LETTERS PATENT APPEAL

Before Bhandari, C.J. and Gosain, J.

FIRM JAIKISHEN DASS-JINDA RAM,—*Appellant.*

versus

THE CENTRAL BANK OF INDIA, LTD., BOMBAY;—*Respondent.*

Letters Patent Appeal No. 27 of 1955.

1959

Sept., 3rd

Banker and Customer—Relationship between—Whether that of creditor and debtor—Right of lien and set-off—When can be exercised—Mutuality—Whether essential—Firm and partners—Debts due to firm—Whether can be set off against the debt due from a partner of the firm and vice virsa—Mutual—Meaning of—Indian Partnership Act (IX of 1932)—Section 4—Partnership—Nature and incidents of—Two firms constituted by same persons as partners—Debts due to one firm from the bank—Whether can be set off against debts due to the bank from the other firm—

A Bank appropriated the monies belonging to a firm constituted by a certain set of partners for payment of an overdraft of another firm constituted by the same set of partners.

Held, as follows:—

(1) As soon as a customer deposits money in a bank the relation of debtor and creditor comes into existence, the bank being the debtor of the customer. Two rights flow out of the relationship of debtor and creditor, namely (1) the right of the customer to demand repayment of the amounts due to him if and when he so desires, and (2) the right of the bank to appropriate the monies, funds and securities of the customer coming into its possession in the course of their dealings for repayment of the customer's indebtedness. This latter right is known as banker's lien and it rests on the principle of the law-merchant that any credit given by a bank

to a customer is given on the faith that sufficient monies and securities belonging to the customer will come into the possession of the bank in the due course of further transactions. This right is akin to the right of set-off which obtains between persons occupying the relation of debtor and creditor and between whom there exist mutual demands. As mutuality is essential to the validity of a set-off, it is necessary that before one demand can be set off against another both must mutually exist between the same parties and between them in the same capacity. The mutual nature of the debt and not the mutual nature of the parties should be considered. Debts accruing in different rights cannot be set off against each other. A bank can enforce its lien if mutual demands exist between itself and the customer, that is when they mutually exist between the same parties and between them in the came capacity.

(2) As applied to debts which may be the subject of set-off, the expression "mutual demands" necessarily imports that there must be reciprocal dealings between the parties, wherein each party gives credit to the other on faith of indebtedness to him. A partnership is a contractual association with certain incidents recognised by law for the convenient transaction of legitimate trade and business and its status as a legal entity is limited and incomplete. Where two firms have been constituted by the same persons as partners, they are not two separate legal entities and cannot be distinguished from the members who compose them. Although two separate accounts were opened with the bank, the customers in both the cases were the same, namely the appellants. The bank was a creditor of the appellants in one case and a debtor of the appellants in the other. It is manifest that mutual demands existed between the bank on the one hand and the appellates on the other.

(3) The expression "in the same right" means obviously that a debt due from one person shall

discharge only a debt to that person alone and that a debt of one character, that is, whether several or joint. individual or representative, shall discharge a debt of the like character and no other. Thus a joint debt or claim cannot be set-off against a separate demand nor a separate debt or claim against a joint demand. But joint debts owing to and by the same person in the same right can be set-off against each other. Here a joint debt was owing to the appellants in their capacity as members of a firm, and another joint debt was owing by the appellants in their capacity as members of antoher firm. These two demands could be set-off against each other. It was open to the Bank to combine the two accounts and to appropriate the deposits in one account to the payment of the debt due to the Bank in the other account.

(4) As soon as firm No. 1 placed a sum of Rs. 15,000 in the hands of the Bank for being delivered to the Sugar Mills at Samli, a trust arose in favour of the Mills. But when the Mills declined to accept the money from the Bank, the trust, which was created; came to an end and the money became the property of the appellants. It was no longer required for the special purpose for which it was deposited and could be used for the liquidation of the appellant's indebtedness.

Appeal under clause 10 of the Letters Patent read with Article 225 of the Constitution of India, against the judgment of the Hon'ble Mr. Justice Kapur, dated the 24th March, 1955 passed in F. A. O. No. 143 of 1954 by which the order of Shri G. S. Bedi, Sub-Judge, Ist Class; Panipat; (Tribunal), dated the 21st day of May, 1954, (dismissing the application of the plaintiff) was affirmed.

C. L. AGGARWAL, for Appellants.

D. K. MAHAJAN & G. P. JAIN, for Respondent.

JUDGMENT

BHANDARI, C.J.—This appeal under clause 10 of the Letters Patent raises the question whether Bhandari, C. J

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a bank is entitled to appropriate the monies belonging to a firm constituted by a certain set of partners for payment of an overdraft of another firm constituted by the same set of partners.

