SHANTI PRASAD JAIN

v.

THE DIRECTOR OF ENFORCEMENT

1962

April 19.

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR and T. L VENKATARAMA AIYAR, JJ.)

Foreign Exchangn—Foreige firm depositing money in account of India in foreign bank.—Money to be used only for purchases from foreign firm—If contravenes prohibition to lend foreign exchange—Relationship between Bank and India—Whether of debtor and creditor—Contingent debt—Power to adjudge contravention given to Director of Enforcement—Director empowered to send case to Court if penalty imposeable by him not adequate—If discriminatory—Foreign Exchange Regulation Act, 1947 (7 of 1947), ss. 4(1), 23, 23D—Constitution of India, Art. 14.

The appellant had claims, for compensation against certain German firms in respect of machineries supplied by them to the appellant's concerns. The appellant went to Germany and arrived at settlements with the firms, under which the firms deposited certain sums of money with the Deutsche Bank in the account of the appellant with the stipulation that the money was only to be used by the appellant for purchases of new machineries from the same firms after obtaining import licenses from the Government of India. The appellant had not obtained permission, general or special, of the Reserve Bank for opening this account. Section 4(1) of the Foreign Exchange Regulation Act, 1947, prohibits a 'person resident in India', *inter alia*, from lending to any person outside India foreign exchange without the permission of the Reserve Bank. Section 23 lays down the penalties for contravention of s. 4(1) on adjudication by the Director of Enforcement and on conviction by a Court. Section 23D confers upon the Director the power to adjudicate whether any person has contravened s. 4 (1) and empowers him, if he is of the opinion that the penalty which he is empowered by impose would not be adequate in the circumstances of any particular case, to make a complaint in writing to the Court. The Director inquired into the appellant's Deutsche Bank account, held that the appellant had contravened s. 4(1) and imposed a penalty of Rs. 55 lakhs. On appeal the Foreign Exchange Appellate Tribunal held that the deposits amounted

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in law to loans by the appellant to the Bank and consequently s. 4(1) was contravened but it reduced the penalty to Rs. 5 lakhs. The appellant contended (i) that s. 23(1) of the Act offended Art. 14 of the Constitution as two parallel procedures were provided for the same offence and it was left to the discretion of the executive to choose which was to be applied in a particular case, and (ii) that there was no loan by the appellant to the Bank and therefore there was no contravention of s. 4(1).

Held, that the power conferred upon the Director under s. 23D to transfer cases to a court is not unguided or arbitrary and, does not offend Art. 14 and s. 23(1) cannot be assailed as unconstitutional. A serious offence should not go without being adequately punished; and in such cases the accused should have the benefit of trial by a Superior Court. Under s. 23D the transfer is to a Court and that only when the Director considers that a more severe punishment than what he is authorised to impose should be awarded.

Held, further, that the appellant had not lent money to the Deutsche Bank and had not contravened the provisions of s. 4(1) of the Act. Though normally when moneys are deposited in a Bank, the relationship that is constituted between the Banker and the customer is one of debtor and creditor, there may be special arrangement under which the relationship may be different. The right of the appellant to the amounts in deposit was contingent on the happening of certain events some of which were beyond his control and until then there was no debt due to him. A contingent debt is no debt until the contingency happens, and as the right of the appellant to the amounts in deposit in his name in the Deutsche Bank arises only on the happening of the contingencies, i.e. granting of the import licenses by the Government of India, there was no debt due to him *in presenti* and there was no loan thereof within s. 4(1) of the Act. The fact that money has been put in a Bank does not necessarily import that it is a deposit in the ordinary course of banking. The purpose of the deposits and the conditions attached to it indicated that the Deutsche Bank held the money under a special arrangement which constituted it not a debtor, but a sort of a stakeholder. The words "a person resident in India" in s. 4(1) has been used in the sense of "resident of India", and it was not necessary that at the time of the contravention of s. 4(1) should be actually in India.

Foley v. *Hill*, (1848) 11 H. L. C. 28, *Webb* v. *Stenton*, (1883) 11 Q. B. D. 518 and *Tapp* v. *Jones*, (1875) L. R. 10 Q. B. 591, referred to

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CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 319 and 320 of 1961.

Appeals by special leave from the order dated October 23, 1959 of the Foreign Exchange Appellate Board, New Delhi, in Appeal No. 51 of 1959.

A. V. Viswanatha Sastri, K. L. Misra, Advocate General for the State of Uttar Pradesh, B. P. Khaitan, S. K. Kapur and *B. P. Maheshwari,* for the appellant (in C. A. No. 319 of 1961) and the respondent (In C. A. No. 320 of 1961).

M. C. Setalvad, Attorney General of India, C. N. Joshi and *P. D. Menon,* for the respondents (In C. A. No. 319 of 61) and the appellant (in C. A. No. 320 of 1961).

1962. April 19. The Judgment of the Court was delivered by

Aiyar J.

VENKATARAMA AIYAR, J.—The appellant in Civil Appeal No. 319 of 1961, Shri S. P. Jain in the Chairman of the Board of Directors of a Company called Sahu Jain Ltd., which holds the managing agency of two companies, the Rohtas Industries Ltd. or more shortly the Rohtas, and the New Central Jute Mills Ltd. The Rohtas carry on business in the manufacture and sale of paper, and own a paper Mill at Dalmianagar in the State of Bihar. Shri Jain is the Chairman of the Board of Directors of that Company also. The New Centre Jute Mills Ltd. carry on business in the manufacture and sale of Jute, and own Mill at Calcutta. They also do business in the manufacture and sale of chemicals and fertilisers at Varanasi. On June 30, 1958, Shri S. P. Jain left India on a tour to the continent of Europe and on his return to this country he was searched at the Palam Airport on October 1, 1958, and the following document was found in his leather attache case :—

"Deutsche Bank Aktiengesellschaft.

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Page 2 to our letter of 25th Sept., 1958 to Mr. S. P. Jain, Hotel Briedenbacher Hof. Dusseldorf.

The "DM-account with limited convertibility No. 50180 of Mr. S. P. Jain has been credited in 1958, upto now, with the following amounts from German sources ;

20th March 1958 DM 210,118,65 from M/s. J. M. Voith G. m: b. H. Maschinenfabrik, Heidenheim marked "DM 210.081,31 less DM. 262,65 banking charges" (the said charge was made by the remitter's bank which is not a branch of ours);

11th July 1958 DM, 205.000 from Messrs. Escher Wyss G. m. b. H. marked "as per letter of 7th July 1958" in translation.

