

(1963) 03 KL CK 0006

In the High Court Of Kerala

Case No : Application No's. 371, 372, 376, 377, 384, 461, 520, 558, 608, 610, 612, 668, 669 and 677 of 1961 and 243, 367, 434, 543 and 721 of 1962 in B.C.P. 11 of 1960

Trivandrum Chit Fund Ltd. and Others

APPELLANT

Vs

Official Liquidator, Palai Central Bank Ltd.

RESPONDENT

Date of Decision : 26-03-1963

Acts Referred:

Companies Act, 1956 — Section 640(6)

Transfer of Property Act, 1882 — Section 130, 130(1), 131, 134

Citation : (1963) KLJ 788

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

Bench : Single Bench

Advocate : G. Viswanatha Iyer, N. Ananthakrishna Iyer, K.N. Parameswaran Pillai, T.S. Krishnamoorthy Iyer, T.K. Narayana Pillai, M.I. Varghese, Varghese M. Mathew, Mani J. Meenattoor, P.A. Francis, C.J. Antony, S.Boothalinga Iyer, C.S. Ananthakrishna Iyer and S. John, for the Appellant; C.M. Devan, for the Respondent

Final Decision : Dismissed

Judgement

Raman Nayar J.

1. The petitioners are persons conducting chitties governed by the provisions of the Travancore Chitties Act, 1120-foremen, as the Act calls them—who had made deposits with the banking company in liquidation in compliance with Section 17 (1) of the Act, in some cases in compliance with Section 19 (2) as well. In the winding up they claimed priority for the debts due to them on the score that the deposits were special deposits made for a specific purpose and were therefore impressed with the character of a trust. Priority was denied by the liquidator who ranked the petitioners with the ordinary creditors; and hence these applications by way of appeal u/s 640 (6) of the Companies Act read with Rule 164 of the Companies (Court) Rules. In the words of the Supreme Court in Shanti Prasad Jain Vs. The Director of Enforcement, :

Now, the law is well settled that when moneys are deposited in a Bank, relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The Banker is entitled to use the moneys without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. There might be a special arrangement under which a Banker might be constituted a trustee, but apart from such an arrangement, his position qua Banker is that of a debtor, and not trustee. The law was stated in these terms in the old and well-known decision of the House of Lords in *Foley v. Hill* ((1848) 2 H. L. C. 28 = 9 E. R. 1002) and that has never been questioned.

The question is whether there was a special arrangement in the present cases by which the bank was constituted a trustee of the moneys deposited with it.

2. The deposits u/s 19 (2) of the Act present no difficulty and the case in respect of them deserves no more than summary rejection. They are ordinary deposits in current account and it is not pleaded that there was any agreement express or implied between the depositor and the bank affecting the ordinary relationship of debtor and creditor. Nor is there anything in the statute which gives the least indication that the bank is to hold the money in a fiduciary capacity. Section 19 of the Act runs as follows:

19 (1) The foreman shall, on the prized subscriber furnishing sufficient security for the payment of future subscriptions, be bound to pay him the prize amount and shall be entitled to get an acknowledgment in writing from him evidencing such payment.

(2) If, owing to the default of the prize winner, the prize amount due in respect of any drawing remains unpaid before the date of the next succeeding installment, the foreman shall invest the same forthwith in any approved bank mentioned in the variola and intimate in writing the fact of such investment to the prize winner.

(3) Payment of the prize amount under sub-section (1) or investment of the same under sub-section (2) shall be intimated to the subscribers at the next succeeding installment and such payment or investment entered in the minutes of proceedings of that installment.

(4) If the prize amount has not been invested in accordance with the provisions of sub-section (2) or if the amount so invested has been withdrawn for purposes other than those for which the same has been held in deposit, the foreman shall be liable to a fine which may extend to five hundred rupees.

All that this means is that if the money cannot be paid owing to the prize winner's default the foreman is bound by the statute to invest the money in an approved bank mentioned in the variola instead of keeping it himself so that it can be withdrawn and paid to the prize winner when the default ceases, and that the foreman is not to withdraw the money for any other purpose. The investment is by the foreman in his own name. The withdrawal also is by him and no

responsibility is cast on the bank in the matter. The words, "purposes other than those for which the same has been held in deposit" refer to the purposes for which the foreman holds the money in the shape of the bank deposit and do not imply that the bank holds the money for the purpose of payment to the prize winner. That is no concern whatsoever of the bank; the obligation is solely that of the foreman.

3. On money being invested in a bank, the relationship created between the investor and the bank, is that of a mere debtor and creditor and that the investor is under an obligation, statutory, contractual, or fiduciary, to make the investment and to apply its proceeds in a particular way does not in any way alter the relationship so long as the bank has not placed itself in the position of a trustee or an agent or other fiduciary. Here there is nothing to show that the bank did anything more than accept the deposit in the ordinary course, and, even if it knew that the depositor occupied a position akin to that of a trustee and was bound to apply the money in a particular way, the only duty cast on the bank is that it should not be a party to a breach of trust as, for example, by knowingly paying the money for a personal purpose of the depositor.

