CALCUTTA HIGH COURT

Ganesh Export and Import Co

Vs.

Mahadeolal Nathmal

A.F.O.D. No. 55 of 1954

(Chakravartti, C.J. and Lahiri, J.)

27.01.1956

JUDGMENT

Chakravartti, C.J.

1. The judgment of the Court will be delivered by my learned brother. I only desire to make a few general observations on the point of law involved in the appeal and two of the cases.

2. The actual question to be decided in the case is whether, in the liquidation of the Sisir Oil Industries Ltd., the respondents can claim to be paid a sum of Rs. 3,01,39/-4-3 in priority over all creditors of the company. Of that amount, a sum of Rs. 3,00,000/- is claimed by way of refund of a security deposit made For the due performance or an agreement and the balance is claimed as interest on that sum, both under the terms of the agreement itself.

3. The insolvent in the present case is a company. Upon an order For the winding up of a company being made, the liquidator is to collect and distribute its assets among the creditors and thereafter if there be a surplus, among the contributories, subject to the rights of the secured creditors and the claim, if any, of some of the creditors to be paid in priority. What the general body of creditors can claim to be distributed among them are the assets of the company. The answer to the question in the present case, therefore, depends on whether the amount claimed by the respondents came to belong to the company and is held by it as a part of its assets.

4. What then are the assets of a company ? It does not require a statutory provision to establish that no property in which the company has not a beneficial interest can be one of its assets, even though it be a property held in its hands. Unlike the Insolvency Acts, the Companies Act has not undertaken to say what properties shall not be regarded as the properties of a company in liquidation and seems to have left the matter to principle. Section 52(1)(a), Presidency Towns Insolvency Act says specifically that the property of the insolvent divisible among his creditors shall not comprise "property held by the insolvent on trust for any other person."

5. Similarly, Section 28(5), Provincial Insolvency Act provides that the property of the insolvent, vesting in the Official Receiver and divisible among his creditors, shall not include "any property

.... which is exempted by the Civil Procedure Code or by any other enactment For the time being in force from liability to attachment and sale in execution of a decree" and Order 21, Rule 61, Civil Procedure Code provides that the Court shall disallow a claim to property under attachment if it is satisfied that the property was "in the possession of the Judgment-debtor as his own property and not on account of any other person", implying thereby that where the Judgment-debtor is in possession on account of another person, the Court shall allow the claim. Property held by a Judgment-debtor in trust for another person is held on account of that person. The Companies Act does not contain any provisions like Sections 52(1)(a) and 28(5) of the Insolvency Acts, nor does Section 229 which provides that in respect of certain matters, the same rules shall be observed in the winding up of an insolvent company as are in force under the law of insolvency with respect to the estates of persons adjudged insolvents, attract those provisions. But no specific provision was necessary. The Act has said that it is the assets of the insolvent company that shall be distributed among the creditors. In a property held by an insolvent wholly in trust for another person, he has no beneficial interest and therefore such property 5. On the other hand, there can be no doubt that conformably to ordinary notions and the general law, the Companies Act does not regard monies lent to a company as monies paid to it on trust. It does not enable the creditors of a company to say, any more than the creditor of any other debtor, that the monies lent by them remained their property and were only let out for a stipulated period on hire and that, therefore, upon the insolvency of the company, they are entitled to recover their monies from among the assets of the company in the manner of following their property there. Under the general law, monies borrowed by a person become the property of the borrower, in spite of the stipulation for repayment. Repayment is not refund. In the case of the Companies Act, it is not even necessary to invoke that principle, because the Act deals directly and specifically with debts and lays down what the rights of the creditors shall be in a liquidation of the company. Leaving aside the secured creditors who may look to their securities wholly or so far as they may be sufficient to satisfy their debts, the ordinary creditors have no absolute right to get back the whole of what they lent on the footing that the money remained their property. Monies obtained by a company as loans are treated by the Act as having become its own property and as still such property so far as they may be available; and the ordinary creditors can only share in the existing assets of their debtor in proportion to their debts, subject to the rights of the secured creditors and those of themselves who may be entitled to priority. The principle applies also to creditors who do not claim on the basis of a loan, but the liability owned to whom is nevertheless a debt. As has been seen, in respect of monies held in trust, the position as between the company and the truster is very different.

6. It is For the foregoing reasons that whenever a claim has been made in a liquidation For the payment of a certain sum in preference to all creditors, the Courts have striven to see whether the relation between the company and the claimant is that of debtor and creditor or it is that of trustee and truster. The propositions I have referred to are elementary, but it is necessary to recapitulate them in order to understand clearly why the enquiry takes that particular form and what the underlying concepts are.

7. A truster of monies can claim a refund from an insolvent company in priority over all creditors, not on the ground that an obligation to return trust property must be discharged before an obligation to repay debts, but on the ground that the monies never became the property of the company and are not therefore divisible among its creditors. If the monies have been kept separate, they must be handed back. Even if they have been mixed up with other funds of the

company, an equal amount, if available, must first be extracted and paid over to the truster, subject to such deductions, if any, as may be provided for by the trust itself. In order, however, that a property may be excluded from the assets of a company, divisible among its creditors, it is not necessary that it should be held formally in trust for a third party. Where there is such a trust, the company has obviously no beneficial interest in it of the nature divisible among creditors upon insolvency. But there may also be a trust in effect. Property held by an insolvent in a fiduciary capacity is treated as property held in trust For the purposes of the insolvency laws and property held for a specific purpose is treated as clothed with a species of trust, subject to the same principles as trust property. In all these cases, the property concerned is outside the divisible assets of the company. The party who put the property in the hands of the company can claim it back in a winding up as his property, while the creditors cannot claim that it should be brought into the distribution.

