. But this would not make any difference because even if the Bank had given a draft on

another banking institution, payment of the draft could be countermanded in which case the amount represented by the draft can be claimed only

from the appellant Bank. If the appellant Bank has a lien for the other amounts due to it by the first defendant or if the Bank can set off the amount

of the draft against the indebtedness of the first defendant, the plaintiff must fail. At one stage it appeared as though the question could be disposed

of shortly on the ground that the indebtedness of the first defendant in respect of which the lien or set-off was claimed arose subsequent to the

receipt by the Bank of the plaintiff's notice, Ex. P-2 dated the 31st October, 1938. The plaint in O.S. No. 69 of 1940, as stated above, ended in

a decree for over Rs. 5,000 and that is the amount in respect of which the lien or set-off is claimed. It appears from Ex. P-4 (c) that the suit was in

respect of four hundis all dated the 29th December, 1938. If these hundis were all fresh transactions it "is clear that with notice of the plaintiff's

claim to the draft in question, the Bank advanced fresh monies to the first defendant. In that case, the question would be easy to answer and the

case of the appellant would stand on a very slender basis. If with notice of an adverse claim to the draft in question, the appellant Bank went on

advancing fresh amounts to the first defendant it would be doing so with its eyes wide open and cannot complain if it turned out that the amount

due under the draft really belonged to the plaintiff. With a view to clarify the position, I directed the appellant to produce its accounts. That was

done and Mr. Gopalaswami Ayyangar, learned Counsel for the respondent, went through them and stated quite fairly that all these hundis were

really renewals of earlier hundis. On this statement it was unnecessary to have the accounts formally exhibited. There is one statement made by Mr.

Gopalaswami Ayyangar which I must here record that even the accounts produced do not show that the first defendant was indebted to the

appellant Bank on the 10th August, 1937.

5. The case as presented before me is one of either lien or of set-off. Banker's lien can properly be said to arise only in respect of any securities

held by the Bank. If the customer deposits certain securities and ultimately there is a sum due to the Bank, the Bank has a lien over these securities

and it could hold them against the amount due by the customer. Strictly speaking, the present case is not one of lien. The Bank has no securities of

the first defendant over which it seeks to exercise this right of lien. The only question that arises is whether the appellant has a right of set off. The

subject of Banker's lien is dealt with in Hart's Law of Banking, 4th Edn., Vol. II Chapter 6, page 843 onwards. The learned author begins the

discussion of the subject thus:

Banker's lien is the right of retaining things delivered into his possession as a banker if and so long as the customer to whom they belonged or who

had the power of disposing of them when so delivered is indebted to the banker

on the balance of the account between them provided the circumstances in which the banker obtained possession do not imply that he has agreed that this right shall be excluded.

6. It will be found that in all the cases where the question of banker's lien came up there were securities or other properties of the customer in the hands of the bank and the bank sought to exercise the right of retaining those securities or documents until the whole amount due to it was paid.

When and under what circumstances the lien is excluded is dealt with in the same chapter. I agree with Mr. Gopala-swami Aiyangar's argument

that in this case we are not concerned with the question of lien at all. I do not therefore propose to enter into a discussion of the various authorities

cited by Mr. Bashyam, learned Counsel for the appellant, on the question of lien. I confine myself to the question whether the bank has a right of

set-off. Here a draft was given in the name of the first defendant and delivered to him on the 10th August, 1937. The draft is now produced by the

plaintiff and she claims that she is entitled to the beneficial interest in the amount represented by the draft. It is admitted by the appellant bank that

even at the time of the suit the bank had not actually adjusted the amount of this draft against the first defendant's account, i.e., against the first

defendant's indebtedness to itself. But Mr. Bashyam says that his client has the right of setting off the amount of the draft against the indebtedness

of the first defendant and that his client can exercise it even in the course of the suit.

7. In the case of money of the customer paid into the bank into his current account or deposit account, the amount ceases to be the property of the

customer and becomes the property of the banker and he is thereafter under a contractual obligation to repay or give credit to the customer for the

amount. In such a case, there is no property of the customer of which the banker has possession, the possession of the banker co-existing with his

own ownership of the money. Accordingly, the essential conditions necessary to the existence of the lien are lacking. Moreover the purpose of the

lien which exists over the property of the customer is in this case attained by the application of the principle of set-off whereby the banker can take

into account any item in his own favour as against any payment in by his customer before arriving at the balance subsisting between them. In the

present case if the bank had not issued a draft for the sum of Rs. 4,000 and there was a sum of Rs. 4000 to the credit of the first defendant in

some account and the first defendant later on became indebted to the bank in respect of the bills drawn by him, the bank would clearly be at liberty

to set off the amount in question against the amount due on the bills.

