R. B. Seth Jessaram Fatehchand vs Om Narain Tankha & Anr on 19 January, 1967

Equivalent citations: 1967 AIR 1162, 1967 SCR (2) 429

Author: K.N. Wanchoo

Bench: K.N. Wanchoo, R.S. Bachawat, J.M. Shelat

PETITIONER:
R. B. SETH JESSARAM FATEHCHAND

Vs.

RESPONDENT:
OM NARAIN TANKHA & ANR.

DATE OF JUDGMENT:
19/01/1967

BENCH:
WANCHOO, K.N.
BENCH:
WANCHOO, K.N.
BACHAWAT, R.S.
SHELAT, J.M.

CITATION:
1967 AIR 1162 1967 SCR (2) 429

ACT:
Trust-Security deposited with company by sole selling agent-Interest payable by company-Deposit allowed to be mixed with other funds--Deposit whether held by company as trustee-Matters to be taken into consideration.

HEADNOTE:
The appellant firm was appointed sole selling agent of a sugar manufacturing company and deposited Rs. 50,000 as security for due performance of the contract; this amount was to carry interest at 6 per cent per annum. There was no restriction on the use of the said deposit by the, company. According to cl. (9) of the agreement the security and interest were to be refunded at the termination of the agency; in default of such payment the appellant firm was entitled to a commission as if agency had not terminated. The clause further said that "as long as security with

interest is not refunded and commission due is not paid this agreement will not be terminated." The company was ordered to -be wound up before the period of agency came to an end. Consequent on the winding up the appellant made an application praying for refund of its security deposit along with interest. It was contended that as the company held the amount of deposit as a trustee the appellant was entitled to priority among the creditors. On behalf of the liquidators it was denied that the amount deposited was in the nature of a trust entitled to preference over other debts. The company judge held that he amount was an ordinary debt. The Division Bench of the High Court also decided against the appellant. In appeal by special leave to this' Court.

HELD:The deposit did not amount to a trust.

The question whether the security deposit in a particular case can be said to be impressed with -a trust will have to be decided on the basis of the terms of the agreement and the facts and circumstances of each case, without any leaning one way or the other on the fact that the money was given as a., security deposit. [434 C]

If a trust can clearly be spelled out from the terms of the agreement that ends the matter. But if the trust cannot be spelled out clearly the fact that there was no segregation provided for, and the fact that interest was paid, would go a long way to show that the deposit was not impressed' with the character of a trust particularly when the person with whom the deposit was made could mix it with his own money and could use it for himself. In such a case the inference would be that the relationship between the parties was that of a debtor and creditor. Further besides these circumstances, if there is any other term which suggests one kind of ' f relationship rather than the other that will also have to be taken into account. [436 B-C]

In the present case the company was free to use the money for its own purpose and had to pay interest on it. Further, in cl. (9) of the agreement the security was put on a par with the commission which was nothing but a debt. The courts below had therefore rightly treated the security deposit as an ordinary debt. [436 F]

Peter Donald Macpherson v. Dugald Mckechine and Ors. XXVIII (1923-24) Cal. W.N. 721. In the matter of Travancore National and

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Quilon Bank Limited, Official Liquidators and Another Applicants, A.I.R. 1939 Mad. 337, In re Manekji Petit Manufacturing Company Ltd. A.I.R. 1932 Bom. 31 1, Maheshwari Brothers v. Official Liquidators, I.L.R. [1942] All. 242, Keshetra Mohan Das v. D. C. Basu, I.L.R. [1943] 1 Cal. 313. Gee v. Liddell, (1866) 55 E.R. 1038, Knatchbull v. Hallett, (1879-80) XIII Ch. D. 696. In re Hallett & Co., [1894] 2 Q.B.D. 237 and Frank M.Mckey v. Maurcie Paradise, 81 L. Ed. 75, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 891 of 1964 Appeal by special leave from the judgment and decree dated October 30, 1961 of the Allahabad High Court in Letters Patent Appeal No. 83 of 1951.

N. C. Chatterjee, B. C. Mishra, B. R. G. K. Achar and M. V Goswami, for the appellant.

Chaman Lal Pandhi and S. L. Pandhi, for the respondents. The Judgment of the Court was delivered by Wanchoo, J. This is an appeal by special leave against the judgment and decree of tie Allahabad High Court. The appellant is a registered partnership carrying on business at Kanpur. -It entered into an agreement in December 1948 with the VijiaLakshmi Sugar Mills Limited, Doiwala, District Dehra Dun (hereinafter referred to as the Mills) and was appointed sole selling agent of the Mills. According to the terms of the agreement, the appellant ,deposited a sum of Rs. 50,000/- as security for due performance of the contract, and this amount was to carry interest at the rate of Rs. 6/- per cent per annum to be paid by the Mills. In November 1949 an order was passed. winding-up the Mills and this happened before the period of agency can* to an end. Consequent on the winding-up of the Mills, the appellant made an application in September 1950 by which it prayed for refund of security deposit -along with interest. It was also prayed that the Mills held the -amount of deposit as trustee and in consequence the appellant was ,entitled to priority with respect to the amount of Rs. 50,000/-. In addition, there was a claim of Rs. 24,500/- with respect to commission. That claim was given up and we are now not concerned with it.