8. The present case was argued before us as if the decision turned on there being or not being a full and complete trust. It was also argued on the footing that unless an agency could be made out from the agreement, no trust could be established and, conversely, if there was an agency, a trust would necessarily follow. None of those assumptions was correct. As I have already pointed out, in order that a sum of money can be claimed from an insolvent company without diminution and in priority over all creditors, it is not necessary that there should be, with respect to it, a full and complete trust. All that is required is that it should be impressed with a character which prevents it from becoming the property of the company and keeps it outside the flux of the company's fortune as respects its own funds by virtue of the special purpose for which it is placed in the hands of the company. Secondly, in order that a deposit made with a company may be said to be held in trust or on terms in the nature of a trust, it is by no means essential that the depositor should be an agent. Nor cars it be said that a deposit made by an agent must always be a deposit made on trust. A deposit made by a customer may well partake of the nature of a trust and a deposit made by a trade agent may-well be an advance or advance payment made in the ordinary course of business.

9. A great deal of argument took place before us as to whether there could at all be a trust in respect of a deposit when there was a provision for payment of interest on the sum. Speaking for myself, I do not think that either the decision of the Privy Council in - '*Official Assignee of Madras v. Krishnaji Bhat*'[1], or the decision of the Rolls Court in - '*Gee v. Liddell (No. 1*[2]*),* on which reliance is always-placed, answers the question. In the Privy Council case, a nephew had a certain sum of money lying with his uncle's firm and he, by a letter, instructed the uncle to invest the amount in his firm in the name of his (the nephew's) son, who was then a minor, and to hand1 over the money to him on his attaining the age of 21, paying the interest in the meantime to the father. In the course of a suit by the minor For the appointment of a new trustee and a direction on the members of

[1] AIR 1933 PC 148
[2](1866) 35 Beav 621

the firm to hand over the money to him, the firm went insolvent and a question, arose between the minor and the Official Assignee as to whether the former was entitled to preferential payment out of a sum which had been realized by the sale of a portion of the stock-in-trade. The Courts in India decided in favor of the minor. In the Privy Council, their Lordships declined to allow the Official Assignee to raise any question as to whether the transaction constituted a trust, because

throughout the course of the litigation a trust had been admitted. Proceeding on the basis that there was admittedly a trust, the only question which their Lordships decided was whether the beneficiary was entitled to follow the trust fund into the mixed funds of the firm, in view of the fact that the money had been employed in the business of the trustees, not improperly but in pursuance of the terms of the trust itself. The question whether the provision For the payment of interest prevented the transaction from constituting a trust was not allowed to be raised, far less decided. In the other case, '*Gee v. Liddell (No. 1)*, a testator appointed his son the executor of his will and bequeathed a sum of £2000/- in the form that he directed the executor to stand possessed of the amount upon trust to pay the interest earned by it to a daughter and upon her death to her children, adding that if, instead of investing, the executor retained the money in his own hands which he would have liberty to do, he would have to pay interest at the rate of £4/- per cent. The executor did not invest the amount. After the death of the testator, he stated both verbally and in writing that his father had really intended, as he himself had told him, to make a bequest of not £2000/-, but £3000/- and that he would make it that sum in accordance with his father's real wishes. A question having arisen as to whether the only son of the daughter, who had died in the meantime, was entitled to be paid the additional £1000/- out of the estate of the executor, who was the residuary legatee and who also had died all that the Court really decided was that the executor's liability with regard to the £1000/- was exactly the same as that with regard to the £2000/- and that with regard to the former sum as well there was a complete voluntary trust. It is true that in the course of his judgment, Lord Romilly, M.R. also held that there was a trust in respect of the £2000/- as well, but he did so not by way of holding that the provision for payment of interest did not negative a trust, but toy way of holding that although the money had not been separated from the estate, there was nevertheless a completed trust, because the testator had allowed the executor to retain the money in his hands at interest. That finding was necessary, because there is a distinction between an incomplete trust and a completed trust of which the beneficiary can enforce execution through court and a completed trust was required in the case, because there was a claim for money under the terms of the trust. But the Court was not asked to decide and did not purport to decide whether a trust in respect of a sum of money could be accompanied by a provision for payment of interest thereon by the trustee. Indeed, there was no argument at the Bar at all with respect to the £2000/- Neither Halsbury, nor any of the text-book writers cites the case as authority For the proposition that a provision for payment of interest by the trustee is not inconsistent with a trust.

10. In some of the more recent Indian decisions to which my learned brother will refer, it has been held that a provision for payment of interest does not necessarily negative a trust, but no reason has been given except that it was so held in the above two cases. I have not been able to trace any decision, English or Indian, where the matter has been discussed.