9th August 1958 DM 201.424,81 from Messrs. J.M. Voith G. m. b. H. Maschinenfabrik, Heidenheim marked "DM. 201.676,59 less banking charges."

15th August 1959 DM 472.886,03 from Messrs. Friedr. Udhe G. m. b. H. Dertmund, marked—in translation—"derived expenses DM. 465.633,63 interest payment DM. 7.2.52,40."

24th September 1958 DM, 350.000, from Messrs. Pintsch-Bamag A.G., Butzbach marked-in translation "payment of excess price."

25th September 1953 DM. 250.000 from Messrs. Pintech-Bamag A.C., Butsbech marked-in translation "in respect of excess price."

Now s. 4(1) of the Foreign Exchange Regulations Act (VII of 1947) herienafter referred to as 'the Act' provides that "Except with the previous general or special permission of the Reserve Bank, no person resident in India other than an authorised dealer shall

outside India buy or borrow from, or sell or lend to, or exchange with, any person not being an authorised dealer, any foreign exchange." The expression 'foreign exchange' as defined in s.2(d) means "foreign currency and includes all deposits, credits and balances payable in any foreign currency and any drafts, travellers' cheques, letters of credit and bills of exchange expressed or drawn in Indian currency but payable in any foreign currency."

As Shri Jain had admittedly not obtained the permission general or special of the Reserve Bank, for opening the account aforesaid, the Director of Enforcement started proceedings against him under s.4(1) of the Act. The explanation of Shri Jain was that the amounts in question had been deposited into the Bank by four German firms in settlement of claims which two Indian Companies the Rohtas and the New Central Jute Mills Ltd. had against them for delayed and defective supplies of machinery and equipment under previous contracts, that the deposits in question had been made subject to the condition that they should be utilised only for making initial payments towards price of new machineries to be purchased from the German firms and that in consequence there was no loan by the appellant within s.4(1) of the Act. The Director rejected this explanation and held that s.4(1) had been contravened and imposed a fine of Rs. 55 lakhs on Shri Jain under s. 23(i)(a) of the Act. Against this order there was an appeal to the Foreign Exchange Appellate Board who, examining the question in the light of fresh materials which were made available to them accepted the version of Shri Jain, and held that the deposits had been made by the German firms under the circumstances and on the condition stated by him. They however held that even so the deposits in question would in law be loans by Shri Jain to the

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Bank, and that in consequence, s.4(1) of the Act had been infringed, as no permission had been obtained as required by it. In this view they confirmed the order of the Director but reduced the fine to Rs. 5 lakhs. Against this order both Shri S. P. Jain and the Union of India have preferred the above appeals with the leave of this Court under Art. 136 of the Constitution. In this judgment Shri S. P. Jain will be referred to as the appellant and the Union of India as respondents.

On the contentions urged before us the questions that arise for our decision in these appeals are :

(1) What are the terms and conditions on which the deposits in question were made ;

(2)whether on those terms and conditions there has been a violation of s.4(1) of the Act by the appellant ; and

(3) whether the imposition of penalty under s. 23 (i)(a) of the Act is bad on the ground that the section is in contravention of Art. 14 and in consequence void.

It will be convenient to dispose of the last contention first, as it goes to the very root of the jurisdiction of the Director of Enforcement to proceed under the impugned section. Section 23 (1) of the Act is as follows :

"23(1) If any person contravences the provisions of section 4, section 5, section 9 or sub-section (2) of section 12 or of any rule, direction or order made thereunder, he shall—

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as

may be adjudged by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both."

Then there is s. 23-D which, omitting what is not material, runs as follows : -

"23-D(1) For the purpose of adjudging under clause (a) of sub-section (i) of section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity of being heard and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of the said section 23 :

Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the Court."

It will be seen that when there is a contravention of s.4(1), action with respect to it is to be taken in the first instance by the Director of Enforcement. He may either adjudge the matter himself in accordance with s. 23(1)(a), or he may send it on to a Court if he considers that a more servere penalty than he can impose is called for. Now the contention of the appellant is that when the case is transferred to a Court, it will be tried in

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accordance with the procedure prescribed by the Criminal Procedure Code, but that when the Director himself tries it, he will follow the procedure prescribed therefor under the Rules framed under the Act, and that when the law provides for the same offence being tried under two procedures, which are substantially different, and it is left to the discretion of an executive officer whether the trial should take place under the one or the other of them, there is clear discrimination, and Art. 14 is contravened. Therefore s. 23 (1) (a) must, it is argued, be struck down as unconstitutional and the imposition of fine on the appellant under that section set aside as illegal.

It is not disputed by the appellant that the subject-matter of the legislation, viz., Foreign Exchange, has features and problems peculiarly its own, and that it forms a class in itself. A law which prescribes a special procedure for investigation of breaches of foreign exchange regulation will therefore be not hit by Art. 14 as it is based on a classification which has a just and reasonable relation to the object of the legislation. The *vires* of s. 23 (1) (a) is accordingly not open to attack on the ground that it is governed by a procedure different from that prescribed by the Code of Criminal Procedure. That indeed is not controverted by the appellant. That being so, does it make any difference in the legal position that s. 23-D provides for transfer by the Director of Enforcement of cases which he can try, to the Court ? We have not here, as in *State of West Bengal* v. *Anwar Ali* (1) a law which confers on an officer an absolute discretion to send a case for trial either to a Court or to a Magistrate, empowered to try cases under a special procedure. Section 23-D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a Court, and that too only when he consider that a more severe

(1) [1952] S. C. R. 284.

punishment than what he is authorised to impose, should be awarded. In a Judicial system, in which there is a hierarchy of Courts or Tribunals, presided over by magistrates or officers belonging to different classes, and there is a devolution of powers among them graded according to their class, a provision such as s. 23-D is necessary for proper administration of justice. While on the one hand a serious offence should not go without being adequately punished by reason of cognizance thereof having been taken by an inferior authority, the accused should on the other hand have in such cases the benefit of a trial by a superior court. That is the principle underlying s. 349 of the Criminal Procedure Code, under which magistrates of the second and third class, are empowered to send the cases for trial to the District Magistrate or Sub-Divisional Magistrate, when they consider that a more severe punishment than they can inflict is called for. In our view the power conferred on the Director of Enforcement under s. 23-D to transfer cases to a Court is not unguided or arbitrary, and does not offend Art. 14 and s. 23 (1) (a) cannot be assailed as unconstitutional.