The liquidators admitted that there had been an agreement as alleged by the appellant and that a sum of Rs. 50,000/- had been deposited with the Mills. But their case was that this amount -was an 'Ordinary debt with respect to which the appellant could not claim any preference and thatt the appellant's contention that -the amount deposited was a kin 1 of trust with the Mills was not -correct. The only question that had to be decided therefore was whether the amount of Rs. 50,000/- deposited as security for due performance of the contract of sole selling agency was in the nature of a trust which was entitled to preference. or was an ordinary, ,debt.

The learned Company Judge held on a construction of the agreement that the amount was an ordinary debt. He referred in this connection to the apparent conflict between the decisions of the Calcutta and Madras High Courts on one side and the Allahabad and Bombay High Courts on the other but was of opinion that this conflict was largely illusory as the question whether the deposit in a particular case was in the nature of a trust or was an ordinary debt depended on the facts and circumstances of each case. He finally held that the deposit in question was not In the nature of a trust and, was not entitled to any preference on that ground.

The appellant then went in appeal to, a Division Bench.. The Division Bench upheld the view taken by the learned Company Judge and dismissed the appeal. The High Court having refused to grant a certificate, the appellant applied for an obtained special leave from this Court, and that is how the

matter has come before US.

The two main terms of the agreement, viz. Nos. 8 and 9 bet- ween the appellant and the Mills which call for consideration in the present case are these:-

> "(8) That the firm has deposited sum of Rs.

50,000/with the said Mill as a security for the due performance of the contract on their part, on which amount the Mill shall pay interest to the said firm at the. rate of 6 per cent per annum.

> "(9) That the Mill shall refund the said security deposit of Rs. 50,000/- with interest thereon at the rate on termination of the agency. In case he said amount is not refunded with interest thereon the firm shall be entitled to commission at the rates mentioned above as if agency has not terminated. In other words as long as security with interest is not refunded and commission due is not paid this agreement will not be terminated."

It may be mentioned that the agreement was for a period of one year which, as already indicated, had not expired before the winding up order was passed on November 8, 1949. It will be seen from the terms of the agreement already set out: that there was no stipulation that the amount of Rs. 50,000/- deposited as security would be kept as a separate fund by the Miffs and it would not use it for its own purposes. On the other hand,, it is clear that interest had to be paid and there was nothing in the agreement to prevent the Mills from using the money as its own so long as it paid interest on it. It is true that the money was to be re- funded along with interest on the,termination of the agency, but cl. (9) further provided that in case the money was, not refunded after one year, the appellant would be entitled to commission as if the agreement had not terminated. As the agreement itself puts it, it will remain alive even after the period of one year so long as the security with interest was not refunded and the commission due was not paid. The last words of cl. (9) of the agreement put the security deposit and the commission due on the same footing. It is because of this provision that the learned Company Judge held that as the security deposit and the commission due were put on the same footing and the commission could only be a debt, the security deposit in the circumstances of this agreement could not be treated on a higher footing. It seems to us that the view taken by the learned Company Judge so far as this agreement is concerned (which was upheld by the Division Bench) is correct.

We may now refer to the apparent conflict between the Calcutta and Madras High Courts on one side and the Allahabad and Bombay High Courts on the other, on this question. The representative cases on one side are: (i) Re:

> Alliance Bank. of Simla: Peter Donald Macpherson v. Dugald Mckechnie and others,(1) and (ii) In the matter of Travancore National and Quilon Bank Limited, Official Liquidators and other applicants (2). On the other side the cases are (i) In re: Manekji Petit Manufacturing Company, Limited(3) and (ii) Maheshwari Brothers v. Official Liquidators(4). The two Calcutta and Madras cases seem to take the view that

where there is a deposit there is creation of some kind of trust even though the deposit may carry interest and the person with whom the deposit is made is entitled to use the money as his own. It may however be mentioned that the Calcutta case was with respect to provident fund of the employees of a bank which went into liquidation while the Madras case was with respect to security deposit by an employee of a bank for due performance of his duties. It may be added that such cases were later provided for specifically by the amendment of the Indian Companies Act (No. VII of 1913) which was made in 1936 and by which s. 282-B was added to the Companies Act along with cl. (e) in S. 230(1) of the same Act. Even so, these two cases make it clear that the proper approach to the question is to ask whether on the interpretation of the document, if there is one, or from proved or admitted facts and circumstances a trust is established or not. if a trust is established, a provision for payment of interest by the trustee does not destroy the character of the trust nor does the fact that the money is not segregated. The matter was again considered by the Calcutta High Court in Kshetra Mohan Das v. D. C. Basu(5) in connection with a deposit made by a sole, selling agent and the principle for deciding whether the deposit was in the nature of a trust or a loan was put thus:.

