(1982) 05 KAR CK 0007

In the Karnataka High Court

Case No : Company Application No. 1784 of 1981 in Company Petition No. 10 of 1979

Galaxy Trading and Chit Funds (P.) Ltd. (In Liquidation) APPELLANT

Vs

S. Bashanudien and Another RESPONDENT

Date of Decision : 31-05-1982

Acts Referred:
Companies Act, 1956 — Section 446 (2) (b), 458 A

Citation : (1984) 56 CompCas 479 : (1982) 2 KarLJ 335

Hon'ble Judges : M.P. Chandrakantaraj, J

Bench : Single Bench

Advocate : S. Vijayashankar, for the Appellant; H.S. Dwarakanath, T.S.K. Murthy, Md. Saifulla, M.K. Pasha and Ishad Ahmed, for the Respondent

Judgement

Chandrakantaraj Urs, J.—This is an application by the official liquidator under s. 446(2)(b) of the Companies Act, 1956, praying for an order of this court directing the respondents to pay him the sum of Rs. 15, 331.70 together with interest on Rs. 8,200 at six per cent. Per annum from the date of application till the date of realisation.

2. It is stated in the application that the first respondent, S. Bashanudien, was a member of M/s. Galaxy Trading and Chit Funds (P.) Ltd. (in liquidation) in chit group No. AM- I having chit No. 13 in the value of Rs. 10,000. It is further alleged that respondent No. I was the highest bidder at one of the actions held in the said chit group and received payment of prize amount on May 26, 1975. Respondent No. I as well as respondent No. 2, Abdul Shukkor, executed a promissory note jointed on May 26, 1975, in favour of the company (in liquidation) promising to pay the amount mentioned therein with interest at 18 per cent annum. The second respondent had earlier executed a deed of mortagage by deposit of title deeds in favour of the company on May 22, 1975 situated in South Strict Cross, Neelasandra, Civil Stattion, Bangalore, measuring on the East : 36 feet, West : 36 feet North : 45 feet and South : 43 feet. The

mortagage was for securing payment of Rs. 10,000 with interest thereon at 18 per cent. per annum.

3. A petition was presented in this court on March 1, 1979, for the winding up of the company and this court by an order dated July 13, 1979, ordered the company Application No. 53 of 1979, the official liquidator attached to this court was appointed as the provisional liquidator of the company. On December 12, 1979, and February 3, 1981, notices were issued to the respondents by the official liquidator calling upon them to pay the amount due by them.

4. The claim of the official liquidator is as follows :

Rs. Chit value 10,000 Subscriptions paid up to 23-5-75 1,800 ---------- Balance 8,200 Add : Interest @ 18 per cent. Per annum from 26-5-75 to 12-7-79 6,096.70 Interest @ 6 per percent per annum from 13-7-79 to 12-8-81, the date of the application 1,025.00 Notice charge 10.00 ------------ Total 15,331.70 -----------

5. The official liquidator has asserted that the claim application is within time having regard to the provisions of s. 458-A of the Companies Act, 1956, read with art. 137 of the Limitation Act, 1963.

6. The first respondent entered appearance through his advocate and filed his written statement of objections. In the objections he has stated that he was a benami subscriber to chit No. 13 of group "AM-4". He has asserted that the actual person who took the chit was the second respondent, Abdul Shukoor. It is further stated that it was on that account that property belonging to the second respondent was mortgaged to the company in liquidation. The first respondent has asserted that the loan is a secured loan. He has further stated that he has no objection for the recovery of the balance of subscribed due to the company by proceeding against the property mortagaged. He has also stated that he and in that connection the second respondent was due to him in the sum of Rs. 40,000, and it has not been paid by the second respondent. It is further asserted by the first respondent that he has paid a total sum of Rs. 4,700 to the company against vouchers and the details have been set out as follows :

Rs. 1. Vr. No. 15681 dt. 23-5-75 3,000 2. Vr. No. 15679 dt. 22-5-75 400 3. Vr. No. 22908 dt. 15-2-75 250 4. Vr. No. 23187 dt. 22-4-75 200 5. Vr. No. 34893 dt. 24-12-75 50 6. Vr. No. 34893 dt. 24-12-75 50 7. Vr. No. 1781 dt. 21-2-75 200 8. Vr. No. 1782 dt. 21-2-75 200 9. Vr. No. 3 dt. 100-4-75 200 ---------- 4,700 ----------

7. He has also stated that he was made to pay on may 23, 1975, the sum of Rs. 3,000 by the company representing that the entire chit amount had to be repaid forthwith and the second respondent persuaded him to pay the said sum of Rs. 3,000. He has reiterated that he was only a benami subscriber and the real subscriber was the second respondent. In those circumstances, he has denied the accuracy of the claim of the official liquidator for not giving due deductions to

the amounts subscribed. He has denied his liability to pay any amounts the amount was a secured loan and as the same should be recovered by proceeding against the property secured.

