

against the debt incurred by him but a third person, the sons cannot be compelled to meet such a liability as that would be deemed *Avyavaharika* in the sense of "a debt for a cause repugnant to good morals" according to Colebrooke's translation of the term. This view is in accord with the decision of the Privy Council in *Kesar Chand v. Uttam Chand* (1) and does not come into conflict with the view held by the Hindu jurists.

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In view of what has been stated above, the appeal fails and is dismissed. In the circumstances of the case I will not burden the appellant-bank with costs.

B.R.T.

CIVIL ORIGINAL

Before D. Falshaw and Tek Chand, JJ.

THE NATIONAL TOBACCO COMPANY OF INDIA
LTD.—Petitioner.

versus

SIMLA BANKING AND INDUSTRIAL COMPANY LTD.
(IN LIQUIDATION),—Respondent.

Civil Original No. 13 of 1959.

Banker and Customer—Bank collecting the amount of bill and remitting it by bank draft as per instructions of the customer but without making arrangement for its encashment—Draft dishonoured on presentation—Relationship between the bank and customer—Whether that of trustee and cestui que trust or debtor and creditor—Bank going into liquidation—Customer—Whether entitled to rank as preferential creditor in respect of the amount of the draft.

1961
Sept., 11th

The petitioner company sent several consignments of cigarettes to one of its customers at Simla and instructed

(1) A.I.R. 1945 P.C. 91.

the respondent bank to make over documents of title to the customer upon receipt of the payment therefor and to "remit the proceeds less your usual commission to us at the above address by a crossed draft payable on any Calcutta Bank." The respondent bank collected the amount and remitted it by ten drafts on different dates drawn on the Central Bank of India Limited, Calcutta, which were dishonoured despite repeated presentations. The respondent bank closed its doors and later was ordered to be wound up. The question arose whether the petitioner company was entitled to realize the entire amount of the drafts from the bank in liquidation as a preferential creditor.

Held, that when a Bank acts purely as a collecting agent for bills with instructions to remit the proceeds less commission, the relation between the parties in the initial stages is not that merely of a creditor and debtor, but, that of trustee and *cestui que trust*. The fiduciary relationship thus created does not come to an end by the bank sending a draft on itself or on one of its branches or on another bank which is bound to be dishonoured on presentation because of the failure of the collecting bank to make arrangements to assure that the draft will be honoured on presentation. If the collecting bank thereafter is ordered to be wound up, the customer is entitled to recover the entire amount of the draft as a preferential creditor on the basis of the fiduciary relationship which had been created and which had not changed into the relationship of creditor and debtor merely by sending the draft which was dishonoured.

Case referred by Hon'ble Mr. Justice Tek Chand, on 29th January, 1960, to a Division Bench for decision of an important question of law involved in the case. The case was finally decided by Hon'ble Mr. Justice Falshaw and Hon'ble Mr. Justice Tek Chand, on 11th September, 1961.

D. D. KHANNA AND V. P. GANDHI, ADVOCATES, for the Petitioner.

D. N. AWASTHY, ADVOCATE, for the Respondent.

JUDGMENT

Falshaw, J. FALSHAW, J.—This case has been referred to a larger Bench by my learned brother Tek Chand, J., sitting as liquidation Judge.

The facts are that the National Tobacco Company of India Ltd., a firm of cigarette manufacturers, sent a number of consignments of cigarettes to one of their customers at Simla, a firm called Jalla Mal Jawahar Mal. At the same time in respect of these consignments the Company sent the Railway Receipts, etc. to the Simla Banking and Industrial Company Ltd. (now in liquidation) with instructions, in what was apparently their standard form, to hand over the documents of title to M/s. Jalla Mal Jawahar Mal, on receipt of payment therefor and to "remit the proceeds less your usual commission to us at the above address by a crossed draft payable on any Calcutta Bank". In pursuance of these instructions the Bank, as collecting agent for the Company, on various dates between the 24th of January and the 8th of February, 1949, purported to remit to the Company a total sum of Rs. 38,619-7-3 by ten separate drafts drawn by the Bank in favour of the Company on the Central Bank of India Ltd., Calcutta.

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The latter Bank, however, dishonoured the drafts in spite of its repeated presentations, and on the 8th of February, 1949 the Simla Banking and Industrial Company Ltd. sent the plaintiffs a telegram reading:

"Arranging payment all drafts issued favouring you."