(1) XXVIII (1923-24) Cal. W.N. 721. (3) A.I.R. 1932 Bom. 311. (2) A.I.R. 1939 Mad. 337. (4) I.L.R. [1942] All.24. (5) I.L.R. [1943] 1 Cal. 313.

"If the security deposit of an employee or an agent of a company in the hands of such company can be regarded as impressed with trust or held in a fiduciary capacity company then such employee or agent is entitled the whole of the security deposit even after such goes to liquidation..... In the absence of or fiduciary relation the employee or the agent company in liquidation is merely a creditor of the and must share the assets pro rata with other There can in our opinion be no disagreement by such to get back company such trust of the company creditors.

There can in our opinion be no disagreement with the principle so enunciated, and the conclusion whether the deposit is in the nature of a trust or a loan will depend upon the facts,and circumstances of each case, particularly on the terms of the agreement if there is one in writing. The difficulty however arises in the application of -the principle to particular cases. But the Calcutta and Madras High courts seem to lean to the view that where there is a security deposit it will generally be in the nature of a trust.

This brings us to the cases on the other side. The Bombay High Court in Manekji Petit's case(1) was 'also considering the case of a deposit by an agent. It considered the terms of the agreement which provided for Rs. 6/- per cent interest. Ordinarily the company was entitled to use the deposit as it thought fit, but there was a provision in the agreement that in the event of the company raising a loan secured by debentures of the company or by mortgaging company's property, the moneys deposited by the agent were to be forthwith invested in Government securities and to

be earmarked in some manner satisfactory to the agent. It was held on the basis of this last clause in the agreement that there could be no trust till the contingency provided therein came to pass. In that case that contingency had not come to pass and the moneys were mixed with the moneys of the company and used by it. The Bombay High Court held that upto that stage there was no trust created. In Maheshwarl Brothers(2), the question arose whether the security deposited by the agents for the fulfillment of their obligation under the agreement was impressed with trust. The Allahabad High Court considered the agreement and came to the conclusion that as interest was provided and further as the company was entitled to use the deposit as its own and lastly because a floating charge was intended to be created on the assets of the company which failed for want of registration, the deposit was not in, the nature of a trust. Thus absence of segregation and presence -of interest coupled particularly with a,provision for a floating charge which had failed for want of registration inclined the court to hold that the deposit was not in the nature Of a trust.

(1) A.I.R. 1932 Bom. 311. Sup. Court./67-14 (2) I.L.R. [1942] All. 242.

It will thus be seen that the view of the learned Company Judge that the conflict between the Calcutta and Madras High Courts on one side and the Allahabad and Bombay High Courts on the other is more apparent than real is borne out by the fact that in each case the court considered the agreement to decide whether on the terms thereof and facts and circumstances of the case the deposit was impressed with a trust, though it must be admitted that the conclusion reached was not the same.

We are of opinion that the question whether the security deposit in a particular case can be said to be impressed with a trust will have to be decided on the basis of he terms of the agreement and the facts and circumstances of each case, without any leaning one way or the other on the fact that the 'money was given as a security deposit. If the terms of the agreement, if it is in writing, clearly indicate that the deposit was in the nature of a trust, the court will come to that conclusion in spite of the fact that interest is provided for in the agreement. But where the terms of the agreement do not clearly indicate a trust, the court will have to consider the facts and circumstances of each case along with the terms to decide whether in fact something in the nature of a trust was impressed on the security deposit. In such a case the fact whether segregation was provided for or not would be one circumstance to be taken into consideration. Where segregation is provided for the court would lean towards the deposit being in the nature of a trust. But where segregation is not provided for and the deposit is permitted to be mixed up with the funds of the person with whom the deposit is made, the court may come to the conclusion that anything in the nature of trust was not intended, for generally speaking in view of s. 51 of the Indian Trust Act, (No. 2 of 1882) a trustee cannot use or deal with the trust property for his own profit or for any other purpose unconnected with the trust. It is true that where there is a clear trust and the trust deed if any provides that the trustee may use the trust property as he likes, the fact that the trustee can mix the trust property with his own may not make any difference. But where there is no clear indication that a security deposit was impressed with a trust, absence of segregation would be a circumstance against there being a trust.