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Two partnership firms with identically the same partners, were carrying on business at Chichawatni, one under the name of Jaikishan Das-Jinda Ram and the other under that of Jaikishan Das-Hans Raj. On the 25th June, 1945, the firm Jaikishan Das-Jinda Ram (hereinafter referred to as firm No. 1), opened a cash-credit account with the Central Bank of India, Chichawatni, and on the 30th January, 1946, this account was closed. Firm Jaikishan Das-Hans Raj (hereinafter referred to as firm No. 2) had opened a similar account with the Bank and was indebted to the Bank to the extent of Rs. 26,000.

On the 7th August, 1947, firm No. 1, paid a sum of Rs. 15,000 to the Bank at Chichawatni for the purpose of being remitted to the Upper Doab Sugar Mills, Samli. The Mills declined to receive the money in question and the money was accordingly returned to the remitting office at Chichawatni. On the 15th September, 1948, the Bank credited this sum to the overdraft account of firm No. 2 and made a corresponding reduction in the amount of the debt due by firm No. 2 to the Bank.

On the 9th December, 1952, firm No. 1 made an application under section 13 of the Displaced Persons (Debts Adjustment) Act, 1951, claiming a sum of Rs. 15,000 from the Bank. The Bank resisted the claim by stating that the amount had been lawfully appropriated towards the debt due from the partners of firm No. 2 and consequently that in view of the provisions of section 49 of the Act of 1951, the matter could not be reopened and

reagitated. The Tribunal constituted under the Act of 1951, dismissing the application of firm No. 1 on the ground that the latter had no claim to the said money, and the order of the Tribunal was upheld by a learned Single Judge of this Court. Firm No. 1 has now preferred an appeal to this Court under clause 10 of the Letters Patent.

The relation of banker and customer arises as the result of a contract, express or implied, according to which the customer delivers to the bank money, funds or credits constituting the deposit and the bank assumes obligation to pay out on his demand or order a sum equal to the amount deposited. This arrangement is to the advantage of both the parties, for the customer receives the benefit of banking facilities and the bank the benefit of the use of the customer's money with or without interest. The moment the money is deposited in the bank the relation of debtor and creditor comes into existence, the bank being the debtor of the customer. The deposit becomes a loan which merges in the general fund of the bank and becomes the property of the bank. Two rights flow out of the relationship of debtor and creditor, namely (1) the right of the customer to demand repayment of the amounts due to him if and when he so desires, and (2) the right of the bank to appropriate the monies, funds and securities of the customer coming into its possession in the course of their dealings for repayment of the customer's indebtedness. This latter right is known as banker's lien and it rests on the principle of the law-merchant that any credit given by a bank to a customer is given on the faith that sufficient monies and securities belonging to the customer will come into the possession of the bank in the due course of further transactions. This right is akin to the right of set-off which obtains between

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persons occuping the relation of debtor and creditor and between whom there exist mutual demands. As mutuality is essential to the validity of a set-off, it is necessary that before one demand can be set-off against another both must mutually exist between the same parties and between them in the same capacity. The mutual nature of the debt and not the mutual nature of the parties should be considered. Debts accruing in different rights cannot be set-off against each other. A bank can enforce its lien if mutual demands exist between itself and the customer, that is when they mutually exist between the same parties and between them in the same capacity.

There are a number of cases in England in which the doctrine of mutuality has been extended to partnership. As a rule a debt owing by one of the members of a firm cannot be set off at law against a debt owing to him and his co-partners [*Gordon* v. *Ellis* (1), *France* v. *White* (2)]; a debt owing to one of the members of a firm cannot be set-off against a debt owing by him and his co-partners [*Arnol* v. *Banbridge* (3)] ; and a debt due to the bankers from the partners jointly cannot be set-off against the debts due from the bankers to the partners separately [*Whats* v. *Christina* (4)].

The first point for decision in the present case is whether the demands between the appellants on the one hand and the Bank on the other were mutual, for debts to be set-off must be mutual and to be mutual must be due to and from the same persons in the same capacity. The expression "mutual" is defined as reciprocally acting or related, reciprocally giving and receiving, reciprocally interchanged. It requires reciprocity of

(1) 2 C.B. 821
(2) 8 Scott. 257
(3) 9 Ex. 153
(4) 11 Beav. 546

action, co-relation, inter-dependence. As applied to debts which may be the subject of set-off, the expression "mutual demands" necessarily imports that there must be reciprocal dealings between the parties, wherein each party gives credit to the other on faith of indebtedness to him.