On the 13th of February, 1949, the Simla Banking and Industrial Company Ltd., sent a telegram to the Central Bank of India Ltd. at Calcutta, and also a copy to the plaintiff, as follows:—

"Reference sales securities worth Rs. 25,000 not included in the limit and sale of 75 Imperial Bank, thereby releasing 16,000 will cover drafts favour N.T.Co. (National Tobacco Co.). Kindly pay the same and advise. Will reduce the remaining overdraft by sale of shares."

On the 18th of February, 1949 the Simla Banking and Industrial Company Ltd. sent another telegram to the Central Bank of India Ltd. reading:

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“Sale proceeds of the shares not on approved list may kindly be applied in payment of drafts National Tobacco Co.”

On the same day a letter was also sent confirming the telegram and asking the Central Bank of India Ltd. to honour the drafts of the National Tobacco Co. Ltd. against the proceeds of the shares of a list which was attached.

It appears from a letter sent by the Simla Banking and Industrial Company Ltd. to the Central Bank of India Ltd. on the 27th of January, 1949 that the position was that the drafts in favour of the National Tobacco Company Ltd. had not been honoured because the limit of credit of the Simla Banking and Industrial Company Ltd. with the Bank at Calcutta was Rs. 3,00,000 and the debit balance stood at Rs. 3,10,000 and in that letter the Simla Banking and Industrial Company Ltd. had requested the Bank at Calcutta to honour the drafts in favour of the National Tobacco Co., and promised to adjust the excess overdraft within a week or two. However, the drafts had not been honoured by the time the Simla Banking and Industrial Co. Ltd. suspended payment and closed its doors on the 21st of February, 1949. Finally, after a scheme of settlement sanctioned by this Court had failed to work, the Simla Bank was ordered to be wound up by this Court. In the meantime the National Tobacco Co. had instituted a suit against the Simla Bank in the High Court at Calcutta for recovery of the amount of the drafts with interest and in due course that suit was transferred to this Court under the provisions of the Banking Companies Act. Although an issue has been framed as to whether the plaintiff was debarred from contending that he was a preferential creditor, the only real question appears to be whether the plaintiff Company is in fact a preferential creditor entitled to payment in full regarding the sum in dispute.

On behalf of the defendant Bank the general principle is conceded that when a Bank acts

purely as a collecting agent for bills with instructions to remit the proceeds less commission, the relation between the parties in the initial stages is not that merely of a creditor and debtor, but that of trustee and *cestui que trust*, but the position of the Bank is that in the present case this relationship had terminated and the parties were in the position of simple creditor and debtor. The contention is that the relationship of trustee and *cestui que trust* ended the moment the Bank sent the drafts to the Company, regardless of the fact that the drafts were dishonoured by the Bank on which they were drawn and remained so dishonoured until the Simla Bank closed down its business. It was on account of certain difficulties on where the line is to be drawn in these matters that my learned brother thought the matter required consideration by a larger Bench, though it is clear from his referring order that he was inclined to the view in the present case that the Company was a preferential creditor and the fiduciary relationship continued to exist until the Bank closed its doors.

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There does not appear to be any decided case in which the facts are entirely similar to those in the present case, but there appeared to be a fairly similar point of principle involved in the case of *Suganchand and Co. v. Brahmayya and Co.* (1), a decision by Rajamannar, C. J., and Panchapakesa Ayyar, J. Actually the judgment in this case deals with three appeals against orders of a learned Single Judge passed in the course of the liquidation of the Hanuman Bank by which he had rejected the claims of three separate creditors to be ranked as preferential creditors in respect of drafts.

Briefly the facts in the first of the cases dealt with were that the head office of the Bank at Madras closed its doors on the 15th of July, 1947 and the various branches on the 16th of July, 1947. The creditor had sent a railway receipt for certain goods supplied to a customer to the

(1) A.I.R. 1951 Mad. 910 (2).

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Madurai branch of the Bank for collection, as in the present case, with instructions to remit the proceeds through a demand draft. The sale proceeds were collected by the Bank at Madurai on the 10th of July and a demand draft on the Madras branch of the Bank was issued and sent to the creditor. It was presented to the Bank at Madras on the 14th of July through his own Bank but was returned with the endorsement "Awaiting funds. Present again." As I have said on the following day the Bank closed its doors.