11. The position, however, appears to me to be plain. Where A pays a sum of money to B merely on the condition that B will repay it after a stipulated period or on demand and will pay interest in the meantime, there is only a loan. No question of a trust arises in such a case. But A may also pay money to B on trust to how it For the benefit of C, to be paid to him in a certain contingency, and not" only to hold the corpus of the fund for such purpose but also to increase the fund by investing it and pay the increase, as it accrues, either to C or the trustee' himself. In other words, the trust may include a condition that the trustee shall invest the trust fund and pay the interest earned to the same beneficiary as that of the corpus or to the creator of the trust or any other person. In such case, a trust clearly attaches also to the provision for investment and payment of interest. Going one step further, the trust may provide that the trustee may or shall invest the fund

with himself and pay the increase to the beneficiaries named. Where a rate of interest is mentioned, it only means that what the increase shall be in the case of an investment with the trustee himself is quantified and laid down in the trust and the obligation of the trustee is limited to that amount, as distinguished from the actual profits and irrespective of any loss. The transactions in the Privy Council case and the case decided by the Rolls Court were transactions of this character and constituted, trusts. They covered not merely the holding of the trust fund but also the application of the fund with a view to bringing about an increase and payment of the increase to the beneficiaries named. The beneficiary need not be a third party; he may be the truster himself or the truster and the trustee. So where A pays money to B to be held for a specific purpose For the benefit of himself or of himself and B and also makes it a condition that during the time the money lies in the hands of B, awaiting application to the specific purpose, it shall not remain idle, but shall be invested with B himself who shall pay interest to A at a certain rate, the transaction is not essentially different and the provision for payment of interest does not take away from its nature of a trust. It does not take away from the nature of a trust, because It is included among the terms of the trust itself, the obligation under it being a further obligation of the trustee qua trustee in addition to his obligation with regard to the corpus of the sum.
Where the term is that the trustee shall invest the trust fund with third parties and pay the profits of the investment to the truster or some other named beneficiary, it can by no means be said that a trust is negatived by such a term it does not make any difference if the term be that the trustee may or shall invest the fund with himself and pay the profits, fixed at a certain rate provided there is a clear trust with respect to the corpus. The test as to whether there is a loan or a trust in such a case appears to be this where money is paid merely on condition of repayment and payment of interest till then, there is only a loan; but where the main condition on which money is paid shows that the corpus of the fund is being handed over in confidence to be held For the benefit of some person or object, the provision for payment of interest is only a provision for an increase or improvement of the fund and there is no loan but a trust, despite such provision which does not in any way negative a trust.

12. Coming to the facts of the present case, I agree entirely with my learned brother, For the reasons presently to be given by him, that the agreement did not make the respondents agents of the company. They were simply buyers. Nor could there be a question of a trust property so called, because there was a bilateral agreement between the parties and their rights and obligations lay clearly in contract and not in confidence But the money was paid by the respondents to be held by a company for a specific purpose and it was therefore clothed with what has been called "a species of trust". The specification of a particular purpose for which the money was to be held and kept available, prevented it from becoming the property of the company and invested it with the character of a trust fund, standing outside the vicissitudes of the funds belonging to the company itself.
To what extent allocation for a particular purpose prevents a sum of money from becoming the property of a bankrupt and thus available to the trustee in bankruptcy is illustrated by cases like In re, Rogers Ex parts Holland sand Hannen (1891) 8 Morr 243 'In re, Drucker (No. 1), Ex parte Basden (1902) 2 KB 237 and Re Watson Ex parte Schipper (1913) 107 LT 783, where it was held that money paid by a third party For the specific purpose of paying a particular creditor of the bankrupt, even if paid with knowledge of the bankruptcy, was impressed with a trust and could not form part of the general assets of the bankrupt, divisible among his creditors.

13. For the foregoing reasons it must be held that the deposit in the present case was impressed

with a species of trust, but a further question arises which was not argued at the Bar. It was perhaps not argued because of a consent order recorded by the trial Court on 31-3-1954 and appearing at page 23 of the Paper-book. But I am unable to see how, if the question was to be left to further proceedings as stated then, there could be an unqualified declaration that the entire sum of Rs. 3,01,397-4-3- was held in trust For the respondents alone and an unqualified order For the payment of the whole sum out of the entire assets of the company, as made by the trial Court. It is true that the deposit was made for a specific purpose, but the specific purpose was not simply return of the deposit upon the termination of agreement but included application of such part of the deposit as might be required For the payment of outstanding dues of the company, arising out of transactions under the agreement. That purpose is implied in the term that the money is to be kept as security For the due performance of the agreement". It is true that Clause 4 of the agreement says that the return of the security deposit and the interest thereon shall be secured by an unconditional guarantee to be executed by the Directors and Clause 15 says that before the termination of the relationship between the parties, the company must refund "the said deposit of Rupees Three Lacs with interest thereon", but if those provisions are relied on for a contention that the entire amount of the deposit, together with interest, was to be refunded in any event, there would be nothing like a security at all and the transaction would be simply a loan of money at interest.

> 'In that event, the respondents would have no preferential claim. The true construction of the agreement, however, appears to me to be that the money was to be applied, if and when necessary, to the satisfaction of outstanding dues thereunder, which appears not only from the description of the deposit as a security but also from the provision contained in Clause 11 that the prices of the goods purchased by the respondents or ordered to be supplied on their account should be "adjusted" within a certain time.