(1) Passing on to the question as to the terms on which the deposits standing to the credit of the appellant in the Deutsche Bank were made, though before the Director, and the Appellate Board, the truth of the settlements between the German firms, and the appellant was itself questioned by the respondents, before us it is not disputed that there were such settlements or that the deposits were made pursuant thereto. The whole of the controversy before us is limited to the question whether the deposits were unconditional and absolute or whether they were made subject to the condition, that the appellant could operate on them only for payment of the price of new machineries to be purchased from those German firms.

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Before entering on a discussion of the materials bearing on this point, we may deal shortly with a question which was agitated before the Director of Enforcement and the Appellate Board. That is whether the provisions of the Evidence Act are applicable to the proceedings under the Act. Rule 3 (5) of the Rules framed under the Act provides that in taking evidence, "the Director shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (I of 1872)". Section 24-A of the Act provides that the court shall presume the genuineness and the truth of the contents of certain documents tendered in evidence by the prosecution unless the contrary is proved. The Director of Enforcement held that by reason of the above provisions the Evidence Act had no application to proceedings under the Act. The Appellate Board came to a different conclusion. It held that s. 24-A had application only to proceeding in Court and that Rules 3 (5) had not the effect of rendering admissible evidence which was irrelevant or inadmissible under the Evidence Act. In our opinion this is the correct view to take of the scope of s. 24-A and Rule 3 (5) and that was conceded before us by the learned Attorney General appearing for the respondents.

For a satisfactory determination of the question as to the terms on which the deposits in account No. 50180 were made, it is necessary to narrate briefly the history and nature of the disputes, which form the subject-matter of the settlements. They have their origin in four contracts entered into with four German firms, two of them by the Rohtas and the other two by the New Central Jute Mills Ltd. Taking the first of them, some time prior to 1953 the Rohtas had placed an order with a German firm called Messrs. Voith & Company for the supply of three paper Machines. The shipment of these machines was

delayed beyond the time stipulated and moreover when they were supplied their production was found to be far below what had been guaranteed under the agreement. The Rohtas claimed compensation from M/s. Voith & Company on both these accounts and after some correspondence between them a representative of the German firm Mr. Zimmermann came over to India to make an enquiry on the spot, and as a result of the discussion which he had with the Rohtas he recommended on February 21, 1957 that a sum of £ 17,900/- might be paid by the German firm as compensation for delay in shipment. He however declined to admit the claim made by the Rohtas on account of the deficiency in the output of the machines. In accordance with this recommendation Messrs. Voith & Co. remitted on March 15, 1958, German Marks equivalent to the sum of £ 17,900/- to the Deutsche Bank to be credited in the name of the appellant and it was so credited on March 20, 1958. The appellant was in due course informed of the deposit, but on May 14, 1958, he wrote to M/s. Voith & Co. that he was not prepared to accept the amount in full satisfaction as no compensation was paid for deficiency in output. Thus the dispute was still unsettled, when the appellant left for Germany.

Coming next to the second contract, some time in 1951 the Rohtas had purchased from M/s. Escher Wyss another firm in West Germany a Yankee Paper-making Machine. As soon as it was installed it was discovered that some of its parts were defective and that its output was also below what was guaranteed. On December 17, 1953, the appellant brought these defects to the notice of the German firm and asked them to substitute good and suitable parts in the place of the unusable old ones. On this a protracted correspondence followed but as the machines could not be worked without replacement of the defective parts, the Rohtas could

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not wait until a settlement was reached and so purchased the requisite parts from another German firm called O'Dorries and made a demand on M/s. Escher Wyss & Company for compensation. A representative of the firm Mr. Staudenmaier came over to India some time in 1956 to investigate the matter and after making a local inspection he submitted proposals for remodelling the machines. On June 17, 1957, the Rohtas wrote to the German firm that they were not agreeable to these proposals and requested them "to have the claims settled as put forward by us in our previous letters". Thus the claim under this contract was also pending settlement at the material period.

The facts relating to the third and fourth contracts concerned in these disputes are that the New Central Jute Mills Ltd. had decided to instal at Varanasi a Gas and Synthesis Ammonia Plant for the manufacture of Chemicals and Fertilisers and placed orders for the machineries and parts with two German firms M/s. Friedrich Udhe and M/s. Pintsch Bamag. The case of the appellant is that many of the equipments which were supplied by the two firms were not in accordance with the specifications, that the pipe lines were not properly fabricated and were untailored and that there was also shortage in the supplies made by M/s. Pintsch Bamag. The New Central Jute Mills Co. claimed compensation for the defective supplies as aforesaid from the German firms, and negotiations for settlement of these claims were also pending at the relevant dates.

Another factor forming the background for the settlements must now be mentioned. At about this time the appellant had come to a decision to instal a new Paper Plant at Dalmianagar and a new Ammonium Chloride Plant at Varanasi.

To carry out those projects it was necessary to secure the requisite foreign exchange and for that the permission of the Government of India had to be obtained. Accordingly the appellant wrote on May 26, 1958, to the Ministry of Commerce & Industries and again on June 5, 1958, to the Ministers for Industries and for Finance settling out his proposals for expensations and desiring to know the amounts of foreign exchange which could be made available for these projects. In his reply to the appellant dated June 9, 1958, the Minister for Industries stated: "As you know under the present acute foreign exchange position, no earlier payments before production are permitted .... Also export earnings from the products of a particular plant lay only be allowed to be used for payments for that very plant and nor for the payment of Import and other capital goods and equipment".

Thus the position when the appellant left for the Continent was that he had outstanding claims against four German firms and negotiations for their settlement were pending, and that he had on hand schemes for expansion of industries at Dalmianagar and Varanasi which could be put through only if the requisite machinery could be imported but that the Government of India would not permit imports which involved payments of price at the time of delivery of goods.