In the second case dealt with in the judgment the creditor was the Canara Bank Ltd., Mangalore, which had sent a bill for Rs. 1,000 to the Kumbakonam branch of the Hanuman Bank for collection with instructions "We shall thank you to collect the amount in trust for us and remit the proceeds to us by demand draft on Erode." The sum, less a small amount of commission, was remitted by the Kumbakonam Bank by a draft on the Erode office of the Hindu Bank, Karur, Ltd. The draft was presented to the latter Bank on the 15th of July, 1947 and was returned unpaid with the endorsement "No advice. Present again."

In the third case the Hanuman Bank had apparently been acting as agent for the collection of premiums through its various branches for the Indian Mutual Life Association. The premiums thus collected by the branches were to be remitted monthly by drafts payable at Madras and the dispute concerned two drafts from different branches of the Hanuman Bank for comparatively small amounts drawn on the Hanuman Bank, Madras, and sent by the branches to the Association. One of these drafts was presented by the Bank at Madras on the 10th of July 1947 and returned with the endorsement "Awaiting funds, Present again." and this draft along with the other draft was only presented on the 15th of July when the Bank closed down.

The learned Single Judge held that in none of these cases was the creditor entitled to be ranked

as a preferential creditor. After considering the law on the point the learned Judges of the Division Bench accepted the appeals of *Suganchand and Co. and the Indian Mutual Life Association* and ranked them as preferential creditors, but dismissed the appeal of the *Canara Bank Ltd.* The ratio of the decision in favour of two of the creditors is contained in the following passage:—

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“The test laid down in the *Alliance Bank of Simla Ltd. v. The Amritsar Bank* (1), *in re: Noakhali Union Bank Ltd.* (2), and *in re: Calcutta Commercial Bank Ltd.* (3), namely, where the Bank has collected money and issued the draft or drafts in compliance with the instructions of the party or in accordance with the ordinary course of business, the payee of the draft should be treated as an ordinary creditor, is, in our opinion, not quite accurate, and is subject to the exception created by a special express or implied agreement referred to already by us, though we are not prepared to go so far as Achhru Ram J. did in *In the matter of the New Bank of India Ltd.* (4). The above test, if strictly applied, would lead to inequitable results, as pointed out by Mr. T. M. Ramaswami Iyer for the appellants. Thus, if a principal asks a Bank to collect his cheques or bills and remit the proceeds by cheque or send it by a messenger of the Bank, it will be inequitable to say, when the cheque is sent and dishonoured for lack of funds, or the Bank’s messenger is given the money and he runs away with it or loses it on his way to the principal, that the fiduciary relationship of principal and agent ceases and the relationship of creditor and debtor takes its

(1) A.I.R. 1915 Lahore 214.
(2) 54 C.W.N. 744.
(3) 54 C.W.N. 747.
(4) A.I.R. 1949 E.P. 373.

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place. Mr. Swaminathan, for the Official Liquidator, conceded that the mere sending of the collections by cheque, as per the instructions of the agent, would not do, but urged that the sending of a draft on the Bank itself, as per the instructions of the principal, would do, even if the draft is dishonoured, and relied on the difference between a draft and cheque referred to already. We cannot see any difference in principle between a dishonoured draft and a dishonoured cheque issued by a Bank on itself, for it cannot be said that the Bank has, in such cases, taken on commitments of its own in favour of a third person, at the instance of the purchaser, or accounted for the monies in its hands to the principal by paying it over to him or his nominee or any other Bank.

On the facts, we have no doubt whatever that all the three appellants only wanted the demand draft for the purpose of transmitting the money to themselves. None of them had any banking accounts, current or deposit, with the Hanuman Bank and in the case of the Indian Mutual Life Association they had expressly declined to open an account with the Hanuman Bank.....

..... We are satisfied, on the evidence, that there was request by the Indian Mutual Life Association and by Suganchand and Co., to the Hanuman Bank, to send the collections by demand drafts on Madras, and that the sending of the drafts on the Hanuman Bank, Madras, would satisfy the terms of that request, and we rejected the contention on behalf of these appellants that the request could be complied with only by