8. The second respondent has also filed his statement of objections. In the statement of objections, he has averred baldly that he is not aware of the details of the transactions stated by the official liquidator. He, however , admits having signed certain papers at the instance of the first respondent without knowing the contents or purport of the documents. In the statement, he has denied the execution of the mortgage deed by deposit of title deeds. He has stated that the first respondent was a good friends of him and had promised to help him to put up construction on the site and in the site and in that connection he had given the title deeds to the first respondent as he had faith in the first respondent; that he was to sign on certain papers in favour of the petitioner-company on the representation that it was a mere formality required to grant a loan to the first respondent; that he had signed on certain papers not only before the officials of the petitioner-company but also before the sub-registrar He has reiterated that he did not know the contents of the documents which he had signed. He has stated that the application of the official liquidator may be dismissed as there was no relationship of debtor and creditor between him and the petitioner-company and, therefore, there cannot be any mortgage in the absence of such relationship. He has further stated that the mortgage was without consideration and, therefore, invalid. He has reiterated that at the time his signatures were obtained by the petitioner-company''s officials, he was assured that it was a mere formality and unless remedies were exhausted against the first respondent, he would not be liable and his liability respondent. He has further stated that the claim as regards interest was invalid as the transaction was not a commercial transaction. He has also alleged that the court fee paid on the claim was insufficient and the claim was barred by time.

9. It is useful to notice at this stage that the first respondent and his counsel both remained absent on March 1, 1982, and in that position the first respondent was placed ex parte.

10. On the said date, i.e., on March 1, 1982, the counsel for the second respondent stated that the burden of proving the case against the second respondent was on the official liquidator. But that contention was rejected by me on March 1, 1982, in view of the admissions made in the statement of objections and having regard to the fact that he had admitted the execution of the documents the knowledge of contents of which alone were denied by him.

11. Accordingly, the second respondent examined himself as R.W. 1. In the witness box, the second respondent stated that he knew the first respondent; that he had no transactions with the first respondent; that he was not a subscriber in M/s. Galaxy Trading and Chit Fund Co. P. Ltd; that he knew that the first respondent has subscribed for a chit in the with the chit transaction of the first respondent with the company in liquidation. He reiterated his assertion in

the statement of objections that he signed the documents at the Taluka Office at Jayanagar he also stated that he had also signed certain documents at the office of the company. He also stated that when he signed the documents, the first respondent as well as one Basheer Ahmed were present. He admitted that Basxheer Ahmed was the manager of the company He admitted having site bearing Corporation No. 7/45. He stated that the site measured 36"x45." He also stated that the title deeds in respect of the site were given to the first respondent on his representation that he would get a building plan sanctioned for that site because he was to build a house on that site.

12. In cross-examination, on seeing the pronote, Ex. P-1, he stated that he did not know what it was. He admitted the signatures at Exs. P-1 (a) and P-1 (b). He stated that he did not know how to read and write except to sign his name. He stated that he had signed at Exs. P-1 (a) and P-1 (b). He also stated that he had signed at Ex. P-2 (c) and P-2 (d) at the back of page one of the document. He stated that when he signed at Exs. P-1 (a) and P-1 (b), there was already a signature and did not know who had signed before him. On seeing the mortgage deed Ex. P-2, he stated that the same bore his signatures at several places. He has identified the signatures at Exs. P-2 (a) at the bottom of page 1, Ex. 1-2 (b) at the bottom of page 2 and also Exs. P-2 (c) and P-2 (d) at the back of page 1 of the documents He admitted having signature at Ex. P-2 before the Sub-Registrar, Jayangar, Bangalore. He denied that he knew any one by name Syed Abdul Azeez. He also denied knowledge any one by name Iqbal Pasha. On seeing Ex, P-3 reply by him to the official liquidator in response to his notice, the second respondent admitted his signature at Ex. P-3 (a). He denied that he received any notice from the official liquidator to the effect that he was ude to pay to the official liquidator certain sums because he was the surety in respect of certain chit transaction of the first respondent with the company in liquidation. He also stated emphatically that he did not sign on papers after they were read over and explained to him. He stated that he was doing electrical contract business since 1968. On seeing Ex. P-4, he has identified his signature at Ex. P-4 (a) and he also admitted that the date below his signature at Ex. P-1 (a) was written in his own hand. He also stated that the contents of Ex. P-4 were explained to him : it was a notice of demand demanding payment as surety. He admitted having got a reply issued to the same. He also admitted that Ex. P-3 was the reply. He admitted having signed the reply.