The appellant left India for Europe on June 30, 1958. In the following months he contacted the respresentative of the four German firms mentioned above and all the disputes were settled. According to the appellant, the terms of the settlement which were same in all the four contracts were as follows: The amount payable to the Indian Companies as compensation was fixed. It was to be deposited by the German firms to the credit of the

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appellant in the Deutsche Bank. The Indian Companies were to obtain import licences from the Government of India and place orders with the respective firms for the supply of new machineries. The amounts in credit in the Deutsche Bank were to be supplied *pro tanto* for the payment of the price of these machines to the respective firms. The appellant was not to operate on this account except for the purpose of making payments to the German in the manner aforesaid.

It is now necessary to refer to the evidence bearing on the settlements, because, as already stated, while the respondents admit that there were settlements with the German firms and deposits were made pursuant thereto, they do not admit that the deposits were made subject to conditions, as stated by the appellant. It will be remembered that on March 20, 1958, M/s. Voith & Company had deposited with Deutsche Bank DM. 210.081,31 Marks being the equivalent of £ 17,900/- as compensation for delayed shipment, which was the only portion of the claim admitted by them, in full settlement of all the claims of the Rohtas: Now pursuant to the settlement reached with the appellant, they deposited on August 1, 1958, a further sum of DM. 201,67,659 Marks in the name of the appellant in the Deutsche Bank. The terms of the settlement appear in two letters written by M/s. Voith & Company on August 1, 1958, one to the Rohtas and the other to the Deutsche Bank. In the letter addressed to the Rohtas M/s. Voith and Company say "Mr. Jain informed us of your plans for the future such as the establishment of a new complete pulp and paper making unit in Assam, and in particular, of your immediate desire to increase the production of your Board Machine P.M. I in Dalmianagar. For this re-construction project we have already submitted an offer.....Regarding the remodelling of your

P.M. I., we understand that you have already obtained an industrial licence and that you expect to get an import licence for the equipment offered by us. An advance payment of 20% of the ex-works price is, however, for this comparatively small order a pre-condition for our credit insurance. In view of Mr. Jain's assurance that we will enjoy preference for the supply of our machinery in the event that an import licence for the new paper mill will eventually be obtained, and in order to make the early placing of your order for the reconstruction of P.M. I possible, we have finally agreed to meet your claims for the paper machines already supplied to the extent of a total sum of DM. 412,058 including the amount already placed with the Deutsche Bank, Dusseldorf, in March, representing 20% of the price quoted in our offer of January 15th, 1958. We are, therefore, remitting the balance to the Deutsche Bank as per letters addressed to them translation of which we attach hereto. This settlement of your claims is considered on the definite understanding that the total amount can only be utilised by you to make to us the initial payment of 20% only and when the import licence for the reconstruction of P.M.I. is received. The Bank is, therefore, instructed to hold both remittances made by us at your disposal for this purpose only." On the same day M/s. Voith & Company advised the Deutsche Bank that they had remitted a further sum of DM. 201,676.59 to it in addition to the previous remittance of DM. 210,381.31 and then go on to say "the two amounts are paid in final settlement of the claims of Messrs. Rohtas Industries Limited against us in connection with the supply of 3 paper machines. We repeat that the said amounts may be utilised by Mr. S. P. Jain, Chairman of Messrs. Rohtas Industries Limited, only for the purpose of asking initial payments to us against further purchase of

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machinery, which payments will be made on final approval of our tender after receipt of the Indian import licence. For other's sake please confirm receipt of these instructions to us."

It should be mentioned that under the Export Regulations in force in Germany no goods manufactured therein could be exported unless 20% price quoted were paid for before the goods left the country. The effect of the arrangement come to between M/s Voith & Company and the appellant was that the firm would be free to export goods to the Rohtas on payment to it of 20% of the price out of the funds standing to the credit of the appellant in the Deutsche Bank, and it may be gathered that the total amount of compensation had relation to the 20 per cent of the price of the new machinery to be purchased.

The settlement made in respect of the three other contracts was also on the same lines. M/s. Escher Wyss & Company settled the claim of the Rohtas on July 7, 1958, and wrote to the appellant as follows: "We are pleased that a solution has been arrived in the course of the talks we had with you to settle your long outstanding claim. We have declared to pay the agreed amount of DM. 205.000, as finally settled immediately for your satisfaction to Deutsche Bank to be held by them for your utilising in purchase of machinery by Messrs. Rohtas Industries Ltd., Dalmianagar from us after you have finally decided on the several plans discussed here and obtained import licences from your Government. We have pointed out to you that we attach great value to entertaining good and friendly relations and to do further business with you. We shall thank you also to let us have a confirmation that all claims against our firm in connection with our delivery of Yankee Paper Machine are now definitely settled." On the same

day M/s. Escher Wyss & Company transferred a sum of DM. 205.000 to the Deutsche Bank communicating to them a copy of the letter addressed to the appellant containing the terms of the deposit with them. The amount was duly credited to the account of the appellant on July 11, 1958.

On August 11, 1958, a settlement was reached between the appellant and M/s. Friedrich Udhe & Company, who, then addressed the following letters to the Deutsche Bank: "We are releasing a sum of DM. 472,866,03 as derived expenses DM. 465.633,63 and interests payment DN. 7.252.40 to meet claims of Mr. S. P. Jain, President, New Central Jute Mills, Calcutta. We request you to hold this amount in the name of Mr. S. P. Jain but it shall not be payable to him and is to be utilised only for payment to us against purchase of expansion machinery by Sahu Chemicals—Proprietor New Central Jute Mills—after they secure licence and DM transfer guarantee from their Government." The amount was actually credited in the Deutsche Bank in the name of the appellant on August 15, 1958. Confirming this arrangement M/s. Friedrich Udhe wrote to the appellant on August 18, 1958, as follows: "As a very special case, to promote our pleasant business relations, we have, only in view of your assurance for expansion order, released a sum of DM. 472,886,03 calculated as aforesaid, against our engineering fees and expenses on your existing supply, which must be utilised, however, only towards your meeting payments to us against order and shipments which are essential for our credit insurance. We have made over this amount to Deutsche Bank A. C. with instructions to hold the same for payment aforesaid after your Government grants you licence and DM transfer guarantee is established as may be acceptable to competent German authorities."

