
(1939) 04 MAD CK 0015
In the Madras High Court

D. Sundaravaradan

APPELLANT

Vs

M.K. Mani Iyer

RESPONDENT

Date of Decision : 19-04-1939

Acts Referred:

Citation : AIR 1939 Mad 915 : (1939) 50 LW 306 : (1939) 2 MLJ 325

Hon'ble Judges : Gentle, J

Bench : Division Bench

Judgement

Gentle, J.—The applicant was the subscriber for one ticket in a chit fund conducted by the company of the nominal value of Rs. 1,000.

Having been a successful bidder for the prize at the sum of Rs. 940, he withdrew the prize. Thereafter his liability to pay his subscriptions from

month to month continued. He withdrew the prize money upon supplying to the company security for the amount, the security being the monies to

which his two brothers would each be entitled in respect of their respective subscriptions to other chit funds conducted by the company, the two

brothers being sureties. In the applicant's affidavit, he states that the two brother's non-prized tickets were to be held as security for future

instalments payable by him, and the company were empowered to appropriate the amounts due to them under the two tickets belonging to the two

brothers towards any future instalments if default were committed in respect of such instalments. The learned Official Liquidator has taken the

objection that any arrangement which had been made between the applicant and the company together with the two brothers is contained in letters

written by the two brothers and that these required stamping and the absence of the stamp renders the documents inadmissible in evidence and

also their contents cannot be included in an affidavit and the facts set out therein treated as proved facts. In the light of the conclusion to which I have arrived, it is not necessary to deal with this aspect of the application, and I propose to assume for the purpose of my decision that it has been established that the applicant's two brothers were his sureties and the company is entitled to look to them if default were made by the applicant in respect of any future instalments. Under the rules of the Fund, failure by the applicant to pay any one instalment rendered the total amount outstanding immediately payable to the company.

2. The applicant contended (1) that his liability ceased at the date when his two brothers became surety inasmuch as it was to them the company agreed to look for payment and not to him. This contention is contrary to the facts which are set out by the applicant in his affidavit in which he says the company was entitled to look to the monies payable to the two brothers if default were committed by the applicant in respect of future instalments due from him. It follows that this contention fails.

3. Secondly, learned Counsel on behalf of the applicant contended that since the company has gone into liquidation and therefore has reached a position in which the securities which had been taken in respect of monies due from the applicant cannot be returned to him, the Official Liquidator is not entitled to recover from the applicant any monies due from him. In support of the contention now raised two cases were cited to me, *Official Assignee v. M.C. Harikrishna* AIR 1935 R. 201 and *Ellis & Co.'s Trustee v. Dixon-Johnson* (1925) A.C. 489. The latter case was referred to and discussed in the Rangoon case. The facts in the *Ellis & Co.'s* case (1925) A.C. 489 were as follows:

4. The firm carried on business as stockbrokers and the defendant opened with them a speculative account and he deposited as security for any debit balances which might be owing, various bonds and shares. *Ellis & Co.* sold some of the shares without the knowledge, authority or consent of the defendant, and he was ignorant of such sales until after the firm had become bankrupt. The trustee in bankruptcy having given credit to the defendant in respect of monies received from the proceeds of sales, claimed the balance due upon the general account and sued for this amount. It was held by the House of Lords that the stockbrokers themselves could not have

maintained an action for the balance against the defendant

inasmuch as they would not be entitled to be paid unless they were able to restore the security which he had furnished, since payment by the

defendant would entitle him to the return of the securities which he furnished. Lord Cave, L.C., at page 491 in the course of his speech pointed out

that the rule in equity being that:

If a creditor holding a security sues for his debt, he is under an obligation on payment of the debt to hand over the security.

5. In that case, the debtor and the person giving security for the debt was the same individual and from that aspect the, observations were made

and the decision given. In *Official Assignee v. M.C. Harikrishna* AIR 1935 Rang. 201, the facts were as follows: The defendants maintained an

account with a Chettiar firm which subsequently became insolvent. One of the partners in the defendant partnership named Chaganlal maintained

with the Chettiar firm a deposit account and it was agreed between all the partners that recourse should be had to this deposit account in respect of

the defendants' debt to the Chettiar firm. Chaganlal being a partner in the defendant firm was, as such, liable to pay all its debts. This obligation of

course was also one which affected any other partner. When therefore Chaganlal entered into the arrangement with the Chettiar firm that his

deposit account should be in effect a security for the partnership debt, he was as a debtor on the one hand, being a partner, giving security for his

own debt. In the *Rangoon* case, it was held that the Chettiar firm having become insolvent they had dissipated the security in consequence of which

it could not be returned to Chaganlal in the event of the debt from the partnership being paid, and consequently the Official Assignee of the Chettiar

firm not being in a better position than the firm itself before it became insolvent failed in the action. Mr. Justice Leach as he then was followed the

decision in the other authority, which I have quoted in the House of Lords in England.

6. In the present case, there is in my view clearly a distinction to be drawn between both the authorities I have cited. The security was not furnished

by the applicant who was the debtor; it was furnished by two others. The principle in equity that a creditor is not entitled to recover the amount of

his debt for which security has been given when he is not in a position to return

the security applies in my view when the debtor and the person giving the security are the same person. Further, here the company has not, as Ellis & Co., in the English decision, wrongfully dealt with the securities. They are still in existence and whatever the dividends eventually may be, the two brothers would be entitled to a division from the assets realised. If the present contention were allowed to be given effect and if 16 annas in the rupee are eventually paid, it would follow that the applicant would avoid entire responsibility for his debt and his two sureties would be paid in full. Also the two securities are still in existence and all benefits and rights which eventually will arise will accrue to them. In my view, the applicant's contention fails, and it must follow that the Official Liquidator will not set off any amounts against the indebtedness of the applicant to the company, the sum of Rs. 360, but he will remain a debtor in respect of that amount. This application is dismissed. No order as to costs, the Official Liquidator appearing in person.