
(1952) 03 OHC CK 0006
In the Orissa High Court
Case No : Money Suit No. 16 of 1951

H. Naik, Official Liquidator, Puri Bank	APPELLANT
Vs	
Panchanon Das	RESPONDENT

Date of Decision : 27-03-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Companies Act, 1913 — Section 229
Limitation Act, 1908 — Article 85
Provincial Insolvency Act, 1920 — Section 46

Citation : AIR 1954 Ori 7 : (1953) 23 CompCas 369

Hon'ble Judges : Jagannadhadas, C.J

Bench : Single Bench

Advocate : G. Jena and U.N. Rath, for the Appellant; R.N. Sinha, for the Respondent

Judgement

Jagannadhadas, C.J.—This is a suit filed by the Official Liquidator of the Puri Bank for recovery ,of an amount of Rs. 7988-5-0 from the defendant alleged to have been, due in respect of the current, mutual and open account No. 202 of the defendant in the Balasore Branch of the Puri Bank. The defendant was admittedly a person having a current account with the said branch of the Puri Bank. In addition to having a current account, he made certain fixed deposit"s and was allowed overdraft facilities for double the amount thereof, on the security of the said deposits. The two fixed deposits are evidenced by Exts. B and B-1 and are for Rs. 2000/- each. Ext. B is dated 17-10-1944, and Ext. B-I is dated 21-9-45. That they were pledged as security for the overdraft account is evidenced by Ext. C dated 23-10-45. These facts are not disputed. The amount now sued for is what is due in respect of the said overdraft account with interest without any adjustment of the fixed deposit"s. The defendant does not dispute the correctness of the principal amount shown in the account as having been advanced to him, nor does he dispute that the claim is in time. His defence is twofold: (1) That the interest should have been calculated at 7 1/2 per cent and

not at 9 per cent as has been claimed in the plaint: (2) That the moneys due to him under the fixed deposit receipts, Exts. B and B-1 have in fact been adjusted as against his overdraft account and that he is liable to pay only the balance. (3) That even if the adjustment is found not to be a fact or not to be valid and binding on the liquidator, he is entitled as a matter of law to a set-off in respect of the amounts payable to him under the said fixed deposit receipt's.

2. So far as the dispute regarding interest is concerned, the defendant relied upon a letter Ext. A dated 18-9-45 written by the Secretary of the Bank to the defendant which shows that in respect of the fixed deposit amount, the defendant will get 7 per cent and that in respect of his over-draft account, he will pay $7\frac{1}{2}$ per cent. The advocate for the plaintiff-liquidator accepts the genuineness of this letter and states that he is willing to have the interest as from the date of this letter recalculated with reference to the terms of this letter, Ext. A and to reduce the claim in the plaint accordingly. Before therefore passing a decree in this case this recalculation will have to be made as above.

3. The main question raised in this case is about the truth of the factum of adjustment leaded by the defendant. On behalf of the Bank, learned counsel for the liquidator does not accept this adjustment as true. He also raises the plea that the adjustment is not valid and binding for two reasons, (a) By the date of the alleged adjustment, neither of the fixed deposits under Exts. B and B-1 had matured and the Secretary, who is said to have made the adjustment of the unmatured deposits has no authority to do so, without the orders of the Managing Director. Therefore the said adjustment is not valid and binding on him; (b) The application for winding up of the Bank was admittedly made on 24-7-47 and the adjustment is alleged by the defendant to have been made by the Secretary on 25-7-47. Hence the same is not valid and binding, unless the Court sanctions it.

4. As regards the truth of the alleged adjustment, the parties have gone to trial and the defendant on whom the burden of proof lies has in the first instance examined himself as D. W. 1 and has marked Exts. A to K. The plaintiff has examined P.W. 1 and P.W. 2 and has marked Ext. I.

5. Broadly stated the defendant's evidence is to the following effect. The two fixed deposits evidenced by Exts B and B-1 covering Rs. 4,000/- and another fixed deposit of Rs. 1000/-which he had with the Bank of Calcutta, were all given as security for the overdraft account. in the Puri Bank which the defendant required for his business. He stopped his business in the year 1947. He received the demand Ext. K and wrote a letter to the Secretary of the Bank,, Ext. D dated 24-7-47 informing him that he cannot any longer run his business and requesting him to adjust his fixed deposits-against the overdraft accounts and to let him know what further money remained to be paid by him. To this he received a reply from the Secretary, Ext. D-1 of the same date, informing him that he was busy at the moment and would send him a reply in a few days. He therefore went in person to the Bank on 25-7-47. The Secretary attended to him and made

the necessary adjustments between the overdraft account and the fixed deposits. The Secretary noted all the adjustments in the pass-book of the defendant relating to his overdraft account. The defendant also says (in cross-examination) that to the best of his recollection, endorsements were also made on the back of the fixed deposit receipts showing the adjustment. The Secretary who has been examined as P.W. 1 while accepting that the letter Ext. D dated 24-7-47 was received by him and that he sent his reply, Ext. D-1, of the same date, denies that the defendant came to him on the 25th or that he made any adjustments of the fixed deposits, as against the over-draft account, on the 25th or on any other date.