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On September 21, 1958, there was a settlement of the dispute with M/s. Pintsch-Bamag under which the latter agreed to pay 600.000 Marks in full satisfaction of the claim on the same terms as in the other contracts. On the same day M/s Pintsch Bamag wrote the following letter to the Deutsche Bank. "We hereby notify you that we are placing DM. 600.000 with you in payment of excess price claimed by Mr. S. P. Jain, President of New Central Jute Mills Co. Ltd., we further advise that the amount is to be held by you in the name of Mr. S. P. Jain, but it would not be available to him except for making payment to us against extension machinery to be ordered with us by Sahu Chemicals Proprietors New Central Jute Mills Co., on their obtaining licence from their Government and approval of payment conditions." On September 24, 1958, M/s. Pintsch Bamag wrote to the appellant that they had deposited the amount settled in the Deutsche Bank and added "we must however point out expressly that but for the assurance of extension order to us, it would not have been possible for us to meet your claims. This amount will be available therefore only for making payment to us against extension machinery and the bank has been specifically advised to hold the same for you only in accordance therewith."

The evidence above referred to clearly establishes that the deposits in account No. 50180, were made subject to the conditions stated by the appellant, and there is intrinsic evidence in the entries themselves in this account which support this contention. Thus the entry relating to the receipt of deposit from Messrs. Friedrich Udhe speaks of "derived expenses" and "interest' "; and those relating to the receipt from Messrs. Pintsch Bamag read as "payment of excess price and "in respect of excess price" These entries have reference to the nature of the claime on account of which the deposit are made, and would be wholly out of place in

the case of ordinary deposits. On the other hand, they would be quite explicable if made under special directions from the depositors.

But the matter does not rest there. While the appeal was pending before the Appellate Board both the parties agreed that further information should be elicited from the Bank as to several matters concerning the deposits, and on August 21, 1959, a questionnaire agreed to by counsel on either sides was sent by the appellant to the Bank for its reply. Therein the Bank was asked to furnish particulars regarding the heading of account No. 50180 the certified copy of the relevant entries therein, the certified copy of page—1 of the letter dated September 25, 1958 from the Bank to Mr. Jain, and the communications which passed between the Bank and Mr. Jain in respect of the six items of deposit appearing in the account. Among the questions sent to the Bank were the following :—

(a) Please state whether the amounts referred to were deposited with you and were held by you on the conditions mentioned in the letters, copies whereof are enclosed herewith.

(b) What is meant by the expression "DM" account with limited convertibility" ? What does it signify in relation to the deposits taken by you under the conditions mentioned in those letters ? Was the acceptance of these conditional credits by the Bank confirmed to the persons who deposited these amounts ?

To this the Bank sent a reply dated September 1, 1959, to the Chairman of the Board, but addressed to the appellant. Therein it give particulars of the six items of deposit as contained in the letter

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dated September 25, 1958. Then there are the following statement which are material ;

> "The deposited amounts are being held by us subject to the conditions given in the enclosed certified copies of the relevant letters from the German parties concerned ..... As is evident from the stipulations mentioned above, you are not entitled to withdraw the amounts specified or parts thereof, without fulfilling the terms and conditions stipulated in the said letters. The acceptance of these conditions, has, of course, been confirmed to the firms concerned and we are, therefore, bound to observe the conditions vis-a-vis those firms, too, before we possibly could carry out any instructions from your part to dispose of the funds. It need not be emphasized that these conditions applied during all the time the amounts have been maintained in this account where, indeed, they continue to be kept on the same basis."

As the letter of the Bank did not contain replies to all the questions raised in the letter of August 21, 1959, the Appellate Board directed that it should be asked to send a further reply with respect to all the questions. On September 17, 1959 the appellant accordingly wrote another letter to the Bank asking for a reply specifically to all the questions, to which the Bank again replied on September 23, 1959. Therein they stated that the heading of the account was "Mr. Shanti Prasad Jain, Account No. 50180" that the account consisted in its entirety of six items of credit totalling DM. 1.689. 429,50 and that there were no further credits or debits in the account. The reply then proceeds on to state : "The restrictions prevailing against the

disposal of the amounts as imposed upon us by the firms who deposited the money are—as is customary in such cases—not expressed or referred to in the heading of the account. Such restrictions are marked to the account concerned by means of internal instructions. That is what has been done in this case too. We give below the exact copy of page 1 of our letter dated 25th September, 1958 except for the portion wherein we communicated to you some particulars of a strictly confidential nature concerning the affairs of a third party, some client of ours. This information we cannot disclose to any other party, as you evidently went us to do..... we, however, state that this omitted part page-1 does not in any way relate either to the account of the six items of deposit or to you". The copies of the communications addressed by the German firms to the Bank were enclosed.

It is not disputed for the respondents that if the statements contained in the replies given by the Bank are to be accepted at their face value then the case of the appellant must be held to be established beyond all reasonable doubt. But they contend that there are circumstances which give rise to a suspicion that the above statements might have been 'inspired' by the appellant. They argue that the letter of the Bank dated September 25, 1958, shows that what we have on record is only the second page of the account of the appellant in the Bank and that shows that this is only a continuation of a previou account which has not been produced. It is also pointed out that in the letter which the Bank sent to the Appellate Board on September 23, 1959, it was stated that the annual statement of the account ending December 31, 1958, had been sent to the appellant but that again has not been produced. All this, it is said, throws a cloud of suspicion on the truth of the arrangement as set up by the appellant.

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We are not impressed by this contention. There is no basis the evidence for the supposition that the account as produced is not the whole of the dealing of the appellant with the Bank. The Bank has categorically stated that the six items of credit were all the transactions standing in the name of the appellant and there is no reason to discredit it. Nor is there any force in the contention that the annual statement ending December 31, 1958, had not been produced by the appellant, because the total amount standing to the credit of the appellant on that date as stated in the letter of the Bank, is precisely what is shown in the account at page-2. It is, therefore, clear that there were no dealings between the Bank and the appellant, other than those we are concerned with. Nor is there any [illegible] in the complaint that it is only the second page of the account that has been produced and the first page suppressed. The Bank has made it clear that the first page only contains some confidential communications relating to a customer, and that there are no entries relating to the deposits of the appellant in that page.