8. In a case of this kind, the question is when does the right to set off arise and if by the time when the bank seeks to set off the sum due by it to

the customer against the sums due by the customer to it, it gets notice of an adverse claim, is the right to set off lost?, On the facts stated when the

plaintiff sent her notice on the 31st October, 1938, the bank owed the sum of Rs. 4,000 represented by the draft to the first defendant and the first

defendant owed about Rs. 5,000 on the bills which were later on renewed in December that year. The appellant's argument is that before the bank

got notice, the bank had the right to set off and that the right of set off is not lost merely because by the time it is sought to be exercised, the bank

got notice of the plaintiff's claim. The respondent's argument is that in this case the bank issued a draft to the first defendant who was thus put in a

position to enable third parties to acquire a title to the money represented by the draft and that his client's right must therefore prevail. It is

conceded that if the draft had been assigned over to the plaintiff even after the first defendant became indebted to the appellant under the bills, the

plaintiff would have become entitled to claim the amount in question from the appellant. The respondent's learned Counsel argues that if this is the

true position, the plaintiff became beneficially entitled to the amount of the draft though it was obtained in the name of the first defendant and that at

any rate after the draft had been handed over to her, the plaintiff could claim the amount in question from the bank. On the findings of the lower

appellate Court, the plaintiff had given definite instructions to the first defendant to obtain the draft for Rs. 4,000 in her own name on a Madras

Bank. The first defendant obtained the draft but did not get it in the name of the plaintiff. That was a clear breach of duty on the part of the first

defendant who stood in a fiduciary relationship to the plaintiff. The argument is that in such a case the beneficial interest in the draft passed to the

plaintiff and that there is no reason why the result should not be the same as in the case of an actual assignment made by the first defendant to a

third party. It is urged that one is an assignment by act of parties, that the other is an assignment by operation of law, that in either case a third party

gets a right to the amount represented by the draft and that the bank which enabled the first defendant to create rights in third parties must suffer

and cannot claim the set off.

9. Strong reliance is placed by Mr. Bashyam for the appellant on two decisions. One is the decision of the Privy Council in *Union Bank of*

Australia v. Murray Aynsley (1898) A.G. 693 *Murray Aynsley* was one of the trustees under an ante-nuptial settlement executed by Mr. and Mrs.

Harris. A sum of ₹ 1,800 was held by the trustees under this ante-nuptial settlement for the benefit of Mr. and Mrs. Harris. There was a firm of

Miles & Co., which was carrying on business and which had a banking account with the Union Bank of Australia, Ltd. This sum of ₹ 1,800 was

invested through the agency of Miles and Co., on two loans one of ₹ 1,600 to L.V. Lodge and the other of ₹ 200 to one Kemp. These

amounts were repaid by the debtors in October, November and December 1894. By that time Miles and Co., had transferred their business to a

joint stock company of the name of Miles and Co., Ltd. The moneys were realised by Miles & Co., Ltd., on behalf of Murray Aynsley and as

when they were received, the amounts were paid into the appellant bank to the credit of No. 3 account. Miles and Co., and their successors Miles

& Co., Ltd., were the customers of the appellant bank. For their convenience the bank kept two accounts one which was known as the general

account and the other which was known as the stock account of the concern. Later at the request of the managing partner of Miles & Co., a third

account known as No. 3 account was opened for the firm. It was into this third account, that the amounts in question were paid by Miles and Co.,

Ltd., who continued to keep the third account just mentioned. The sums remained with the bank of Australia until Miles & Co, Ltd., failed. At that

time the bank had to get large sums of money from Miles & Co., Ltd. The question was whether the bank was entitled to set off the amount

remaining to the credit of Miles & Co., Ltd. in account No. 3 against the amounts due to the bank under accounts Nos. 1 and 2. The Judicial

Committee held that it was entitled to do so. It was pointed out that at the time when account No. 3 was opened or -when monies were paid into

that account from time to time, the bank had no notice that the account related to trust funds or that monies paid into that account were trust funds.

The bank was therefore entitled to set off the amounts in No. III account towards the sums due to it under the two other accounts.

10. Mr. Bashyam urges that in that case the Bank had at the time when it claimed the right of set-off, notice that the amounts paid into No. III

account were trust monies and that nevertheless the Judicial Committee held in favour of the Bank's right to set off. The crucial point of time,

knowledge at which time, would deprive the Bank of the right of set off would appear to be the time when the account was opened or when the

monies were paid into that account.

