

(2005) 05 DEL CK 0250
In the Delhi High Court
Case No : CA (M) No. 165 of 2002

CRB Capital Markets Ltd.

APPELLANT

Vs

Smt. Bimla Devi Sahney (deceased thru. LRs) and Another

RESPONDENT

Date of Decision : 31-05-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 19, Order 8 Rule 6, Order 8 Rule 6(2)
Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1956 — Section 171, 229, 446(2)
Presidency Towns Insolvency Act, 1909 — Section 47

Citation : (2005) 4 BC 53 : (2006) 132 CompCas 788 : (2005) 83 DRJ 126 : (2006) 71 SCL 460

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : N.A. Abraham, O.L, for the Appellant; Mahinder Singh, for the Respondent

Judgement

A.K. Sikri, J.—M/s. CRB Capital Markets Ltd. (hereinafter referred to as the "Company") is in provisional liquidation. At the instance of Reserve Bank of India, which filed CP No. 191/97, order dated 22nd May 1997 was passed admitting the petition and appointing the Official Liquidator as the Provisional Liquidator with direction to take charge of the assets and records of the company. This application is filed by the company through the O.L. u/s 446(2) of the Companies Act (in short the "Act") for recovery of Rs. 10 lakhs plus interest thereon @ 18% per annum from 15th July 1997 till realisation as well as administrative expenses @ 1%. Averments made in the application are that the respondents entered into a Lease Deed and Maintenance Agreement with the company for the premises located at 1st Floor, C-643, New Friends Colony, New Delhi and paid Rs. 10 lakhs as security deposit. These premises were vacated by the company on 15th July 1997 and rent for June and July 1997 was also paid. However, at the tie of vacation of the premises aforesaid security deposit of Rs. 10 lakhs was not refunded by the respondents to the company. O.L. sent notice

of demand dated 11th April 2000 calling upon the respondents to remit this amount to the O.L. within 15 days from the receipt of the demand notice with interest. The respondents replied to this notice and stated that they had kept a sum of Rs. 5 lakhs with the company as fixed deposit by means of four FDRs, which was to carry interest @ 14% per annum and after adjusting the said amount and interest due thereon from Rs. 10 lakhs (security deposit), it is the respondent who had to still receive a sum of Rs. 32,952.04/-.

2. According to the O.L., the respondents are not entitled to the adjustment of the security deposit in the aforesaid manner and, Therefore, this application is filed seeking an order against the respondents for payment of this amount with interest.

3. Reply filed by the respondents to the present application is on the same lines. It may be mentioned, at this stage, that respondent No. 1, Smt. Bimla Devi Sahni died during the pendency of these proceedings and her legal heirs have been brought on record. Apart from stating that legal heirs had not inherited any assets of late Smt. Bimla Devi Sahni, in respect of transaction in question it is mentioned that the premises were let out by Smt. Bimla Devi Sahni and Sh. Shiv Lal Sahni vide lease deed date 25th February 1995 at a rent of Rs. 15,000/- per month (Rs.9,750/- as use and occupation charges and Rs. 5,250/- as maintenance charges). Separate agreement of the same date was also entered into between the parties whereby a sum of Rs. 10 lakhs was given to Smt. Bimla Devi Sahni as security deposit repayable without any interest. On 15th July 1997 the company vacated the premises without paying rent for the months of June and July 1997. While vacating the premises damage was caused and the respondent ad to spend Rs. 50,000/- for getting it restored. The company also failed to pay booster pump and water charges of Rs. 1,200/- for the period April to July 1997 payment @ Rs. 300/- per month. It is further mentioned that out of Rs. 10 lakhs given by way of security, Sh. Shiv Lal Sahni and Smt. Bimla Devi Sahni kept Rs. 5 lakhs in FDR with the company which carried interest @ 14% per annum. They have also taken loan from the company. However, even when the said loan was finally repaid, the company failed to redeem/return the FDRs kept by them as security for taking the loan. Accordingly to respondents' calculation at the time of vacating the premises, Sh. Shiv Lal Sahni and Smt. Bimla Devi Sahni were to get Rs. 10,32,952.04/-, details of which are given as under:-

Value of FDRs = Rs. 5,00,000.00 Interest on FDRs = Rs. 4,35,136.00 Rent for June and July 1997 = Rs. 30,000.00 Booster pump and water charges = Rs. 12,000.00 Repair charges = Rs. 50,000.00 TDS = Rs. 16,616.04

Thus, its claim that it is the respondents who are entitled to a sum of Rs. 32,952.04/- from the company.