It is argued for the respondents that it is unusual for a Bank to take deposits on the terms stated by the appellant, and that furnishes cogent reason for rejecting the settlements pleaded by him as an afterthought. It should be mentioned that while the matter was pending before the Appellate Board, the respondents obtained the opinions of German Banks and a German Lawyer as to whether deposits on the terms mentioned by the appellant were usual and what the incidence of such deposits was. Among the opinions received was one from Sal Oppanheim Koein in which it is stated "A German banking practice in export trade with India—as described in your above letter—is not known to us." This is strongly relied on for the

respondents, but then it is further stated in that opinion : "We think it possible however, that in individual cases, agreements of this kind could be arranged between the two contracting partners..... If the contracting parties reach such an agreement, and if the customer instructs his bankers accordingly, the bankers, will, as a matter of usual business conduct inform the third party beneficiary accordingly of the instructions and all relevant modalities which they have received.....If it has been ascertained that the Indian beneficiary has not fulfilled or cannot fulfil the stipulations agreed upon, he forfeits his claims to conditional payment and the bank can then, on principle, refund the customer of the secured amount. As in the aforementioned case, proceedings here depend on the terms stipulated in individual cases, between the customer and his bankers."

We have then the opinion of the Dresdner Bank on the practice of the German Banks. Therein after observing that they would as a matter of principle avoid handling transactions of the sort referred to lest they should get involved in dispute between the depositor and the payee, the Bank proceeds on to state that "we will handle such business only if the depositor and the payee are known to us as well reputed businessmen" and that when a Blocked Account is opened at the depositor's request in the name of the payee, the responsibility of the Bank with reference to the amount "vis-a-vis the depositor to release the deposited money to the payee is only upon receipt of a special authorization to this effect from the dapositor" and that "on the other hand Bank, may refund this amount to the depositor only after expiration of the term stipulated by the depositor or, with the payee's consent, before expiration of the stipulated term." This is relied on behalf of the appellant.

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Another Bank, Messrs. Schacht & Company stated in their opinion that a German Bank when handling deposits would follow exclusively the instructions given by the depositor and that when payments have to be made out of the deposits on the fulfilment of certain conditions the Bank would "effect the payment only after fulfilment of these conditions given by the depositor" and that conditional deposits would "as a rule be limited in time so that after expiration of this limit amounts which have not been paid out for reasons of non-utilization or non-fulfilment of the conditions will be at the depositor's free disposal."

One Mr. J. Bergermann a lawyer of Bonn states in his opinion that "it is common practice to accept deposits under conditions" and that in case of such deposits the payee "could not enforce payments if the conditions are not fulfilled."

There was some argument before us as to who will be entitled to the amounts in deposit in case the conditions agreed to between the parties are not fulfilled. One view is that the amounts would then revert back to the depositors. The German lawyer could not say on this question more than this that "if the conditions are not fulfilled the legal situation is doubtfull." The correct position possibly is that if the conditions become impossible of performance, the contract becomes void on the ground of frustration, and the parties are thrown back on their rights prior to the settlement. It is however unnecessary to enter into a discussion of this question, as all that we now concerned with is to see whether deposits of the kind set up by the appellant are so unusual, as to cast a suspicion on their truth. The evidence on record shows that such deposits are well known, though not very common in German banking practice, and there are therefore no sufficient grounds for discrediting the

statements of the Bank, as to the terms on which the deposits were made.

But the respondents argue that stripped of all its embellishments, the substance of the agreements between the appellant and the German firms, was that the latter were to pay compensation to the Indian Companies, not in cash, but in kind, by delivery of goods manufactured by them against new orders, that that object could have been easily achieved by the Indian Companies and German firms entering into a simple contract to that effect, without complicating the matter by associating the Deutsche Bank in the transaction, and that there is therefore ground for suspecting that the present version of the terms of the arrangement is an after thought so conceived as to fit in with deposits which must have been made previously in the normal course.

We are unable to accept this argument. The Deutsche Bank occupies, it should be marked, a position analogous to the State Bank in this country, and it is a Bank of great international repute, and status. Its statements as regards the conditions which the deposits were made are not to be lightly brushed aside, and no grounds have been shown as to why they should not be accepted. On the other hand, there is on record unimpeachable evidence which fully supports them. On March 15, 1958, when M/s. Voith & Company remitted to the Bank the sum equivalent to £ 17,900/- to the credit of the appellant, they gave the following instructions to the Bank :

> "The said amount should be held in the name of Mr. S. P. Jain, Chairman of Messrs. Rohtas Industries Ltd., who will arrive in Germany in the course of the next month. As soon as we have arrived on a final understanding with Mr. S. P. Jain would be authorised to

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utilise the above amount for payment only of the purchase of further machinery by Messrs. Rohtas Industries Limited from us. Please be advised that the amount may not be used otherwise by Mr. S. P. Jain or Messrs. Rohtas Industries Limited."

Thus the deposit was conditional, and it was to be repaid to the depositors in payment of the price of goods, to be thereafter ordered by, and supplied to the Rohtas. The importance of this lies in this that it is the first of the six credits in account No. 50180, which is now under scrutiny, and it was long prior to the settlement reached between the parties, which was on August 1, 1958. This completely shatters the theory that the statement of the Bank might have been 'inspired' as suggested for the respondents. The fact would appear to be that when Mr. Zimmermann came over to India in February 1957 for settling the claim of the Rohtas for compensation, he must have been apprised of the intention of the appellant to expand the industries, and as practical businessmen, he, and the appellant must have evolve the scheme of conditional deposits, to be applied in payment of future goods to be ordered by the Indian Companies. Such a scheme would be of advantage to M/s. Voith & Company because that would insure them new business, and they could make up for it in fixing the price. The Indian Companies would under this arrangement be in a position to overcome the difficulties of getting foreign exchange, and it would be easy to get import licence from the Government of India. And as for depositing the amounts in the Bank, that would not merely lend assurance to the Indian Companies, but also enable the parties to comply with the German regulations, as to payment of 20 per cent of the price of manufactured goods, before they are exported. This precisely is the sort of

arrangement which businessmen might be expected to conclude in the situation in which the parties were placed.