4. The law on the point is succinctly stated by Scott on Trusts (Second Edition, Vol. IV, page 3347):

If a general deposit is properly made by a trustee in his name as trustee the bank does not become a trustee of the money, but a debtor to the trustee. The trustee becomes a creditor of the bank and holds his claim against the bank in trust for the beneficiaries of the trust. The bank is as free to use the money deposited by a trustee as it is to use any other funds which are placed on general deposit with it. If the bank fails, the trustee or the beneficiaries are not entitled to priority over other creditors of the bank even though the money deposited is traceable. It is true that if the bank permits the trustee to withdraw money knowing that he intends to commit a breach of trust with the money, it is liable to the beneficiaries of the trust; but this is not because the bank is a trust, but because it is assisting the trustee to commit a breach of trust and is thus liable for participation in the breach of trust.

See also *In re T. N. and Q Bank* (A. I. R. 1940 Mad. 178), which was confirmed in appeal in *The Nayar Modern Bank Ltd. Vs. James Voce Pirrie, Cyril Gill and John Stanley Goodwin, the Official Liquidators of the Travancore National and Quilon Bank, Ltd., (in liquidation),* .

5. The deposits made u/s 17 (1) stand on no different footing. They are interest bearing fixed deposits in the foreman's name, on the face of them not different from any ordinary fixed deposit, and, just as in any other case, the fixed deposit receipt made out in the foreman's name is delivered to him, although, for the purpose of securing acceptance of the security given by him, he has to deposit the receipt with the Chitty Registrar so as to prevent him from drawing the money without the latter's concurrence. A fixed deposit, like any other deposit,

is only a loan, although for a stated term, and, like any other deposit, the relationship it creates between the depositor and the bank is, in the absence of a special arrangement whether express or implied, impressing it with the character of a trust, that of an ordinary debtor and creditor. The essence of the matter is whether the deposit is a species of trust. And to say as some decisions do, that the test is whether the bank holds the money in a fiduciary capacity, or whether the deposit is a special deposit for a specific purpose, is to say the same thing in different words. But, with regard to the latter test, it is necessary to bear in mind the caution that it is not enough that the depositor has in mind a special purpose when making the deposit, even if that purpose be known to the bank. An example would be of a trustee depositing trust funds in a bank. As already pointed out, even if the bank knows that the funds are trust funds, the transaction is, in the absence of any special arrangement, a mere loan creating only the relationship of an ordinary debtor and creditor. To make it something more and to entitle the deposit to priority, it is necessary that the bank should have agreed to hold the money and to apply it for the particular purpose thus making of itself an agent or a trustee.

6. Section 17 runs as follows:

17. (1) Every foreman shall, before the first drawing of the chitty execute a bond in favor of or in trust for the other subscribers for the proper conduct of the chitty, charging property sufficient to the satisfaction of the Registrar or any officer empowered by our Government in that behalf for the realization of twice the chitty amount or depositing cash in any approved bank of not less than the chitty amount:

Provided however, that, if the property charged by way of security be movable property the same shall be deposited in such manner as may be provided for in the variola, or with such authority as Our Government may appoint in this behalf:

Provided also, however, that cash security of not less than 50 per cent of the chitty amount may be deposited before the registration of the chitty and the balance within seven days after the receipt by the foreman of his prize money under clause (9) of S. 9, in cases where the foreman himself is a subscriber to a full ticket in the chitty.

(2) Any foreman contravening the provisions of sub-section (1) shall be liable to a fine not exceeding five hundred rupees.

There is an obvious ellipsis in the body of sub-section (1) for, while it clearly states that the bond is to charge property (which it is clear from the first proviso may be either immovable or movable) sufficient for the realization of twice the chitty amount, it does not in term say what purpose the deposit is to serve if the alternative of depositing cash of not less than the chitty amount in an approved bank is adopted. Confining the sub-section (shorn of the provisos) would read:

17. (1) Every foreman shall, before the first drawing of the chitty, execute a bond

in favor of or in trust for the other subscribers for the proper conduct of the chitty, depositing cash in any approved bank of not less than the chitty amount.

But it is apparent that the deposit is to be charged, in other words, made security, for the proper conduct of the chitty and the second proviso to the sub-section, in which the words, "cash security" obviously refer to the cash deposited in an approved bank under the body of the sub-section, makes this abundantly clear. Accordingly, Ext. P. 8 which is a security bond executed under the sub-section by one of the petitioners-it is the common case that the bonds in the remaining cases are in similar terms, and, by common consent Ext. P. 8 has been received in evidence in all the cases to prove the terms of the bond in all of them-charges the deposit made with the bank, in other words, the debt due by the bank on the deposit (not, be it noted, the money itself) for the proper conduct of the Chitty.