sending the demand drafts on another Bank in Madras. We are also of opinion that the non-charging of commission on the amount collected and remitted to Suganchand and Co., is of no significance. But we hold that the Hanuman Bank was entitled to hold the monies involved in these two appeals only in law, and that the appellants had an equitable right to the monies, preventing the Official Liquidator from merging them with the general funds of the Bank, as the appellants had not got what they had bargained for, namely, the collections made on their behalf, and the Bank had not been authorised to use the collections and had not accounted for the collections, as a matter of fact, to the appellants, their principals, by handing them over to the appellants, or their nominees, or to another Bank for purchasing the demand drafts and terminated the fiduciary relationship of principal and agent. The Bank had not admittedly handed over the funds either to the nominees of the appellants, or credited them to any accounts of the appellants in the Bank and thus terminated the relationship of principal and agent. Of course, if the appellants or their nominees had taken the monies from the Bank and purchased drafts even on the Hanuman Bank, Madras, for the purpose of transmission, and without any express agreement that it was solely for the purpose of transmission and that the Bank would be liable to pay the amount of the draft, in any event, at Madras, to the appellants, before being discharged from their liability under the draft, the appellants would only rank as creditors, along with other creditors, but would not be entitled to preferential treatment, but that would be because the

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fiduciary relationship as principal and agent terminated the moment the money was paid over (or was credited to the appellants' funds in the Bank as per their instruction) and the new relationship of creditor and debtor took its place. But merely purchasing drafts on their own Bank at Madras in the name of the appellants, as per the instructions of the appellants to remit by demand drafts on Madras, and receipt of such drafts by these appellants, did not, in our opinion, terminate the relationship of principal and agent. No doubt, as Mr. Swaminathan urged, the collections made on behalf of the appellants were mixed up with the other funds of the Bank by such purchase of the drafts, but that will not do away with the relationship of principal and agent as already stated, as the funds can be traced from the funds of this Bank with the Liquidator. It is also significant that the appellants in these cases presented their drafts to the Hanuman Bank, Madras, for payment, and that they were returned unpaid with the obviously disingenuous endorsement 'Awaiting Funds', 'Present again', and the doors of the Bank were closed when presentation was made again as requested. Surely, equity will compel this Bank to honour the drafts issued by itself on itself, and will not allow it to escape its responsibility by this kind of tactics. The essence of payment by cheque or draft on oneself is the understanding that it will be honoured, otherwise it will be like giving a worthless piece of paper as representing a currency note or valuable security."

On the other hand the appeal of the Canara Bank Ltd. was dismissed on the distinction that the agency of the Hanuman Bank ended when it

remitted the amount collected to the Canara Bank by means of a draft on the Erode branch of the Hindu Bank, Karur, Ltd. The distinction is drawn in the following words :—

“This appeal stands on a different footing, because of the different facts and has to be rejected in law. In this case, the appellant, the Canara Bank Ltd., had asked the Hanuman Bank, Kumbakonam, to collect a bill for Rs. 1,000 sent to it and to remit the proceeds to them by a demand draft on Erode, and the Hanuman Bank, Kumbakonam, had collected the bill and sent a demand draft on the Hindu Bank Ltd., Karur, for Rs. 999-11-0, after deducting the commission of 0-5-0 to the Canara Bank and thus terminated the relationship of principal and agent, as the draft complied with the directions of the Canara Bank and was issued on another Bank, namely, the Hindu Bank, Karur, having nothing to do with the Hanuman Bank, and the collected amount had been fully spent, as per the directions of the principal, in purchasing a draft and sending it.”

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The judgment then goes on to express agreement with the decision in the *Alliance Bank of Simla Ltd. v. The Amritsar Bank* (1), though it is mentioned that the learned Judges did not agree with the reasons in that decision. Since this decision has been relied on by the learned Judges of the Madras High Court and also by the learned counsel for the Bank, it requires some consideration. The facts in that case were that the Delhi branch of the Alliance Bank of Simla Ltd. sent two bills for collection to the Gwalior branch of the Amritsar Bank and directed the latter to send “your drafts on realisation” after deducting the usual charges. It appears that the Amritsar Bank at

(1) A.I.R. 1915 Lah. 214.

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Gwalior realised the money, made a slight deduction for exchange, and remitted the balance by two drafts on the Delhi branch of the People's Bank Limited, but before the drafts could be cashed both the People's Bank and the Amritsar Bank went into liquidation. On these facts it was held by Rattigan and Shadi Lal, JJ., that since the Alliance Bank had asked the Amritsar Bank specifically to send drafts on Delhi, the special business for which the agency had been created was completed as soon as the drafts were despatched under the terms of section 201, Indian Contract Act, and the fiduciary relationship then came to an end and consequently the Alliance Bank was simply a creditor of the Amritsar Bank entitled to receive payment *pari passu* with other creditors.