The 'specific purpose' for which the deposit was made was therefore the dual or rather combined purpose that the money should be held as security For the dues of the company, accruing from time to time and so much of it should be refunded upon the termination of the agreement as might not have been required and spent For the first purpose. If that was mixed purpose for which the money was held, the respondents cannot have a declaration that it was held in trust for them alone, nor can they be entitled to a refund of the whole amount, unless it is established that no part of it is required to pay any dues of the company, secured by it. Expressed in terms of a trust, the position here is that the money was held by the company in trust For the respondents and itself, that is to say, held in the language of the Indian definition of a trust, For the benefit of "another and the owner".
The law is well-settled that if in such a case, the trustee becomes insolvent, the beneficial interest which he himself has in the trust property passes to the trustee in his bankruptcy and becomes divisible among his creditors : see Halsbury's Laws of England, Vol. 2, p. 226. It follows that the proper declaration will be that the amount was held by the company in trust For the respondents as well as itself and that the respondents are entitled to a refund of the amount, less such sum, if any, as may be found due to the company on account of transactions had under the agreement. Any amount deducted as due to the company will be divisible among its creditors.

14. There is one other small point which also was not argued at the Bar, but to which I may refer For the sake of completeness. It might be argued that so far as the interest on the deposit amount

was concerned, it was payable under a collateral or ancillary agreement and was not earmarked as security and therefore it constituted only a debt for which the respondents would have to take their chance along with the general body of creditors. Where the terms of a trust include the raising of profits on the trust fund and application of the profits for a particular purpose such as payment to a particular beneficiary, no difficulty arises. A trust clearly attaches to the payment of the profits or the interest as well. A case of the present type where the interest on a security deposit is payable to the depositor himself is different, but I have come to the conclusion that where the corpus of the amount is impressed with a trust, the interest also is so impressed, although it may not be applicable to the same purpose, because it represents an increase of the trust fund and is paid by the trustee, not because he borrowed the money as a loan but because he is charged by the truster to exploit the fund for his benefit while the corpus lies as security and pay over the benefit of the exploitation to him.

15. I agree with my learned brother in the order proposed by him.

Lahiri, J.

16. This appeal raises the question whether a sum of Rs. 3,01,397/4/3 held by Sisir Oil Industries Ltd. (in Liquidation), which will hereinafter be referred to as the Company, is available for ratable distribution amongst its unsecured creditors or whether it is held by the company in trust or in a fiduciary capacity For the respondent Mohadeolal Nathmal. The facts which are relevant For the purposes of the present appeal are as follows : On 4-6-1951, the respondent entered into an agreement, purporting to be an agreement for sole agency, with the company for a period of two years on a commission of 2 per cent on the value of goods sold with a guarantee of Rs. 24,000/- as minimum commission per annum. In this agreement the company is described as the Principal and the respondent as the Agent. As the principal points raised in this appeal depend upon a true construction of the terms and conditions of this agreement it is desirable to set out the different Clauses in some detail. The agreement runs as follows :-

> 1. The Principal hereby appoints the Agent as its Sole Agent in the Union of India and abroad For the sale of the entire product of the Principal.
> 2. The Agent will sell the goods of the Principal in its own name as products of the Principal. The Agent will be treated as purchaser of the goods ordered by it.
> 3. The Agent shall keep with the Principal the sum of Rupees Three lacs ear-marked as security For the due performance of the agreement and carrying interest at the rate of five per centum per annum.
> 4. The return of the said security deposit and interest thereon shall be secured by an unconditional guarantee to be executed by all the Directors of the Principal jointly and severally in favour of the Agent. The interest on the deposit shall be payable by the Principal to the Agency every month until refunded.
> 5. The Agent shall procure orders For the products of the Principal and shall forward the same to the Principal for execution on behalf of the Agent.
> 6. The Principal shall promptly execute the said orders of the Agent and send the goods and the invoices direct to the buyers on account of the agent and will forward copies of the invoices to the Agent.

7. The Principal shall not be responsible For the realisation of the sale proceeds from the buyers Introduced by the Agent.

8. The Principal shall however be responsible For the quality of the goods so consigned by the Principal to the buyers introduced by the Agent.

9. The Agent shall sell the products of the Principal at the controlled rates or such other rates as may be prevailing in the market.

10. The Agent shall use its best endeavours to promote the sale of the products of the Principal and propagate the sale of its products.

11. The prices of the goods purchased by the Agent on its account or ordered to be supplied on its own account shall be adjusted within fifteen days from the delivery or despatch of the goods by the Principal or immediately on realisation of the proceeds of sale of the goods from the actual buyers.

12. Besides the interest aforesaid, the Principal shall pay the Agent a commission at two per centum upon the invoiced value of all goods sold by the Principal either directly or through the Agent or any other Agents or sub-agents less only rebate allowed, that is to say, after allowing rebate et cetera on amounts actually realized in respect thereof. The commission shall be paid every month. If during any year the commission paid or payable by the Principal to the Agent falls short of the sum of Rs. Twenty-four thousand for any reason whatsoever the Principal shall forthwith make good the deficit to the agent at the end of such year.

13. The principal shall be entitled to execute any order or orders received direct from any person and to appoint any agent or sub-agent. But in such cases also the Agent shall be entitled to the commission as aforesaid. The Agent shall not be responsible For the sale proceeds of goods sold direct by the Principal.

14. This Agreement shall remain in force for two years unless determined as hereinafter provided.

15. Either party may by a notice in writing to the other terminate this agency, and one month after the receipt of such notice the Agency hereby created shall cease except so far as concerns the rights of either party in connection with acts matters or things done committed or suffered by either party before such determination : Provided always that immediately on such determination the Principal must refund to the Agent the said deposit of Rupees Three lacs with interest thereon and shall continue to pay the Agent the commission aforesaid upto the date of such refund and when the Principal terminates the Agency by a notice it shall not be deemed terminated unless and until the said deposit with interest is so refunded and the said commission, so paid to the Agent.