It should be noted that when the proposal of M/s. Voith & Company and the deposits made by them were communicated to the appellant, he raised no objection in his reply dated May 14, 1958, to the conditions under which the deposit was made. He declined to accept it only because no compensation was awarded for deficiency in output, and it is this claim which was also settled on August 1, 1958, when a second deposit was made by M/s. Voith & Company. The scheme evolved by the appellant and M/s. Voith & Company set the pattern for settlement with the other three firms, and that is how all the four contracts came to be settled on the same terms. On the evidence above referred to, we are satisfied that the deposits in account No. 50180 were made by the German firms on the conditions stated by the appellant. We have reached this conclusion on a consideration of the evidence on record, without reference to any abstract doctrine as to burden of proof. But it is only right to observe, that the proceedings under the Act are quasi-criminal in character and it is the duty of the respondents as prosecutor to make out beyond all reasonable doubt that there has been a violation of the law. Vide the decision in *re. H. P. C. Productions Ltd.* (1) cited for the appellant. The learned Attorney General did not contest this position.

(2) That brings us on to the next question which is whether on our finding as to the nature of the deposits the appellant has contravened s. 4(1) of the Act. The appellate Board has held that he has, for the reason that under the law the true relationship between a Banker and a customer is that of a debtor and creditor and that it makes no difference in that relationship that the deposits were conditional. The respondents maintain that this

(1) [1962] 2 W. L. R. 51.

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is the correct view to take of the relationship between the appellant and the Deutsche Bank with reference to account No. 50180 and that he must be held to have lent out the monies deposited in that account to the Bank. The contention of the appellant on the other hand is threefold. Firstly, it is said, that on the terms of the deposits, he has no present right to the amounts standing to his credit in the account, that he would become entitled to them only on the happening of certain contingencies, and that until then there was no debt due to him and that therefore there could be no lending in respect of that debt. Secondly, it is contended, that when the German firms transferred the amounts mentioned in account No. 50180 to the Deutsche Bank that was not by way of deposit with it as a bank but by way of entrustment for safe custody to be paid over to the person who might become entitled to them in terms of the agreement and that the monies deposited under those agreements were not monies lent to the Bank. And thirdly, it is argued, that on the terms on which the deposits were made in the Bank, the position of the Banker was not that of a debtor but that of a trustee, the appellant being the beneficiary entitled to the amounts on fulfilment of the conditions of which the Bank had been apprised. We must now examine these contentions.

Now the law is well settled that when moneys are deposited in a Bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. And it makes no difference in the jural relationship whether the deposits were made by the customer himself, or

by some other persons, provided the customer accepted them. There might be special arrangement under which a Banker might be constituted a trustee, but apart from such an arrangement, his position qua Banker is that of a debtor, and not trustee. The law was stated in those terms in the old and well-known decision of the House of Lords in *Foley* v. *Hill* (1), and that has never been questioned.

If the point under consideration fell to be decided solely on the basis of account No. 50180 in the Deutsche Bank, there could be no answer to the contention of the respondents that the appellant was a creditor in respect of the amounts deposited in that account he must be held to have advanced them as loan to the Bank. It needs hardly to be stated that it makes no difference in the legal position that the amounts shown in the account were not deposited by the appellant but by the German firms as he had accepted them. But it is contended for the appellant that the acceptance of the deposits by him was under special agreements entered into with the German firms, which gave him no present right to the amounts, that though the account stands in his name he has no right to operate on it, that before he can do so he must obtain licence from the Government of India to import the goods, then place an order with the respective German firms for supply of new machineries and parts and then only draw on the account and that even then it can only be for the payment of the price payable to those firms for the supply of new goods. The right of the appellant to the amounts in deposit is, it is argued, contingent on the happening of these events and that until then there was no debt due to him and s. 4(1) had no application.

(1) [1848] 11 H.L.C. 28-9 E.R. 1002.

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In our opinion this contention is well founded. A contingent debt is strictly speaking not a debt at all. In its ordinary as well as its legal sense, a debt is a sum of money payable under an existing obligation. It may be payable forthwith, *solvendum in presenti*, then it is a debt "due"; or it may be payable at a future date, *solvendum futuro*; then it is a debt "accuring". But in either case it is a debt. But a contingent debt has no present existence, because it is payable only when the contingency happens, and exhypothesi that may or may not happen.

The question whether a contingent debt is a debt as understood in law has often come up for consideration before English Court in connection with garnishee proceedings taken by judgment creditors to attach it as a debt. The decision has invariably been that they are not debts "accruing" and could not be attached. In *Webb* v. *Stenton* (1), the point for decision was whether an amount payable by a trustee to the beneficiary *in futuro* could attached by a judgment creditor as a debt "owing or accruing" and it was answered in the negative. Discussing the distinction between an existing debt and a contingent debt, Lord Lindley observed: "I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable but a debt which is represented by an existing obligation.... The result seems to me to be this: you may attach all debts, whether equitable or legal; but only debts can be attached; and moneys which may or may not become payable

(1) (1883) 11 Q.B.D. 518.

from a trustee to his *cestui que* trust are not debts."

"The meaning of 'accruing debt' observed Lord Black burn in Tapp v. Jones(1), "is *debitum in presenti solvandum in futuro*, but it goes no further, and it does not comprise anything which may be a debt, however, probable or however soon it may be a debt."

The law is thus well settled that a contingent debt is no debt until the contingency happens, and as the right of the appellant to the amounts in deposit in his name in the Deutsche Bank arises only on the happening of the contingencies already mentioned, it follows that there is no debt due to him in *presenti* and there could be no loan thereof within s. 4(1) of the Act.

We should add that our conclusion that there is no present debt owing to the appellant is based on the fact that the contingency on which his title to the amounts in deposit will arise, such as the grant of import licence by the Government is one the fulfilment of which is wholly beyond his control. Different consideration might arise when the contingency is one which can be fulfilled by the very person, who is to take under it.

It is further contended on behalf of the appellant that the payments made by the German firm in account No. 50180 cannot be regarded as deposits made by or on behalf of a customer in the normal course of banking business and that in consequence the principle of law that when a banker receives monies from a customer he becomes his debtor in respect of those moneys has no application. There is considerable force in this argument. It is well know that Bank engage, in addition to their normal work as Bankers, in several

(1) (1875) L.R. 10 Q.B. 591.