It is common ground that there were reciprocal obligations between the Bank and firm No. 2 and that it was open to the Bank to appropriate the monies belonging to this firm for the purpose of satisfying its claim. But, it is argued, it was not open to the Bank to appropriate the money belonging to firm No. 1 for discharging the debt due to it from firm No. 2, for although the appellants happened to be partners of both the firms, the firms themselves were two separate legal entities, distinct from the members composing them, and there could be no reciprocity between the Bank and firm No. 1 *qua* the debt due to the Bank from firm No. 2.

The question whether a partnership is a legal entity distinct from the members who compose it, is not entirely free from difficulty. According to one school of thought, a partnership is an artificial person, a legal entity, having peculiar rights and attributes distinct from the members who compose it. It is separate in estate, in rights and in obligations from the members. It can own property apart from the individual property of its members which it does not own; it can owe debts apart from the individual debts of its members which it does not owe. It can buy and sell; it can sue and be sued; it can plead and be impleaded in a court of law. A judgement may be passed against a partnership as well as against the partners who compose it. It may be adjudicated an insolvent although the parties who compose it may not be so adjudicated. This is

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the general mercantile canception of a partnership and there is a growing tendency on the part of the Courts to adopt this view of the business world.

According to another school of thought a partnership is not an artificial person like a corporation but a voluntary association of two or more persons to carry on as co-owners a business for profit. This conception of a partnership springs from the agreement on which it is founded and is supported by the Indian Partnership Act which defines partnership as a relationship between the persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The use of the partnership name is of no value except in so far as it represents natural persons.

Amid this conflict of authority preponderance of judicial opinion appears to favour the proposition that a partnership is a contractual association with certain incidents recognised by law for the convenient transaction of legitimate trade and business and that its status as a legal entity is limited and incomplete. This conclusion finds support from the fact that although these associations have been in existence for countless years the legislature has not thought fit to designate them as corporations but has preferred to call them as partnerships.

In this view of the case it seems to me that although two separate firms are involved in the present litigation, they are not two separate legal entities and cannot be distinguished from the members who compose them. It follows as a corollary that although two separate accounts were opened with the Bank, one in the name of firm No. 1, and the other in the name of firm No. 2,

the customers in both the cases were the same, namely the appellants. The Bank was a creditor of the appellants in one case and a debtor of the appellants in the other. It is manifest that mutual demands existed between the Bank on the one hand and the appellants on the other.

Nor can it be said that these demands do not exist between the parties in the same right. The expression "in the same right" means obviously that a debt due from one person shall discharge only a debt to that person alone and that a debt of one character, that is, whether several or joint, individual or representative, shall discharge a debt of the like character and no other. Thus a joint debt or claim cannot be set off against a separate demand nor a separate debt or claim against a joint demand. But joint debts owing to and by the same person in the same right can be set off against each other (Lindley on Partnership page 374). The appellants who are partners are governed by the Indian Partnership Act section 25 of which makes it quite clear that partners are liable jointly as well as severally for all acts binding on the firm. Here a joint debt was owing to the appellants in their capacity as members of a firm, and another joint debt was owing by the appellants in their capacity as members of another firm. There can be no manner of doubt that these two demands could be set off against each other.

The same conclusions flow from the agreements which were executed by the appellants when two separate cash-credit accounts were opened with the Bank. These agreements empowered the Bank to appropriate "any money or monies belonging to the borrowers or *any one or more of them* for the time being in the hands of the Bank *in or under whatever account*..... towards payment or liquidation of any and all

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other monies which shall be or may become due from the borrowers or any one or more of them, *whether solely or jointly with any other person or persons, firms or company* to the Bank by way of loans.....". These two separate agreements empowered the Bank to combine the two accounts, to treat them as one and to appropriate the sum of Rs. 15,000 belonging to the borrowers for clearing off the debt which was due from them. The Bank did nothing more than exercise the powers conferred upon it by the terms of the agreements.

Two other submissions have been put forward on behalf of the petitioners. It is contended in the first place that the sum of Rs. 15,000 which was deposited by firm No. 1 was a special deposit and that the Bank has no power to set-off against such deposit or debt due it from the depositors. Certain authorities have been cited in support of this contention. In *Farley* v. *Turner* (1), the customer of a country bank having a sum of £ 942 standing to his account paid in a further sum of £ 707 with a written direction that £ 500 of that sum should be forwarded to another bank to meet a bill to become due. A sum of £ 500 was sent as directed, but before the bill became due the country bank ceased to carry on business. Kindersley V. C. held that the £ 500 was specifically appropriated, and belonged to the customer of the Bank, and not to the genearl creditors. In *Sha Wallace and Co.* v. *Amritsar National Bank (in Liqdn.) and others* (2), a branch of the respondent bank had received bills from the appellants who were not its constituents for collection and remittance of the proceeds and, after collection but prior to remitting, the bank suspended payment. It was held that