4. The applicant has disputed right of the respondents to set-off the amount of security deposit against the aforesaid purported recoveries whereas the

respondents state that they are entitled to adjust the amount on these counts from the security deposit. In order to determine the facts of this application, answer to two question is needed:-

i. Whether the respondents can claim set-off in these proceedings?

ii. If answer to first first is in the affirmative, whether the respondents have made out a case for set-off of the amount mentioned above?

5. Before deciding these questions I may first point out the dispute on facts which is very limited in sphere. Although in the application the applicant had stated that while vacating the premises rent for June and July was paid, this is disputed by the respondents. But no proof is given to show that such rents for these two months was paid. Likewise, the respondents have claimed that maintenance charges of Rs. 1,200/- for last four months were not paid and the respondent had also to pay TDS of Rs. 16,66. 04/-. Repair charges of Rs. 50,000/- are also claimed. In the rejoinder the O.L. has denied the same on the ground that respondents have not produced any documentary evidence. In so far as non-payment of booster pump and water charges are concerned, here cannot be a proof thereof and if it was paid, it was for the applicant to give the proof.

6. Therefore, it can be inferred that rent for June and July, 1997 and maintenance charges are not paid. However, the respondents have not given details of expense of Rs. 50,000/- alleged incurred on repairs. No document is also produced to show that the company or the O.L. was intimated about the alleged damage to the property at the time of handing over possession thereof and that such an expense was incurred at the cost of the company. Further it is possible that the respondents have paid TDS. However, they could have produced document in support, more particularly when the applicant had taken specific plea in this behalf in the rejoinder. In so far as fixed deposit of Rs. 5 lakhs, by means of four FDRs, is concerned, the respondents have filed copies of the said FDRs and there is no denial about the same. In fact, during arguments also learned counsel for the O.L. did not dispute this position.

7. On the aforesaid facts available on record, I revert to the two questions formulated above.

(i) In support of his plea about the entitlement to claim set of in these proceedings, learned counsel for the respondents relied upon the following judgments:-

i. Official Liquidator, Andhra Paper Mills Co. Ltd. v. Anand Brothers (1951) 21 Comp Cas 162

ii. Langley Constructions (Brixham) Ltd. v. Wells Estates (Dartford) Ltd. 1969 (1) WLR 503=(1971) 40 Comp Cas 48

iii. Maruti Ltd. (in liquidation) and Anr. v. Parry and Co. Ltd. (1991) 70 Comp Cas 669

8. On the basis of principles laid down in the aforesaid judgments, it has been argued that since Rule 6 of the Companies (Court) Rules, 1959 provides that practice and procedure of the Court and the provisions of the CPC so far as applicable, shall apply to all the proceedings under the Companies Act and Rules, Order VIII Rule 6 of the CPC shall become applicable which entitles a defendant to claim set-off against any demand made by the plaintiff in a suit and, Therefore, the respondents are entitled to claim set-off.

9. On reading of the aforesaid judgments it is clear that the respondents are right in their submission. First Indian case decided on the point is Official Liquidator, Andhra Paper Mills Co. Ltd. v. Anand Brothers (supra). That was a case under the Companies Act, 1913. Taking note of the fact that there was no Indian judgment on the point and after referring to some of the English judgments the Court held that the respondents were entitled to set-off. Following observations of Rajamannar, CJ, needs to be noted:-

"On principle and in the interests of fairness and justice, we think that a party against whom the company has instituted a suit, should not be prevented from establishing that on a proper taking of the account between the company and the party, i.e., after adjusting mutual credits and debits, no amount is due to the company or that the extent of its liability is more or less reduced. When the company has made a claim, any plea which has the effect of reducing the claim if successful would be a plea in defense. It may be for certain purposes, as, for example for court fees, a written statement containing a plea of set-off or counter claim is treated as a cross suit, but that is not conclusive of the matter. There can be no doubt that the pleading by the defendant is defensive in character. If it is so, then Section 171 cannot apply."