17. It appears that the respondent made a deposit of Rs. 3,00,000/- in pursuance of Clause 3 of the agreement and on the same day viz., 4-6-1951, the directors of the company jointly and severally guaranteed to the respondent due payment of the sum of Rs. 3,00,000/- and the interest thereon. On 7-1-1952 the company went into liquidation and on 15-3-1952 the respondent applied for leave to sue the company in liquidation.

On 2-6-1952, the respondent instituted Suit No. 2164 of 1952 on the Original Side of this Court

For the recovery of a total sum of Rs. 3,47,875/14/- which was made up as follows : Rs. 3,01,397/4/3 was claimed For the deposit under the agreement dated 4-6-1951, together with interest and the balance was claimed for a loan of Rs. 25,000/- on "Khatapeta" account alleged to have been advanced on 27-8-1951 at an interest of Rs. 6/3/4 per cent per annum. In this suit the company was impleaded as defendant 1 and the Directors were impleaded as defendants 2 to 6. No writ of summons was taken out against the company but the directors were served with summons in the usual course. On 20-8-1952 the respondent applied for a summary judgment against defendants 2 to 6 (i.e. the directors) and contained it on 3-9-1952. The director-defendants filed an appeal against the decree but the appeal was subsequently abandoned. The result therefore is that the respondent has got a money decree against the directors of the company as guarantors For the entire sum of Rs. 3,47,875/14/- with interest thereon at the rate of 6 per cent per annum from the date of the decree until realization. The period of two years fixed by the agreement expired on 4-6-1953 and thereafter on 3-8-1953 the respondent filed an application before the joint liquidators of the company claiming to be a preferential creditor in respect of the sum of Rs. 3,01,397-4-3 pies alleging it to be trust money. This claim was resisted by the appellant on the ground that the money was nothing but a loan and the respondent had no better rights than those of an unsecured creditor in respect of this amount. On 19-12-1953, the respondent took out a summons for an order that it might be declared that the said sum of money was field by the company in trust For the respondent and that the liquidators might be directed to pay the said sum to the respondent forthwith. At the first hearing of the application a preliminary objection was raised to the effect that the application could not be heard without an amendment of the plaint in Suit No. 2164 of 1952 which contained no prayer for a declaration that the deposit was trust money and in which the deposit was described as an advance. On 2-3-1954 liberty was given to the respondent to amend the plaint and pursuant to that order the plaint was amended and a prayer was added for a declaration that the said sum of money was held by the company in a fiduciary capacity in trust For the respondent. After the amendment of the plaint the application filed by the respondent was heard by Bachawat, J. as a company Judge and the declaration prayed for by the respondent was granted by a judgment dated 2-4-1954. It is against that judgment that the present appeal has been brought by the appellant firm which is an unsecured creditor of the company.

18. Bachawat, J., has held that the agreement dated 4-6-1951 created relationship of principal and agent between the company and the respondent with fiduciary obligations on both sides. This conclusion has been strenuously challenged by Mr. Meyer appearing in support of the appeal. It has been argued that true relationship created by the agreement is that of buyer and seller and strong reliance has been placed upon Clauses 2 and 5 of the agreement which provide that the agent will be treated as purchaser of the goods ordered by it and that the orders procured by the agent shall be executed by the principal on behalf of the agent. It is further argued that if no agency is created by the agreement and if there is no element of fidelity no trust conies into existence with the result that the deposit made by the respondent is an ordinary unsecured loan and the respondent is entitled to rank as an unsecured creditor of the company. Mr. Chowdhury appearing For the respondent has contended that Clauses 5 and 10 of the agreement impose upon the respondent the duty of procuring orders For the products of the company and using its best endeavors to promote the sale of the company's products. Under Clauses 12 and 13, the respondent is to get a commission of 2 per cent upon the invoiced value of all the goods sold by the company either directly or through the respondent or any other Agent or Sub-agent and under Clause 11 the prices of the goods sold to the respondent or to customers introduced by the

respondent are to be adjusted within fifteen days of the delivery of the goods or immediately on realization of the sale proceeds of the goods from the buyers. These conditions, according to Mr. Choudhury constitute the respondent an agent of the company in the true sense.