(1) 112 Revised Reports 442
(2) I.L.R. 7 Lah. 155

the appellants having employed the bank as a whole in a fiduciary capacity, were entitled to a prior charge on the balances held by the bank as a whole at the date of suspension of payment, and on all monies advanced by the bank after the date when it recovered the monies due on the appellants' bills. *Suganchand and Co.* v. *Brahamayya and Co.* (1) ; *First National Bank Ltd.* v. *Pioneer Commercial Bank*(2) ; and *Indian Hume Pipe Co., Ltd.* v. *Travancore National and Quilon Bank, Ltd.* (3), have also been relied upon. These authorities are, in my opinion, not relevant to the decision of the controversy which is now before us for consideration. In *Devendrakumar Lalchandji* v. *Gulabsingh, Nekhesingh* (4), the Court cited with approval the commentary of Venkatesa Iyer in his Law of Contarcts, Edn. 3 at page 902, where the learned author observes as follows:—

> "In England, general liens of the kind contemplated in the section were first recognised in favour of bankers by the usages of trade which crystallised into the Law Merchant. Where a customer deposited securities with a bank, the banker was given a general lien over all the securities, except in cases where the deposit was for a particular purpose or where there was an agreement or contract inconsistent with the lien. Thus, if securities are deposited for safe keeping or if a particular purpose is mentioned as the object of the deposit, the banker cannot claim a lien on the securities in respect of the general balance that may be due.....When monies

(1) A.I.R. 1951 Mad. 910
(2) A.I.R. 1951 Cal. 34
(3) A.I.R. 1942 Mad. 646
(4) A.I.R. 1946 Nag, 114

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are held in one account and the payer in respect of these moneys owes the bank on another account, the banker's lien gives the bank a charge on all the monies of the payer in its hands, so that they may be transferred to whatever account the bank chooses, to set off or liquidate the debt."

As soon as firm No. 1 placed a sum of Rs. 15,000 in the hands of the Bank for being delivered to the Sugar Mills at Samli a trust arose in favour of the Mills. The acceptance of the money with notice of its ultimate destination created a duty on the part of the Bank to devote it to the purpose intended by firm No. 1. But when the Mills declined to accept the money from the Bank on the ground that none was due to it the trust which was created came to an end the money became the property of the appellants. It was no longer required for the special purpose for which it was deposited. It belonged to the depositor and was for the time being in the hands of the Bank. It seems to me therefore, that in view of the agreement which had been executed by the appellants it could be used for the liquidation of the depositor's indebtedness.

Secondly, it was contended on the authority of *Greenhalgh and Sons* v. *Union Bank of Manchester* (1), that it was not within the competence of the Bank to combine the accounts of the two firms. In that case the learned Judge held that a banker who has agreed with a customer to open to accounts in his name and who holds bills which the customer has specifically appropriated to one account, is not entitled, without the customer's consent, to transfer the proceeds of such bills to

(1) (1924) 2 K.B. 153

the other account. The correctness of this decision has been doubted in Paget's Law of Banking where the learned author observes at page 380 that the words of Swift, J., must be read as part of a judgment in a case in which the proceeds of certain bills were alleged to have been wrongfully appropriated by the bank. Swift, J., found that although there had been an intention to appropriate them, this did not take place, but as the bank knew of the intention to appropriate to a particular account they could not take advantage of the failure actually to do so. The very nature of the case renders it practically useless as a guide to the general question of the right of a banker to set off one account against another. I entertain no doubt in my mind that it was open to the Bank in the present case to combine the two accounts and in exercise of the banker's lien to appropriate the deposits in one account to the payment of the debt due to the Bank in the other account [*Radha Raman Chowdhary and another* v. *Chota Nagpur Banking Association, Ltd., and others* (1)].

For these reasons I would uphold the order of the learned Single Judge and dismiss the appeal. There will be no order as to costs.

GOSAIN, J.—I agree. Gosain, J.

B.R.T.

APPELLATE CRIMINAL

Before Mehar Singh and Dua, JJ.

AUTAR SINGH AND ANOTHER,—*Convicts-appellants.*

versus

THE STATE,—*Respondent*

Criminal Appeal No. 169 of 1959.

1959

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Evidence Act (I of 1872)—Section 133—Accomplice—Whether a competent witness against an accused person—corroboration of the testimony of the accomplice—Whether

(1) A.I.R. 1944 Pat. 368