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activities, which are not associated with, and do not involve any elements of banking. In Halsbury's Laws of England, Third Edition, Vol. 2, Note (g) it is stated "Numerous other functions are undertaken at the present day by banks, such as the payment of domiciled bills, custody of Valuables, discounting bills, executor and trustee business or acting in relation to stock exchange transactions, and banks have functions under certain financial legislation, e. g. by delegation under the Exchange Control Act, 1947, or as authorised dealers under that Act and subordinate legislation. These functions are not strictly banking business."

In Paget's Law of Banking, Sixth Edition, p. 43, it is stated that "superimposed on this general relationship of banker to customer there may be special relationships arising from particular circumstances and requirements" and that the express terms of those relationships overrides the implied terms arising from the general relationship. It was argued for the respondents, that this statement of the law could have, as suggested by the word 'superimposed', reference only to special contracts entered into with customers, and that involves the admission that the appellant is a customer. Normally no doubt Banks would undertake these works for their customers, but there is nothing to prevent them from doing so for others as well. In Corpus Juris Secundum, Vol. 9, it is stated "The intention of the parties controls the character of the relation between Bank and depositor, which may be that of bailee and bailor, but is ordinarily that of debtor and creditor" (Page 546). And it is pointed out when money is delivered to a Bank "for application to a particular specific purpose" it is not a general deposit creating the relationship of debtor and creditor, but a "specific deposit" creating the relationship of bailee and bailor or trustee and beneficiary. Vide p. 570.

Therefore the fact that money has been put in a Bank does not necessarily import that it is a deposit in the ordinary course of banking. We have to examine the substance of it to see whether it is in fact so or not. It is unnecessary for the purpose of this case to elaborately examine what banking business, properly so called, consists in. It is summed up as follows in Halsbury's Laws of England. Third-Edition Vol. 2 p. 150 Para 277: "the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer." Applying these tests, can it be said that account No. 50180 is truly a banking account? Did the appellant open the account in the Bank with a view to deposit his moneys from time to time, and to operate on it by drawing cheques? The question admits of only one answer, and that is in the negative. The account was opened in the Bank with a view to effectuate the arrangement between the German firms, and the appellant, which was that the amounts were to be repaid to the depositors a price of new machineries to be supplied by them and the appellant was not to operate on it except for that purpose. The Bank was informed of this arrangement and took the deposits with notice of the rights of the parties thereunder. Under the circumstances the Bank has really only custody of the money as if it were a stakeholder, with a liability to hand it over to the persons who would become entitled to it under the arrangement. On these facts it cannot be said that there is a deposit in a commercial sense of the word. It would be more correct to say that the Bank holds the money under a special arrangement which constitutes it not a debtor, but a sort of a stakeholder.

It was also argued on behalf of the appellant that when Deutsche Bank received the amounts

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from the German firms on the terms mentioned by them, the relationship that was constituted between it and the appellant was one of trustee and beneficiary and not that of debtor and creditor and that therefore s. 4(1) was out of the way. We are unable to agree with this contention. Under the terms of the arrangement between the German firms and the appellant the deposits were to stand in the name of the appellant and so they never vested in the Bank. It is true that the Bank would have the right to use the funds but that is not because they belong to it but because it must be taken to be the understanding of the parties, when they entrusted the moneys to it pending there repayment to the German firms in terms of the agreement, that the Bank was to have the right to use them until a demand is made for their return. Relience was placed for the appellant on the decision of the Privy Council in *Official Assisgree* v. *Bhat* (1), where it was held that a trust fund which was authorised to be invested in business could be traced, on the principle laid down in *re. Hallett's Estate* (2), into the assets of the business. But in that case it was admitted that the deposit was a Trust and the point for decision was only whether the undoubted rights of the beneficiary to follow that amount was lost by the authority given to the trustee to use it in his business. But here the question is whether the Bank is a trustee and the fact that they are entitled to use the funds does not clothe them with the character of a trustee. If that were not so every banker must be a trustee which clearly is not the law. Then again who are the beneficiaries under the trust, the German firms or the appellant? The fact is that the arrangement under which the monies were deposited in the Bank is *sui generis* and its position in truth is that of a bailee, not a debtor or trustee. It is unnecessary to pursue the discussion further

(1) (1933) L. R. 60 I. A. 203.
(2) (1890) 13 Ch. D. 696.

in view of our decision that the relationship between the Bank and the appellant is not that of debtor and creditor.

It remains to deal with the contention urged on behalf of the appellant that even if it be held that the appellant had made the deposits in question in the Deutsche Bank as a customer, there had been no contravention of s. 4 (1) of the Act as the prohibition enacted therein is only against lending of foreign exchange by a person who is resident in India and that at the time of the deposits in question the appellant was not in India but in Germany. There is no substance in this contention. The intention of the Legislature was plainly to prohibit all transactions in foreign exchange by persons who are residents of India whether such transactions take place during their actual residence in India or during their sojourn in foreign parts. To hold that the prohibition under the Act does not extent to acts done outside India by residents of India must inevitably lead to large-scale evasion of the Act resulting in its object being defeated. A construction which leads to such a result must be avoided. The expression "resident in India" is clearly used in the sense "resident of India".

It may be mentioned that the words used in s. 1(1) of the corresponding British Statute Exchange Control Act, 1947 are "no person resident in the United Kingdom, other than an authorised dealer, shall, outside the United Kingdom, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer". It will be seen that the language in the Indian Statute is in identical terms. In *re. H. P. C. Production Ltd.* (1) cited on behalf of the appellant the question was whether certain transactions entered into by a resident of England

(1) [1962] 2 W.L.R. 51.

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but outside England were hit by s. 1 and the basis of the decision is that they would be if the other conditions were satisfied. We have no hesitation in holding that if the appellant did in fact land monies to the Deutsche Bank while he was in Germany he would, have contravened s. 4 (1) of the Act.

In view of our conclusion that the appellant has only a contingent right to the amounts standing in credit in account No. 50180 and that the deposits were made in the Bank not in the course of normal banking business but under a special arrangement, it must be held that there was no lending of those amounts by the appellant to the Bank within s. 4(1) of the Act and the order of the Appellate Board imposing a fine of Rs. 5 lakhs on him under s. 23(1)(a) must be held to be illegal and set aside.

In the result Appeal No. 319 of 1961 is allowed and Appeal No. 320 of 1961 dismissed with costs, one hearing fee.