19. In order to decide this question we have to bear in mind that the agreement in express terms describes the company as the "Principal" and the respondent as the "Agent", but the question that arises is whether in spite of this description the agreement contemplates the so called agent acting on his own behalf or "on behalf of the so called principal. If upon a consideration of all the terms and conditions of the agreement we come to the conclusion that the agreement in substance contemplates the so called agent acting on his own behalf, we shall have no hesitation in holding that no relationship of agency has arisen in spite of the contrary description in the agreement. Section 182, Contract Act defines an "Agent" as "a person employed to do any act for another or to represent another in dealings with third persons." With regard to the second alternative of this definition we have no hesitation in holding that the element of representation is totally absent in the present case. Clauses 2 and 5 of the agreement make it Clear that in dealings with third persons the Company's products are to be treated as belonging to the respondent and the orders secured by the respondent are to be executed on behalf of the respondent. These conditions in my opinion, are thoroughly inconsistent with the notion of the respondent representing the company in dealings with third persons. The next question is whether the respondent can be said to be a person "employed to do any act for another" within the meaning of the first part of Section 182, Contract Act. The only duty cast upon the respondent under the agreement is the duty of securing orders For the company's products and propagating their sale. On ultimate analysis, however, this duty does not appear to be doing an "act for another", because as soon as orders are secured they are to be executed on behalf of the respondent under Clause 5 and as soon as sales are effected the goods will be sold in the name of the respondent. In order to constitute the relation of agency it is, in my opinion, essential that goods should be a sold to customers introduced by the agent not on behalf of the agent but on behalf of the Principal. If the goods are sold on behalf of the alleged agent and if the alleged agent is to be treated as the purchaser, he ceases to be an agent and becomes a Principal. On a consideration of the agreement as a whole therefore my conclusion is that it does not create a relationship of principal and agent between the company and the respondent but a relationship of seller and wholesale buyer of the products of the company.

20. We have now to consider the question whether the provision about the payment of commission makes any difference in the relationship between the company and the respondent. Under Clauses 12 and 13 of the agreement the respondent is to get a commission of 2 per cent, upon the value of all goods sold by the company either directly or through the respondent or through and other Agent or Sub-agent subject to a minimum of Rs. 24,000/- per year. Clause 5 of the agreement which imposes upon the respondent the duty of securing orders For the company's products does not, however, require that if the orders secured by the respondent fall below a specified minimum limit, it will not be entitled to any commission. On the other hand Clauses 12 and 13 make it plain that the respondent will earn its minimum commission even if it does not secure any order whatsoever For the company. In these circumstances the only conclusion that can be drawn is that the word "commission" as used in the agreement, does not connote remuneration For the work done by an agent. Mr. Meyer has cited before us the decision of the Judicial Committee in the case of '*Balthazar and Son v. E.M. Abowath, (A Firm[3])',* The facts of this case are, however, somewhat different from the facts of the present case. Under the terms of

the agreement in the reported case the seller was to get half per cent, commission for 30 days' credit and one per cent, commission for 60 days' credit whereas in the instant case the buyer is to get a commission of 2C. per cent, subject to a minimum of Rs. 24,000/- per year under all circumstances. In spite of this difference in facts, however, the actual words used by Lord Dunedin support the conclusion that if the terms of the agreement establish the relation of vendor and purchaser the use of the word 'commission' does not convert it into an agency. Lord Dunedin in delivering the judgment of the Board observes as follows :

> "It comes to this that the documents show on the face of them a contract between principals. The mere mention of commission in the contract as signed is not in any way ..... inconsistent with the relation being between principal and principal'.

As I have held that the agreement in the present case does not constitute an agency but creates a relation of vendor and purchaser, the use of the word 'commission' does not affect the position.

21. The point that arises for consideration now is whether in spite of the fact that no agency arises under the agreement, the agreement read as a whole, creates a trust or a fiduciary relationship. Bachawat, J. has proceeded upon the view that since the deposit was by an agent, to be appropriated towards a specific purpose connected with the agency, it must be impressed with a trust. His view has been influenced to a large extent by a decision of a Division Bench of this Court in the case of '*Kshetra Mohan Das v. Dr. D. Basu*[4]' the facts of which, in his opinion are indistinguishable from the facts of the present case. As all the terms of the agreement in that case are not set out in the judgment as reported, we sent For the paper book of that case and read all the terms. On a comparison of the agreement in that case with the agreement in the present case, however, we find that the terms are essentially different. In 'Kshetra Mohan Das's case, the agreement is truely an agreement between a principal and agent as the agent agreed to sell the goods of the principal on behalf of the principal at a price to be fixed by the principal, whereas in the instant case, the alleged agent is to be treated as the purchaser of goods

[3] AIR 1919 PC 166
[4] AIR 1943 Cal 105

and the alleged principal is to execute the orders secured by the alleged agent on behalf of the latter. The agreement in the present case being an agreement between two principals the fiduciary obligation of an agent to account for his dealings to the principal cannot be said to exist. The only obligation of the respondent in the instant case is an obligation to pay For the price of commodities sold to it or to customers introduced by it. Such an obligation in my opinion does not constitute a fiduciary relationship.

22. The next question is whether the deposit in the present case can be said to be impressed, with a trust. On a careful consideration of the agreement as a whole it seems to me that it contains no element of fidelity or confidence which is an essential ingredient of trust as defined by Section 3, Trusts Act. The agreement is bilateral and whatever rights are secured to the parties under it are contractual rights. Under the third Clause of the agreement the company is binding itself in express terms to hold the deposit For the specific purpose of due performance by the respondent of its obligations. An obligation like this does not, in our opinion, create an obligation in trust but an obligation in contract. I accordingly hold that the agreement creates neither a trust, properly so-called, nor a fiduciary relationship.