13. He stated that he had signed on the stamp and he did not know the pronote was filled up. He stated that he thought it was blank when it was signed. He stated that he signed on the representation made by the first respondent that he was getting the loan and he (the second respondent) should stand surety for him. He has also stated in cross- examination that he understood a surety to be a witness. He also stated that the signed Exs. P-1 and P-2 because the first respondent was taking a loan. He explained that he knew the first respondent since 15 years. He stated that the first respondent had a shop on Central Street, Bangalore. He denied the suggestion that he signed Exs. P-1 (a) and P-1 (b)

knowing that he was required to be a surety and that he would be liable in the event of the first respondent not dischargeing the loan. He also stated that the Sub-Registrare Jayanagar, Bangalore, did not read or explain to him the contents of Ex. P-2. He also admitted that he did not take any steps to recover the documents which he had deposited with the company in liquidation. He denied the knowledge of the company-in-liquidation having been wound up ny an order of this court. He, however admitted that he gave instructions to reply as per Ex. P-3. He was only a surety and the real liability was that of Bashanudien. HE, however, claimed knowledge that his title deeds would be returned to him if the first respondent discharged the claim made by the official liquidator.

14. From the above pleadings and evidence recorded, the points that arise for determination in this case are :

1. Whether the application is barred by time ?

2. Whether the second respondent proved that he signed Exs. P-1 and P-2 without the knowledge of the contents of the same and, therefore, he was not liable under the said documents ?

3. Whether the official liquidator is entitled to an order of this court as prayed for ?

15. Shri Dwarkanath, learned counsel appearing for the second respondent, strenuously urged that the claim application was barred by time as on the date the winding-up petition was presented, there was no legal enforceable claim against the respondents. Admittedly, the transaction evidenced by Ex. P-1 was concluded on May 26, 1975. The lose subscription paid by the first respondent is shown as May 23, 1975. The mortgage deed evidencing the creation of the mortgage bt deposit of titled deeds is dated May 25, 1975, but executed and registered on May 23, 1975. The petition for winding up was presented on March 1, 1979, and the order for winding up was made on July 13, 1979, by which time the claim against the first respondent is so far as it related to the chit transaction was barred by time reckoning in so far as it related to the chit transaction was barred by time reckoning the date from the date of last subscription paid on May 23, 1975. It is now well settled that in so far as the claim application under s. 446(2)(b) of the Companies Act is concerned, the right to sue accrues to the official liquidator only from the date the winding up order was made and that he has a period of three years from that date and the period of additional one years provide for under s. 458A of the Companies Act read with the relevant article for computing the limitation, that is, the residuary art. 137 of the Limitation Act, and not the relevant articles provided for filing a suit in so far as they relate to a claim. This is the view I have taken in the case of Syed Patel and Others Vs. N.H. Doddabasappa and Others, the claim against the first respondent could not be enforced on account of the bar of limitation, considering the transaction as a chit transaction and no more, then not withstanding the fact that by virtue of the provisions contained in s. 458 of the Companies Act and applying art. 137 of the

Limitation Act, an application under s. 446(2)(b) of the Companies Act not being a suit, there was no legally enforceable claim on the date the petition for winding up was presented. If this view is applicable then the claim against the first respondent compel him to pay the balance of the subscription together with the interest accrued was not maintainable under that section

16. One should not fail to notice that the first respondent has not admitted the transaction but has claimed only to be a benamidar and not the real subscriber. He has not proved his contention. No document whatsover has been produced by him in support of his assertions in the written statement. Nor has he proved the discharge in the sum of Rs. 4,700 which he has claimed. Even according to him, the last payment was made by him on May 23, 1975, which date has been taken by me for computing the period of limitation. Neverthless, the mere admission of the transaction does not amount to acknowledging any debt from which date a fresh period of limitati9on would commence. In fact, the first respondent has denied any liability at all under transaction referred to in the claim application.

17. Sir Vijaya Shankar, learned counsel for the official liquidator, very forcefully urged that the court should take note of the mortgage created by the second respondent securing payment of the prize amount or balance of the subscription in respect of the chit subscribed to by the first respondent and compute the period of limitation as 12 years under art. 62 of the Limitation Act.

18. This argument is liable to be rejected this application is not filed as a suit under s. 446(2)(a) of the Companies Act. Nothing in the pleading of the official liquidator is indicative of the fact that this is a mortgage suit to enforce the rights flowing out of the mortgage created by the second respondent. I am, therefore, compelled to hold that this application is not maintainable as there was no legally enforceable claim against the first respondent in respect of the chit transaction he had with the company in liquidation and therefore, the application filed on September 22, 1981, was clearly barred by limitation.

19. In the view I have taken, it will not be correct for me to decided the other points set out determination. If the official liquidator is so advised, he may present a suit in this court or the appropriate civil court based on the rights of the company in liquidation acquired by virtue of Ex. P-2, the deed evidencing the deposit of title deeds creating the mortgage. It is also not necessary for me to assess the evidence in this behalf as it would prejudice the rival contentions of the official liquidator and the second respondent if any suit is filed by the official liquidator.

20. In the result the application is dismissed reserving the liberty to the official liquidator to proceed to enforce his rights under the mortgage by procedure known to law and without prejudice to the defence of the second respondent in such proceedings.

21. There will be no order as to costs.