7. The question is, is it the true position that the foreman deposits the money into the bank and gives the deposit, i.e., the debt due to him by the bank on the deposit, as security for the proper conduct of the chitty, or, is it that the bank accepts the money more or less as a stake-holder, agreeing to hold it as security for the bond and make it available on enforcement thereof? In the latter case the bank undertakes the responsibility of holding the money itself for the purposes of the bond which means that it must earmark an equivalent sum for the purpose. It would then be an agent or trustee and it would only have custody of the money-the money would not be its money-in much the same manner as the authority with whom movable property is deposited under the first proviso to sub-section (1) of Section 17 has custody of the property. But, if it is the former, the money becomes the bank's money and there is only a promise by it to pay an equivalent sum of money at the stated time. This only gives rise to an actionable claim in the hands of the creditor, and, what the creditor does with it, whether he assigns it absolutely or gives it as security, will not affect the bank's position as a mere debtor and convert it into an agent or trustee.

8. Sub-section (1) of Section 17 only says that cash must be deposited in an approved bank. It casts no obligation on the bank and contains no indication whatsoever that the bank is to hold it in any manner other than the manner in which it normally holds deposits made with it, namely, as an ordinary debtor. The mere fact that the second proviso to the sub-section and the rules framed under the Act-see the heading of item (2) in Form No. VIII prescribed by the rules-refer to the cash deposit made under the sub-section as cash security does not alter the position and cannot have the effect of making the bank a trustee of the money. On the other hand what the sub-section says if we supply the ellipsis is that the deposit, in other words, the debt due from the bank, should be charged by the bond for the proper conduct of the chitty. And this is precisely what the bond, Ext. P. 8, to which it must be remembered that the bank is no party-the statute would have required the bank to be a party to the bond if any obligation were to be cast upon the bank thereunder-does. In keeping with this R. 44 of the

rules (which supplies the omission in the sub-section) says that, in the case of a cash deposit in a bank, the pass book shall be pledged with the Chitty Registrar who is to intimate the bank that the security amount is not to be disbursed except with the sanction of the Registrar or under orders of court. This would scarcely be necessary if the bank were a trustee bound to hold the money as security for the proper conduct of the chitty. And, an embargo conditional or otherwise, placed on a debtor on the payment of the debt to his creditor, as, for example, by a court attachment-and this is at best all that R. 44 provides for-cannot have the effect of converting the debtor into a trustee.

9. It is however contended that read against the background of the sub-section which specifies the purpose for which the deposit is made (of which purpose, of course, the bank cannot plead ignorance) the letters passed between the depositor, the bank, and the Chitty Registrar make out a special arrangement by which the bank is to hold the money as security for the due conduct of the chitty. I do not think that the letters passed make out any such special arrangement-I am not forgetting that the bank must have been fully aware of the provisions of Section 17 of the Act and of the fact that the deposits were being made in compliance with that section when it accepted the deposits. The letters passed in a few of the cases have been marked in evidence on the understanding that all the cases will be decided on the footing that the agreement between the depositor and the bank in all of them was what is disclosed by these letters. The letters in the several cases are in similar terms; the differences are mainly verbal; but for the purpose of deciding these cases I shall choose those letters which seem to me most favorable to the petitioners.

10. When making the deposit the foreman writes a letter like Ext. P. 1 (a) to the bank in the following terms:

Sir,

I wish to give as security Rs. 1,000/- for the proper conduct of chitty No. 1004 of the Quilon Ex-Officio Chitty Registrar's Office.

I therefore request you to be kind enough to accept Rs. 1,000/- towards Fixed Deposit for 28 months and address the Chitty Registrar, Quilon to the effect that this amount and interest will not be released to me without authority from Chitty Registrar or from Court of Law.

On the letter there is the following endorsement, apparently by the agent of the bank:

Accept deposit and issue letter.

Then the bank writes a letter like Ext. P. 3 (a) to the Chitty Registrar with reference to the deposit made:

Dear Sir,

In pursuance of his application of even date stating that the above deposit is to

be tendered as security for chitty No. 1004 of 1959, registered with your office, we hereby undertake not to disburse the above deposit amount and interest thereof without the written authority from the Chitty Registrar or of the orders from a competent court.

This assurance given by the bank to the Chitty Registrar sometimes takes a slightly different form. Ext. P. 3 is another of these letters:

Dear Sir,

At the request of the Trivandrum Chit Fund Ltd., Trivandrum, as security for their chitty, the deposit mentioned above is held at the disposal of Chitty Registrar, Trivandrum to whom it has been endorsed by the depositor with the permission of the Bank. This deposit is repayable only according to the instruction of the Chitty Registrar, Trivandrum and the interest will be paid to the depositor as and when due for payment.