11. The other decision relied on is *Thompson v. Clydesdale Bank, Ltd.* (1893) A.C. 282, where a stock broker was given some shares by the

appellant with instructions to sell them and to invest the sale proceeds in certain Colonial Banks in the appellant's name. The stock broker sold the

shares through another stock broker and from the sum so realised he repaid to the respondent bank the sum due by him on an overdrawn account.

This he did by means of a cheque. The respondents knew that the cheque represented the proceeds of the sale of shares but was not aware

whether the money paid was in the broker's hands as agent or otherwise. The appellant claimed the amount from the respondent bank on the

ground that the agent's act in paying the appellant's money contrary to directions was a breach of trust and that the respondent bank which knew

that the cheque represented the sale proceeds of the appellant's shares was liable to repay the sum. The House of Lords held that the Bank was

not liable to repay that amount. It was pointed out that the mere fact that a certain sum was the realisations of the sale of shares of a customer of

the broker did not mean in all cases that the broker was not entitled to use it for himself. The Lord Chancellor dealt with this aspect at page 288

and said this:

The only point to which I have not alluded, and upon which stress was laid, is this; that in the bank books Mr. Thompson is described as a

stockbroker; therefore, it was said, his account would be understood to be one relating to matters in which he was acting for principals, and that

this, coupled with the answers to which I have alluded, is sufficient to establish

the appellant's case. My Lords, if a stockbroker who was receiving money in respect of transactions for his clients could never properly pay it to his account in discharge of liabilities incurred, there might be something in the case of the appellants; but obviously that is not so. A stockbroker may make advances to his clients in anticipation of sums which he will receive for them. In that case it is perfectly legitimate, he having obtained for that purpose an advance from his bankers, that when he receives the money for his clients he should pay it to his bankers for the purpose of reinstating the account he has overdrawn. Therefore it is clear that there may well be cases in which a stockbroker having overdrawn his account may properly pay money which he has received for his clients into that account. It is obvious that the case of the appellants wholly fails unless they bring home to the respondents much more than has been attempted here, namely, a knowledge that in the particular case the person was not justified in paying over the particular amount. Of course, if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it. It seems to me that if, because an account is opened with bankers by a stockbroker, they are bound to inquire into the source from which he receives any money which he pays in it would be wholly impossible that business could be carried on, and I know of no principle or authority which establishes such a proposition. I confess therefore, with all respect for the learned Judge who took a different view in the Court below, that it seems to me to be a very clear case.

12. Thus if the broker paid monies of the customer to discharge his own indebtedness to a bank, that by itself is not enough to render the bank liable to repay the amount to the customer. It is a breach of trust as between the broker and his customer. But before the Bank can be charged with any liability it must be proved that the Bank had knowledge of the fact that the broker was paying the money contrary to the customer's instructions or that it had knowledge of facts which would put the Bank on enquiry.

13. In the present case, if the first defendant was indebted to the Bank on 10th August, 1937, when he paid in the cheque for Rs. 18,000 odd and the Bank had retained the sum of Rs. 4,000 without issuing a bank draft, then the bank would have been under no liability to the plaintiff. But the

whole difficulty has arisen from the fact that the bank issued the draft and thereby brought about a position where third parties could claim rights in the draft.

14. The decisions relied upon by the respondent may now be considered. I shall first deal with the case of John v. Dodwell & Co. (1918) A.C.

563 One Williams was managing their (respondent's) business at Colombo. He was authorised to draw cheques upon their banking account for

the purpose of the business which he was managing on their behalf. The appellants before the Judicial Committee were brokers and purchased

shares for Williams. In payment of the amounts due for these shares, Williams tendered cheques drawn on the respondents' account in a certain

Bank. The cheques; themselves indicated that the fund on which the cheques were drawn belonged to respondents Dodwell & Co. These were

accepted by John & Co., and they cashed the cheques and paid it to the sellers of the shares. The respondents thereafter filed the suit which went

up before the Judicial Committee for recovery of the amount. Their case was this. The amount in the bank on which the cheques were drawn

belonged to them. Williams was drawing cheques on that amount. Williams would have authority to draw cheques on the amount belonging to the

respondents only if he drew them for the purpose of the business which he was managing. That was the limited authority given to him to operate on

the banking account of the respondents. Therefore, the act of Williams in drawing a cheque for paying his own dues was not authorised. The clerks

of John & Co. knew when they saw the cheques given by Williams that they were drawn upon the account of the respondents. Therefore they had

knowledge that Williams was drawing upon the account of another person. On these facts, the Judicial Committee held that though the appellant