23. Mr. Meyer, appearing For the appellant has put forward another reason why the agreement in the present case cannot be said to create a trust. He has argued that the stipulation for payment of interest is inconsistent with the notion of a trust, because such a stipulation carries with it the necessary implication that the deposit really belongs to the depositee. On this point there is a conflict of judicial decisions amongst the different High Courts of India. The Allahabad, Bombay and Lahore High Courts have taken the view that the existence of a stipulation for payment of interest is destructive of a trust because it indicates that the depositee would be entitled to use the deposit as his own property and for his own purposes. See '*In re Annapurna Company Ltd.*[5]', '*Maheswari Brothers v. Liquidators Indra Sugar Works*[6]', '*In Re. Manekji Petit Manufacturing Co. Ltd*[7].', '*National Petroleum Co., Ltd. v. Popat Lal Mulji*[8]', and '*Ram Chand v. Mohd. Alcram Khan*[9]',. The Calcutta and Madras High Courts on the other hand have adopted the view that the provision as to payment of interest is not wholly inconsistent with the existence of a fiduciary relationship. See 'In re. Alliance Bank of Simla', AIR 1924 Calcutta 818, 'In re. Bengal Zemindari and Banking Co.', Ltd.', AIR 1937 Calcutta 221, ' AIR 1943 Calcutta 105', and 'In the matter of Travencore National and Quilon Bank Ltd.', AIR 1939 Madras 337. The view taken by this Court is based on the judgment of Lord Romilly M.R. in '(1866) 35 Beav. 621 at p. 628, where a testator made over a certain sum of money to his executor upon trust for his daughter for her life and to pay her interest at the rate of 4 per cent, per annum. Under the terms of the will the executor was authorized to make such use of the capital as he thought fit. Upon these facts Lord Romilly M.R. held that a trustee, if so authorized, could use the trust fund and could be required to pay interest. To the same effect is the decision of the Judicial Committee of the Privy Council in the case of ' AIR 1933 PC 148 (A)'. That was a case where a sum of money was handed over to the deposits For the purpose of investment in the depositee's business in the name of the depositor's son who was then a minor and the depositee undertook to refund the deposit on the minor's attaining the age of 21 and in the meantime to pay interest at the

[5] AIR 1926 All 397 [7] AIR 1932 Bom 311 [9] AIR 1937 Lah 444
[6] AIR 1942 All 119 (FB) [8] AIR 1935 Bom 344

rate of 9 per cent. per annum. Upon the depositee being adjudicated insolvent the question arose whether the depositor's son would rank as an unsecured creditor or had a preferential claim in respect of the deposit. Before the Privy Council it was sought to be argued that the circumstances under which the deposit had been made did not constitute a trust but a mere advance in respect of which the depositor's son could claim no better right than that of an unsecured creditor. Their Lordships, however, did not allow this point to be raised because the trust was admitted both before the Original Court and the Court of Appeal and also in the printed case before the Privy Council. This case is at least an authority For the proposition that an agreement for payment of interest does not militate against the existence of a trust. It may be noted in this connection that in 'In re. Fazl Bhai Mills Ltd.', AIR 1936 Bombay 296 one of the reasons given by Kania J. for not following the decision in 'Manekji Petit's case, was that the attention of the learned Judges who decided that case was not drawn to the decision in '(1866) 35 Beav. 621, and made the following observations at p. 299 :

> "Having regard to the definition of trust in the Indian Trusts Act I do not see any reason why there cannot be a trust merely because the company expressly reserved the right to utilize the trust fund for its own purpose and agreed to pay interest in the meanwhile."

Upon this state of authorities if it had been necessary for us to decide this point in this appeal we

would have held that the view taken by the Calcutta and Madras High Courts is right; but having regard to the fact that I have already held that the agreement in the present case constitutes neither a trust nor a fiduciary relationship, this point is not of any practical importance in this appeal and I need not pursue it further.

24. Though the agreement dated 4-6-1951 does not create a trust properly so called or a fiduciary relationship, we have no doubt in our mind that it imposes a contractual obligation on the company to hold the deposit for a specific purpose. By Clause 3 the deposit is specifically "earmarked as security For the due performance of the agreement". Under the agreement the respondent is liable to pay the company the prices of goods sold to it or to customers introduced by it. Under Clause 11 such prices are to be "adjusted within fifteen days of the delivery or dispatch of goods" and by Clause 15 the company accepts the liability to refund the deposit with interest on the expiry of two years or on prior determination of the agreement by one month's notice. The combined effect of these three Clauses, in my view, is that there is to be an accounting between the company and the respondent in terms of Clause 11 and the respondent is to pay the prices within the period specified in that Clause. In the event of the respondent's failure to pay the prices, however, the company would be entitled to deduct the same from the deposit made in pursuance of Clause 3. Upon this reading of the agreement it is clear that it imposes a contractual liability on the company to hold the deposit For the specific purpose of appropriating it towards the unpaid prices of goods sold or supplied to the respondent in the event of the latter's failure to pay. It is this contractual obligation of the company that protects the right of the respondent to the extent of the balance of the deposit that may remain after deducting the unpaid prices of goods sold to or at the instance of the respondent. From the affidavit of the joint liquidators it would appear that, according to them, there are outstanding dues against the respondent for prices of goods; but the exact amount due, if any has not been ascertained.
There must therefore be an accounting between the company and the respondent with regard to the prices of goods sold to the respondent or to customers introduced by it. If upon such accounting any sum is found due to the company it will be deducted from the deposit and will be available for distribution amongst the unsecured creditors of the company. The balance, if any, will however, be treated as the property of the respondent.