It would appear that the Chitty Registrar also addresses the bank in pursuance of R. 44 asking for an assurance that the deposit made in the bank and given as security for the proper conduct of the chitty will not be repaid without his consent, Ext. P. 2 is one such letter:

Sir,

I have the honor to inform you that Mr. V. Subramonia Pillay, Associated Chit Fund, Suchindram has pledged the Fixed Deposit Account No. 36380/18/132 opened in your Bank for Rs. 2,500/- (Two thousand and five hundred) on 23-12-1949 in connection with the registration of Chitty No. 34 of 1125 of this office, registered under the Travancore Chitties Act XXVI of 1120. Since the amount has been deposited as security for the proper conduct of the chitty, I request that the depositor shall not be allowed to transact on this account except with the written sanction of the Ex-Officio Chitty Registrar, Agastisvaram or of a competent court.

As it is also essential that the bank holding the deposit should give a written assurance that the security deposit will not be allowed to be transacted upon except as stated above, I request you to be good enough to forward to me the requisite assurance in respect of the security under reference.

On the successful termination of a chitty the Chitty Registrar with whom the Fixed Deposit is deposited by way of security writes to the bank as in Ext. P. 4:

Sir,

I write to inform you that as the above chitty has been successfully terminated, the above security is released and receipts handed over to the party. Payment can be made on presentation of the same.

11. Ext P. 7, a circular issued by the Head Office of the bank, permits the renewal of a fixed deposit given as security without the actual production of the deposit

receipt (which, as we have seen, is held by the Registrar) on written instructions from the depositor after obtaining the written permission of the Chitty Registrar.

12. As we have already seen, the bond executed by the foreman u/s 17(1) in favor of or in trust for the subscribers of the chitty for the proper conduct thereof gives the deposit with the bank as security. It is duly stamped and amounts to a mortgage of the debt due under the deposit as contemplated by Section 134 read with Section 130 of the Transfer of Property Act.

13. I am unable to find anything in the letters and the circular, or in the procedure followed, to show that the bank agreed to hold the money as a sort of trustee or agent against any demands under the chitty security bond. What the statute enjoins and what the chitty security bond does is to make the deposit i.e., the debt due from the bank, security for the proper conduct of the chitty. The letters written by the foreman and the Chitty Registrar to the bank and the assurance given by the bank to the Chitty Registrar are but the express notices contemplated by the proviso to Section 130 (1) and by Section 131 of the Transfer of Property Act and acceptance thereof designed, like the deposit of the Fixed Deposit Receipt with the Chitty Registrar to make the security effective. True, the first paragraph of Ext. P. 1 (a) and the second sentence of the first paragraph, the remaining portions of these letters and the acceptances by the bank under Ext. P. 3 and Ext. P. 3(a) make it clear that it is only the deposit that is made security and that the reference in terms of money is only to the quantum of the deposit. And, it would appear, that, like the statute itself, the foreman and the Chitty Registrar made no distinction between the money deposited and the fixed deposit. The latter is only an actionable claim, namely, the debt due from the bank to the depositor, and not the money itself. The distinction is ordinarily no practical significance since a deposit in a sound bank and an approved bank is presumed to be sound-is as good as cash, but, in a winding up it is of great importance.

14. Reading the section and all the documents together, it seems to me that what happened in these cases was that the foreman made fixed deposits with the bank in the ordinary way though with a particular purpose in mind, in other words, lent money to the bank, and then gave the debt due on the deposit as security for the proper conduct of the chitty. The undertaking by the bank to the Chitty Registrar relates to the debt due by it to the foreman and is only to the effect that the debt will not be repaid without the direction of the Chitty Registrar or of a competent court of law. What really happens is that the depositor lends money to the bank and the bank at his request or at the request of the Chitty Registrar or both gives an undertaking to the Chitty Registrar, that the debt will be repaid only with the Chitty Registrar's consent. How the fact that the depositor gives the debt due to him as security to a third party or how the bank's undertaking not to pay the depositor without the consent of a third party can make the bank a trustee for its creditor is difficult to understand. Nor is the position altered by the circumstance that the bank notes the undertaking and the

fact that the deposit has been given as security in its books against the entries relating to the deposit so as to serve as a caution. I do not think that the evidence makes out an agreement by the bank to hold the money as an agent or stake-holder for the purpose of satisfying the chitty security bond.

15. In the result I dismiss the applications but make no order as to costs.

16. I have not thought it necessary to refer to the numerous authorities cited at the bar. They all lay down the same principle, and, in none of them, do the facts approximate the facts in these cases so that they are of little assistance in applying the principle to these facts. The liquidator will doubtless bear in mind that the security given by the foreman and the undertaking given by the bank now attach to the dividends payable on the deposits.