John & Co., took the cheques in good faith and paid the same to the customers, they were liable in as much as they took the money in respect of

which Williams was committing a breach of trust with the knowledge got by the clerks of the appellant company that he was drawing upon the

account of another person. They say this at page 568:

However, it is nonetheless clear that, innocent of fraud as the appellants were found to be, they, by the action of their clerks, took an unmistakable

and grave risk in the transactions in question. On the face of these, Williams

was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was prima facie a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction. For when an agent is entrusted by his principal with property to be applied for the purpose of the latter and to be accounted for on that footing he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied to trusts or in the form which later developments of the Roman law have recognized.

15. This decision helps the respondent only to this extent that the first defendant who got definite instructions to get a draft in the plaintiff's name was in a fiduciary position to the plaintiff and in taking the draft in his own name he was committing a breach of his duty and therefore a breach of trust. But this case does not help the respondent further. The appellant had no knowledge of the instructions given by the plaintiff to the first defendant.

16. I shall then deal with the decision of the Judicial Committee in *O. RM. O. M. SP. Firm v. Magappa Chettiar* (1941) 1 M.L.J. 393 : L.R. 67 LA. 448 : ILR (1941) Mad. 175 . The plaintiff Nagappa Chettiar gave a sum of money to his uncle Subramania with a view that the moneys might be utilised for conducting a charity. It was not paid in cash but in the shape of two hundis. It would appear that the plaintiff Nagappa had an account with a particular bank and the hundis were drawn on that bank, i.e., the plaintiff directed the bank to pay sums represented by the hundi to

Subramania. The hundis were drawn in the name of charity. They were taken by Subramania to the appellant bank and on the nth September,

1917, the bank endorsed each with a statement that the amount with interest up to date had been received. The bank credited the sums in each

case to an account in the name of the charity concerned though Subramania had separate account of his own in the appellant bank, long prior to

11th September, 1917, when the account was opened in the name of the charity. The moneys remained to the credit of the charities till the 10th

February, 1920, when the sum amounted to Rs. 15,700 odd. On that day Subramania owed the bank in his private account a sum of Rs. 15,700.

On the 10th February, 1920, out of the amount standing to the credit of the charities, Rs. 15,700 was taken over to the other account and that

account closed. The balance of Rs. 32-15-9 was paid in cash to Subramania and the charity account closed. The plaintiff filed the suit which went

up to the Judicial Committee for recovering the amount from the bank. On these facts it is clear that the bank knew that the sum. entered in the

charity accounts in its own books was really the charity money and not the amount at the disposal of Subramania. Subramania was indebted to the

extent of Rs. 15,700 on the 10th February, 1920, and what the bank did was to appropriate an amount which it knew was the trust money to the

private account of Subramania. On these facts it is clear that the appellant bank which, right from the very beginning, knew that the amount was the

trust amount aided Subramania to commit a breach of trust by applying trust money to discharge his own individual indebtedness. Such a thing was

not permitted. Though this case was very strongly relied upon by Mr. Gopalaswami Aiyangar in support of his proposition that if at the time when

the adjustment was made the bank knew that the money was trust money it had no right of set-off, it really seems to be a case where the bank

knew right from the very beginning that the amount was one belonging to the trust. In fact when the hundis were paid in September 1917 the bank

credited them in the name of the charity. If the facts had been that there was one account in Subramania's name in which these amounts were

credited and another account in which Subramania had overdrawn and after Subramania became indebted in his No. 2 account to the extent of Rs.

15,700 the bank came to know that the amount in the first account was trust money, then the case would have been of help or if in the case before

us, the indebtedness of the first defendant had arisen after the plaintiff's notice of October 1938 then the decision of the Judicial Committee would have been of great help. Unfortunately, here we have to take it that there are two accounts one represented by the Rs. 4,000 which is the amount of the draft, another account the bills or hundis account. Long prior to October 1938 the first defendant had drawn hundis and had become indebted. In the No. 1 account or the draft account he was a creditor of the bank. If according to the law, the customer had two accounts in a bank, being in one account a debtor and in the other a creditor, the bank can adjust the one against the other, and it had that right on the day when it honoured certain bills of the first defendant and so allowed the first defendant to become a debtor. The principle is that a bank relies upon the general credit of the customer taking all the accounts as one when it advances money or honours bills drawn by the customer on itself. The right of set off must be held to arise on that day. If this is so, the appellant bank would have had the right of looking to the draft account on the day when it honoured the bills of the first defendant. This case does not seem to be of much assistance.