Another circumstance which may have to be taken into account in a case where the agreement does not indicate clearly that the security deposit is impressed with a trust is the payment of interest. Where there is no payment of interest provided for an inference may be readily drawn that the deposit was in the nature of a trust. But where the person with whom the deposit is made is to pay interest it may be possible to infer that payment of interest is a pointer towards there being no trust. Further any other provision in the agreement and any other circumstance as to the manner in which the deposit was dealt with may also have to be taken into account in coming to the conclusion whether the security deposit in a particular case was impressed with a trust or not.

We may now refer to some English and. American cases in this connection. In Gee v. Liddell(1) the facts and circumstances of the case were considered and it was held on those facts and circumstances that there was a trust. In that cast pound 2,000 had been left as trust by a will,-but the executor who was', the son of the testator said that his father had intended to bequeath pound 3,000 and the question was whether the further pound. 1,000 was also a trust. On the facts and circumstances of that case it was held that as the amount bequeathed (namely, pound 2,000) was certainly a trust, -the addition of pound 1,000 to it by the executor would be of the same kind and would be equally impressed with trust. That case also shows that where a trust can be inferred clearly a provision for payment of interest would be immaterial.

In re: Hallett's Estate, Knatchbull v. Hallett(2) it was held that if a person held money in a fiduciary character but mixed it up with his own account, the person for whom the money was held could follow it and had a charge on the balance in the bankers' hands. This case again shows that the main question that courts have to decide in such cases is whether on the facts and circumstances a fiduciary relationship is established. If it is established, then the fact that the money was mixed with the trustee's money may not make any difference.

In re: Hallett & Co.,(3) segregation was the test used for the purpose of deciding whether there was trust or not. In Frank M. McKey v. Maurcie Paradise,(4) the question arose with reference to a claim of an employee welfare association against the employer and it was held that without segregating any money as due to the association there could be no trust. This case shows the significance of segregation in arriving at the inference whether there was a trust.

A consideration of these English and American cases also in our opinion shows that the first question in each case where the court is dealing with a security deposit is to ask whether on the agreement in writing, if any, and on the facts and circumstances of the case and. conduct of the parties it can be said that the security deposit was unpressed with some kind of a trust. If that can be said then the question whether interest was provided for and whether the trustee could mix the deposit money with his own money would not be of importance and would not take away the character of the deposit being impressed with a trust. The mere fact that money was deposited as a security is not sufficient to come to the conclusion (1) (1866) 55 E.R. 1038.

(3) [1894] 2 Q.B.D. 237.

(2) (1879-80) XIII Ch. D. 696.

(4) 81 L. Ed. 75.

that it must be treated as trust money. The court will have to look to all the terms of the agreement if in writing and to the facts and circumstances of the case and to the conduct of the parties before coming to the conclusion whether with a trust. If a trust can clearly be spelled out from the agreement that ends the matter. spelled out clearly the fact there was for and the fact that interest was to be to show that the deposit was not impressed trust particularly where the person with whom the made could mix it with his own money and could use it In such a case the inference would be that the relationship the parties was that of a debtor and creditor. Further these circumstances if there is any other term which a security deposit was impressed the terms of But if the trust cannot be no segregation provided paid would go a long way with the character of a deposit was for himself. between besides suggests one kind of relationship rather than the other that will also have to be taken into account. Illustrations of this will be -found both in the Bombay case (i.e. in Manekji's case(1) and in the Allahabad case (i.e., Maheshwari Brothers' case(1). In the Bombay case besides absence of segregation and presence of interest there was a further fact that in certain circumstances segregation had been provided for. The court was entitled to take that fact into consideration and hold that the deposit was not impressed with trust till segregation took place. In the Allahabad case a floating charge was created which failed for want of registration, and that circumstance was also used to show that the relationship between the parties was that of a debtor and creditor and not that of a trustee and beneficiary.

Let us now apply these principles to the facts of the present case. The facts show that there was no segregation in this case and the Mills could mix the security deposit with its own money and use it for its own purpose. Further because the Mills could use the money for its own purpose, it had to pay interest. In addition to these two circumstances which would incline one to the view that the relationship was that of a debtor and creditor, there is the further fact that cl. (9) of the agreement provides that even though the period fixed in the agreement would continue if the security deposit mission due is not paid.We agree Judge that the last words in cl.(9) commission due on a par. The commission other than a debt; the security deposit That is a further indication that the case was that of a debtor and creditor are of opinion that the High Court was commission due is not paid. The agreement is not refunded and the commission with the learned Company make the security deposit and due can be nothing is put on a par with that relationship in the resent In the circumstances we right in its view as to the nature of the security deposit in the present case.

The appeal therefore fails and is hereby dismissed with costs.

G.C. Appeal dismissed.

(1) A.LR. 1932 Bom. 311. (2) LL.R. [1942] All. 242.