The facts as stated above are all the facts given in the judgment, which is quite a brief one, and it cannot be discovered from these facts what arrangement the Amritsar Bank at Gwalior actually made in connection with the drafts on the Delhi branch of the People's Bank Ltd. In other words it is impossible to say whether the Amritsar Bank at Gwalior merely sent two draft forms made out on the People's Bank at Delhi without making any financial arrangements for the drafts to be honoured, or whether they actually paid the proceeds of the collected bills to the People's Bank or had arranged credit facilities in the absence of actual payment of the money, and it seems to me that there may well be a decisive difference between a case where a collecting bank merely sends a draft or drafts on another bank without making financial arrangements for them to be honoured and a case where the collecting bank actually parts with the collected proceeds for purchasing the draft or drafts or otherwise has made some arrangement with the drawee bank by virtue of which the drafts will be honoured.

On the whole I am inclined to agree with the view of the learned Judges of the Madras High Court regarding the two cases in which they held that the creditor was a preferential creditor in

respect of drafts drawn by the bank in liquidation on itself which were bound to be, and were in fact, dishonoured on presentation, but I am not at all sure whether I would agree with their view in the third case if it is intended to lay down that the fiduciary relationship of the collecting bank is terminated on the sending of the draft in all cases where the draft is on some other bank. It seems to me that if instead of sending worthless drafts drawn on itself the collecting bank retains the money collected and sends equally worthless drafts, which are bound to be dishonoured but drawn on some other bank, it is in no better position and the fiduciary relationship is not terminated by the despatch of such a draft.

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This view is contested by the learned counsel for the Bank, but it is argued that in any case, even if this view is correct, the Simla Bank had an arrangement with the Central Bank at Calcutta and that Bank was at fault, perhaps because it had heard rumours of the shaky financial position of the Simla Bank, in refusing to honour the drafts when they were presented for payment, and in refusing to accept the Simla Bank's undertaking in the letter of the 27th of January, 1949, that it would adjust the account if the drafts were honoured, and also in not acting on the suggestions made from time to time regarding the selling of some of the securities which the Bank at Calcutta held against the overdraft of the Simla Bank. It is, however, clear from the facts on the record that by the time any of the drafts in dispute could be presented they were bound to be dishonoured unless the Simla Bank made some fresh arrangement for extending its credit with the Central Bank at Calcutta. The first draft was sent on the 24th of January, three were sent on the 25th and one was sent on the 26th. Presumably these drafts were sent by post internal air mail not having developed by 1949, and so none of them could have been presented at Calcutta for payment before the 27th of January, and on that date, as the letter referred to above shows, the Bank at Simla was aware that its credit limit with the Bank at Calcutta of

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Rs. 3,00,000 had been exceeded by Rs. 10,000. It does not seem to me possible on the available material to hold the Bank at Calcutta to have been at fault because it was unwilling either to accept the promise of the Bank at Simla to adjust matters if the drafts were honoured, or to meet the drafts by selling securities of the Simla Bank by which its overdraft was secured, and I am, therefore, of the opinion that it must be held that the drafts were issued by the Bank at Simla without arrangements having been made to meet them and with the likelihood that they would not be honoured. Once this finding is reached I consider that it must also be held that the fiduciary relationship between the Bank and the Company was not terminated merely by the issuing of the drafts. I would accordingly hold that the Company is entitled to recover the full sum of Rs. 38,619-7-3 as a preferential creditor of the Bank in liquidation, but would disallow any claim to interest and leave the parties to bear their own costs.

Tek Chand, J.

TEK CHAND, J.—I agree.

B.R.T.

REVISIONAL CIVIL

Before G. D. Khosla, C.J.

SARVAN NATH SETHI,—Appellant.

versus

RAM KISHAN SETHI AND SONS,—Respondents.

Civil Revision No. 85-D of 1958.

1961
Sept., 14th

Jurisdiction of Courts—Two suits consolidated and decided by one judgment—Appeal in each of the suits—Whether to lie in a Court having jurisdiction according to its own valuation—Principles of Res Judicata—Whether applicable.

Held, that where two suits are separately filed but are consolidated for the purposes of trial and both the suits are dismissed, the appeal in each suit will lie to a Court in which