17. The last case is *Imperial Bank of Canada v. Mary Victoria Begley* (1936) 44 L.W. 128 . In that case the respondent Mary Victoria Begley

had an account with the Imperial Bank of Canada., She executed a power of attorney in favour of M authorising him to attend to the investment of her moneys. M was already indebted to the bank on his own private account and purporting to act under the power of attorney he transferred

from the respondent's account to his own account a sufficient sum to discharge his indebtedness to the bank. The object of the power of attorney

was to make arrangements for the investment of the respondent's money at a higher rate of interest than the ordinary bank rate. The appellant

bank had thus allowed M to operate upon the respondent's account with it and so discharge M's indebtedness to it. The officers of the bank

made no attempt whatever to verify from the respondent herself whether M was authorised to act in the way he acted. The Judicial Committee

held that the Act of M in transferring the amount which stood to the respondent's credit in the bank to his own overdrawn account with the bank

was clearly a breach of trust as it was contrary to the directions given by the respondent, namely, an investment at a higher rate of interest. He

himself was an impecunious person and his executing a promissory note to the respondent which he did was really a mere camouflage and could

not be taken as a fulfilment of the trust reposed in him. Investment means a good investment and not lending to an impecunious person and

particularly when it is lent to the agent himself who was possessed of no means. The next question was whether the bank was affected by this

breach of trust on the part of the agent. On this part of the case the facts found were that the bank knew that M was of impecunious character and

that he was drawing upon an account of another person under a power of attorney. Therefore it was held by the Courts of Canada with which the

Judicial Committee agreed, viz., that these facts put the bank on enquiry and their action in transferring the amounts in the respondent's account

with it in payment of M's indebtedness to it without making the slightest reference to the respondent who was also their customer made the bank a

constructive trustee of the sum. This decision would be relevant if at the time when the Rs. 18,000 cheque was paid in, the bank had notice of any

fact which would have put them on enquiry regarding the plaintiff's rights.

18. The case before me can, I think, be disposed of on the ground that the appellant by giving the draft in question to the first defendant enabled

third parties to acquire rights in it and that it is not shown that the right of set off claimed by the bank arose before the third parties acquired rights

in the draft. If the first defendant endorsed the draft to another, it is not contended by Mr. Bashyam that the bank would not be liable to the third

party. That is the very reason why the bank would not agree to the set off when in the previous suit the first defendant claimed the set off. Even if

the first defendant, had, after he became indebted to the bank on the bills in question, assigned the draft to a third party, the appellant would be

bound to pay the amount to the assignee. An assignment may well take the form of creating a trust in respect of the amount covered by the draft. If

the first defendant created a valid trust, the trustee would, like an assignee or an endorsee be entitled to the amount covered by the draft. The same

result should, I think, follow where a trust is created by the operation of law. On the facts found by the lower Court, the first defendant became a

trustee for the plaintiff. When he obtained the draft in his own name, he committed a breach of trust and the law says that the property obtained by

the first defendant under those circumstances must be held by him for the benefit of the plaintiff, i.e. a trust was created in favour of the plaintiff"" in

respect of the amount of the draft. This is certainly analogous to the case of an assignment. If in the case of an assignment for value, the assignee

would be entitled to get the amount from the appellant bank, it seems to me, the answer must be the same in the case of the plaintiff who seeks to

recover the amount as the beneficiary under the trust created by law in her favour. She had already paid for the draft.

19. The next point urged is that the suit is not maintainable without a prayer for recovery of the amount. It is very doubtful whether a suit would lie

for recovery of the amount without getting a declaration of the plaintiff's right to the amount covered by the draft. As held by this Court in Subba

Narayana Vathiyar and Others Vs. K. Ramasami Aiyar, a suit does not lie on a negotiable instrument by any person other than the person named

as the payee or the person to whom he has endorsed it over. There is therefore no substance in the argument that the suit should have included a

prayer for the recovery of the amount. The question is not whether she might not have included that prayer also but whether she ought to have

done so in this case. I hold that she need not include a prayer for recovery of the money in this suit and the suit as filed is maintainable.

20. It is next contended that the suit merely to declare a pecuniary right of a plaintiff arising out of a contract does not lie. This again does not apply

to a case like this where it is necessary to have the right of a claimant to the amount represented by a negotiable instrument declared before a suit

could be filed for recovery of the amount due on the negotiable instrument.

21. In the result, the second appeal fails and is dismissed with costs of the first respondent.

22. No leave.