10. In his separate but concurring judgment Vishwanatha Sastri, J. (as his Lordship then was) noted that following two contentions were raised by the counsel for the O.L.:-

"(1) The only right of the defendant (here respondent) was to prove his claim for debts or damages alleged to be due to him from the company before the Official Liquidator and rank *pari passu* with other creditors and take dividend. He could not indirectly obtain payment of his debt in full from the company by pleading a set-off. (2) The plea of set-off is in the nature of a cross suit or cross claim against the company and cannot be put forward by the respondent without the leave of the company Judge which in this case, had not been sought or obtained."

11. These contentions were brushed aside and the reasons for doing so are contained in the following passages:-

"The argument on the first point overlooks Section 229 of the Indian Companies Act which, by reference, incorporates Section 47 of the Presidency Towns Insolvency Act and Section 46 of the Provincial Act. The result is that where there have been mutual dealings between a company and a creditor proving or claiming to prove a debt in the course of the winding up of the company an

account should be taken of what is due from one party to the other in respect of such dealings and the sum due from the one party has to be set-off against any sum due from the other party and the balance of the amount, and not more, has to be received or paid by either side respectively. The view of the Legislature evidently is that it would be unjust if the Official Liquidator could demand and recover in full moneys due by a debtor, but that very debtor, if he happens to be a creditor of the company for an equal sum, must rest content with a dividend representing a fraction of the debt due to him from the company. The principle is the same whether this right of the creditor to a set-off is asserted before the Official Liquidator or in answer to a claim of the Official Liquidator in a suit filed by him.

The second point relates to the proper interpretation of Section 171 of the Indian Companies Act. Section 47 of the Presidency Towns Insolvency Act and Section 46 of the Provincial Act which are made applicable to proceedings for the winding up of a company and the realisation and distribution of the assets are wider in scope than Order VIII rule 6, of the CPC and would permit, for instance, even a claim for unliquidated damages to be set-off against the claim of the Official Liquidator to recover a debt or other sum of money due to the company: *Mersey Steel and Iron Co. v. Naylor, Benzon and Co.*; *Peat v. Jones and Co.*; *Jack v. Peling*; *Re City Equitable Fire Insurance Co.* Where such a set-off is claimed and established, there is in substance a deduction from one demand for money of another cross demand between the same parties with the result that the claim of the Official Liquidator stands liquidated in whole or in part as the case might be. The right of set-off is a ground of defense and is required by Order VIII rule 6, of the CPC to be pleaded as a part of the written statement of the defendant. If established it is an answer to the plaintiff's claim wholly or pro tanto as the case might be. The defendant, if entitled to a set-off, is not liable to make satisfaction of the claim made against him or so much of it as equals the amount which he is entitled to set-off. If a set-off equal to the plaintiff's claim is established it is an absolute defense entitling the defendant to a decree of dismissal of the suit. The processual law provides that the written statement containing a set-off has the same effect as a plea in a cross suit so as to enable the court to pronounce a final judgment and a single decree in respect of both the original claim and the set-off: See Order VIII, rule 6(2) and Order XX, rule 19, of the Civil Procedure Code. This, however, does not mean that a written statement containing a plea of set-off is to be treated as a plea in all respects and for all purposes. The set-off allowed by Section 229 of the Companies Act is a weapon of defense and a written statement pleading a set-off filed in answer to a suit by the Official Liquidator, is a defensive proceeding. The Official Liquidator having brought the defendant before court, the latter must in common justice, have a right to contest the suit by raising all defenses-allowed to him by law including a defense of set-off."

12. In *Maruti Ltd. (in liquidation) and Anr. v. Parry and Co. Ltd.*, (supra), Punjab and Haryana High Court has taken the same view holding that by virtue of Rule 6

of the Companies (Court) Rules, 1959, provisions of Rule 6 of Order VIII of the CPC would be applicable giving right to the defendant to claim set-off of any demand in a suit for an ascertained sum of money legally recoverable.

13. Court of Appeal in England in the case of Langley Constructions (Brixham) Ltd. v. Wells Estates (Dartford) Ltd.(supra) held the same view after taking note of its earlier judgments, including the judgment in the case of Mersey Steel and Iron Co. v. Naylor (1884) 9 AC 434, which judgment, incidentally, was relied upon by Madras High Court in Andhra Paper Mills Co. Ltd. (supra). Thus, thinking on this legal principle in England and India is on same lines.