25. In aid of his argument that the deposit in the present case amounted only to a loan Mr. Meyer cited the decision, of the Court of Appeal in the case of '*Davies v. Shell Co. of China, Ltd*[10].', The facts of that case are these : a British company used to employ agents in China For the purpose of selling and distributing petroleum products in that country. The practice of the company was to require its agents in China to deposit with the company a sum of money in Chinese dollars which was repayable on the termination of the agency. The company used to deposit with banks in Shanghai sums of money equal to the agency deposits. When Sino Japanese hostilities broke out in 1937 the company transferred the deposits to the United Kingdom and deposited the sterling equivalents with the parent company. On account of depreciation of Chinese dollar in relation to sterling the transfer resulted in profits to the Company. The question arose whether this exchange profit was fixed capital or circulating capital made in the course of the company's business and must be included in the computation of its income for Income-tax purposes. The Court of Appeal held that the exchange profit was capital profit and not subject to income-tax. Prima facie this decision does not appear to have any bearing on the question which has been raised before us, but Mr. Meyer has placed reliance on certain observations made by Jenkins, L.J. at p. 155 of the report where his Lordship summarizes his conclusion in the following words :

> "After paying the best attention to the arguments For the Crown and those For the Respondent company I find nothing in the facts of this case to divest those deposits of the character which it seems to me they originally bore, that is to say, the character of loans by the agents to the company, given no doubt to provide the company with a security but nevertheless loans. As loans it seems to me that they must prima facie be loans on capital not revenue account, which perhaps is only another way of saying that they must prima facie be considered as part of the company's fixed and not of its circulating capital." 'At p. 158' Cohen L.J. said as follows :
> "I agree with my brother Jenkins that the dollars deposited For the purposes indicated in the agency agreement were in the nature of loans and were not part of a transaction on revenue account."

It is true that in the passage quoted above the deposits made by agents were described as loans, but their Lordships were only considering the question whether the deposits were capital or trading receipts. Their mind was not addressed to the question whether the deposits were secured or unsecured loans or whether the deposits were impressed with a trust. The word 'loan' is a genus which includes unsecured as well as secured loans and loans impressed with a trust. The description of deposits by agents as loans is no solution of the problem with which we are confronted, i.e. whether they are loans impressed with a trust. Their Lordships certainly did not intend to lay down the general proposition that agency deposits must be treated as unsecured loans in all cases. For these reasons I am of

[10](1951) 32 Tax Cas 133

the opinion that the decision in the case of '*Davies v. Shell Co. of China Ltd.*', is of no assistance to the appellant.

26. Mr. Meyer relied upon the description of the deposit as "advance" in the plaint of Suit No. 2164 of 1952 before its amendment and also in two affidavits of one Gajanand Himatsingka affirmed on behalf of the respondent. He has also relied upon the fact that the deposit was credited by the company in the "Deposit Sales Account". These circumstances according to Mr. Meyer point to the conclusion that the company treated the deposit as an ordinary unsecured loan. I am not, however, impressed by this argument.

In the plaint of Suit No. 2164 of 1952 as well as in the affidavits relied upon by Mr. Meyer the description of the deposit as an 'advance' is qualified by the statement "upon the terms and conditions contained in an agreement in writing made .....on 4-6-1951." There is therefore no unqualified admission to the effect that the deposit was purely an unsecured advance and even if there had been any we would have found it impossible to decide the present question upon admissions when the original agreement is before us.

The credit of the amount in the "Deposit Sales Account" also does not carry the appellant further. Bachawat, J. has observed : "Ordinary loans were credited in the books of the company in the ordinary loan account whereas the deposit was credited in the Deposit Sales Account". This finding has not been challenged before us. We may, therefore, legitimately conclude that the deposit was treated by the company differently from ordinary unsecured loans. If that be so, it is impossible to accept the argument advanced on behalf of the appellant that the credit of the amount in the deposit sales account is wholly inconsistent with the idea of trust.

27. Lastly Mr. Meyer argued that the relation between the company and the respondent under the agreement was that of a banker and customer and the only obligation of the company was to return the deposit on the expiry of two years or on earlier determination by notice. Such an obligation, according to Mr. Meyer, does not entitle the respondent to any priority over unsecured creditors. After giving the matter my best consideration I find myself unable to accept the proposition that under the agreement the only obligation of the company was to refund the deposit on termination of the alleged agency by efflux of time or by act of parties. In my opinion the contingency that is safeguarded by the deposit is the possible failure of the respondent firm to pay the prices of goods sold to it or to customers introduced by it and the company was under an additional obligation to hold the money as security against such a contingency. It is this last obligation which takes the deposit out of the category of unsecured loans and protects the respondent's right in respect of the balance of the deposit that may remain after deducting its dues to the company.

28. For the reasons given above, the appeal is allowed in part and the order made by Bachawat, J. modified. In lieu of the declaration made by him, it is declared that the sum of Rs. 3,01,397-4-3 is held by the company for a specific purpose in the nature of a trust For the benefit of the applicant firm and itself and in lieu of the order for payment made by the learned Judge it is ordered that the applicant firm will be entitled to repayment of the aforesaid sum out of the entire assets of the company, less such sum, if any, as may be found due from it to the company on account of transactions had under the agreement.
Upon the amount due to the applicant firm being determined, it will be entitled to apply to the Court for payment of such amount within six weeks from the date of such determination. The rest of the order of the learned Judge will stand. There will be no order for costs in this appeal, but the Official Liquidators shall be entitled to retain and pay their own costs of this appeal as well as other costs, if any, ordered to be made costs in the appeal as between Attorney and Client out of the assets of the company in their hands.

Appeal partly allowed.