14. On the basis of these facts next question, which falls for determination, is as to whether provisions of Order VIII Rule 6 CPC would be applicable and the respondents would be entitled to claim set-off. A reading of Rule 6 of Order VIII CPC would show that following conditions have to be satisfied before a defendant is entitled to set-off under that Rule:-

"A defendant may claim a set-off under this rule if the following conditions are satisfied, but not otherwise--

I. The suit must be one for the recovery of money.

II. As regards the amount claimed to be set-off--

(a) it must be an ascertained sum of money;

(b) such sum must be legally recoverable;

(c) it must be recoverable by the defendant or by all the defendants if more than one;

(d) it must be recoverable by the defendant from the plaintiff or all the plaintiffs if more than one. Thus, where the defendant is sued by the agent, he cannot set-off what is due to him from the principal as the principal is not the plaintiff;

(e) it must not exceed the pecuniary limits of the jurisdiction of the court in which the suit is brought; and

(f) both parties must fill, in the defendant's claim to set-off the same, character as they fill in the plaintiff's suit."

15. On the face of it all the conditions are satisfied and no discussion is required thereon except Condition II(f). Whether both parties fill the same character as they fill in the O.L.'s application?

16. Almost in identical circumstances Punjab High Court had allowed the set-off in the case of Mehr Chand v. Amritsar Bank 28 IC 975. That was a case where in a suit by a liquidator against a debtor of the company, debtor demanded set-off of a fixed deposit made by him with the company. It was also held that even if the fixed deposit has not matured at the date of the order for winding-up of the company but had matured at the date of the suit filed by the O.L, such set-off

would be admissible. In the present case it feels the same character, as out of the security amount given by the company to the respondents, respondents kept the amount in fixed deposit. Even on equitable grounds set-off may be allowed. Principles of equitable set-off is recognized in Rule 6 of Order VIII CPC. The essence of such a claim is that there must be some connection between the plaintiff claim for a debt and the defendant's claim to set-off, which will make it equitable to dry up the defendant to a separate suit. In these cases where cross demands arise out of the same transaction or are so connected in their nature and circumstances that can be looked upon as part of one transaction, equitable set-off is permissible. This principle is made applicable even in those cases where the claim of the defendant is for an unascertained sum like that of damages but arising out of same transaction.

17. Coming to the facts of this case it is clear that at the time of letting out the premises when Rs. 10 lakhs was deposited by the company with the landlords, out of this amount Rs. 5 lakhs was kept by them in FDRs with the company. It was a contemporaneous transaction as the deposits were kept with the company within few months from the date of letting out the premises. Further aspect, which is more significant, is that the respondents took loan from the company and deposited these FDRs with the company as security. Although the loan was repaid, the company did not give back the FDRs or the amount of these FDRs. It appears that the understanding between the parties was that security deposit be given by the company to the respondents at the time of letting of the premises , but this security should earn some interest as well and, Therefore, the company accepted Rs. 5 lakhs in the FDR to enable the respondents to pay interest thereon. Therefore, the deal would have attributes of same transaction. Thus the respondents shall be entitled to adjust the value of these FDRs along with interest accrued thereon, which comes to Rs. 9,35,136/-. The respondents shall also be entitled to the set-off of Rs. 30,000/-, which is the rent for June and July, 1997 as well as booster pump and water charges of four months amounting to Rs. 12,000/-. However, as the respondents have not established that they incurred repair charges of Rs. 50,000/-, this amount is disallowed. The respondents would, Therefore, be entitled to et-off of Rs. 9,77,136/-. Similarly, no proof is given for TDS payment and it is also not shown as to how this amount was paid on the company's account. Therefore, this amount is also disallowed. After giving the adjustment of the aforesaid amount from the security deposit, balance amount of Rs. 22,864/- shall be paid. Although it was interest free deposit, since the balance amount was not paid even after it was demanded, it would be appropriate to allow interest @ 8% per annum with effect from the filling of this application till the payment is made. The respondents are directed to pay the aforesaid amount to the applicant within six weeks.

18. The application is disposed of accordingly.