The best evidence of this adjustment would naturally have been (1) the pass-book of the defendant for the defendant's over-draft account in which according to him all the adjustment entries have been made and also (2) the original fixed deposit receipts which according to him would contain endorsements of discharge presumably signed by him. It must be noted at this stage that it is the plaintiff who in the normal course would have the custody of the fixed deposit receipts on either footing, i.e., on the accepted footing that the fixed deposits were security, or on the disputed footing that the fixed deposits had been adjusted and discharged. The plaintiff has accordingly produced these documents marked as Exts. B and B-1. Exts. B and B-1 do not show any endorsements of discharge. The defendant has not produced the pass-book relating to his current over-draft account, which in the normal course should have been with him. To account therefore for these two circumstances, which would prima facie go against him the defendant challenges the genuineness of Exts. B and B-1 and comes out with a definite case that on a subsequent date, viz., in March, 1948, he went to the Bank to pay a sum of Rs. 80/-towards his debt and that the pass-book was then handed over to the Secretary for making necessary entries therein. His case is that the pass-book has ever since remained with the Bank and that it has not been returned and is now being suppressed. Thus, the two subsidiary questions of fact that have been raised with reference to the plea of adjustment are (1) Are the two documents, Exts. B and B-1 genuine? and (2) Does the pass-book of the defendant remain with the plaintiff, who does not produce it.

6-11. (After considering the evidence his Lordship proceeded:) In view of the above circumstances, and particularly having regard to the fact that the pass-book relating to the overdraft account has not been produced by the defendant and the fact that his case as to the retention of that pass-book by the bank has not been made out, and also in view of the fact that the fixed deposit receipts, Exts. B and B-1 do not bear any endorsements of discharge and the defendant has not made out his plea that Exts. B and B-1 are not the original receipts, I have come to the definite conclusion that the plea of adjustment as a fact raised by the defendant cannot be accepted as true.

12. The next question that arises is whether even if the adjustment pleaded is true, it is valid and binding. The two fixed deposits which were for three years

each, matured admittedly on 7-8-1947, and 21-9-1948. The alleged date of adjustment is 25-7-47, i.e., clearly before the dates of maturity. It is the case of the plaintiff that the amounts payable under the fixed deposits were not available to be paid or adjusted before the maturity, except on the specific sanction of the Managing Director. He says so in his chief-examination. Though there has been some kind of cross-examination, on the point, it has not been specifically and clinchingly directed towards it. Neither side has called for or produced the rules of the Bank to show whether or not the Secretary had independent authority in this behalf. But Ext. A. the letter filed on behalf of the defendant and relied upon by him as regards the variation of the interest indicates that even for that variation, the Managing Director's sanction was required. I am, therefore., prepared to accept the evidence of P.W. 1 that the fixed deposits could not be adjusted before the maturity without the specific sanction of the Managing Director. Indeed, this may also be taken to have been realised by the defendant, because he has given evidence that when he met the Managing Director on one occasion at Balasore, he had a talk with him in the presence of the Secretary which resulted in the letter, Ext. A granting reduction of interest on the overdraft account. According to him, it was on that very occasion that he proposed to the Managing Director to permit him to adjust the fixed deposits whenever required even before maturity and he says that the Managing Director agreed to it. This portion of the story cannot be believed, because, if that is true, there is no reason why the letter, Ext. A which relates to the same conversation, does not in terms, refer to this matter also which was equally important. I would, therefore, hold that the authority of the Managing Director was required for adjusting the fixed deposits under Exts. B and B-1 before maturity and that such authority has not been made out in this case. Therefore the adjustment made by the Secretary even if true, is not valid and binding on the liquidator.

13. The further point raised for the plaintiff is that u/s 168, Companies Act, the order of winding up dates back to the date of the application and that no transaction subsequent to that date is binding on the liquidator,, except with the specific sanction of the Court. As has been already stated, the application for winding up in this case was made on 24-7-47 and the alleged adjustment was effected on 25-7-47. The adjustment therefore, if true, cannot be valid and binding unless the Court sanctions the same. The defendant suggests, that the sanction should now be granted. But there is absolutely no reason in this case, why this adjustment, even if true, should be sanctioned at this stage. Obviously having regard to the proximity of the dates, such an adjustment, if true would be open to the suspicion that it is some hasty and collusive attempt to defeat the general body of creditors by a fraudulent preference.

14. I am therefore definitely of the opinion that the adjustment pleaded was not true as a fact and that even, if true, it is unauthorised and cannot be sanctioned by the Court.

15. The next question however remains as to whether or not in spite of the

absence of any adjustment, the defendant is entitled to a set-off against his dues, for the amount due to him under the fixed deposit receipts, Exts. B and B-1. The defendant's advocate relies on Section 229, Companies Act read with Section 46, Provincial Insolvency Act. Section 229, Companies Act is as follows:

"In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of Secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

Section 46, Provincial Insolvency Act is as follows:

"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the other party and the balance of the account, and no more, shall be claimed or paid on either side respectively."

The argument on behalf of the defendant is that the debt due by the defendant to the Bank and the amount due by the Bank to the defendant in respect of the fixed deposits are mutual dealings between the insolvent Bank and the defendant in his capacity as debtor as well as creditor and that therefore he is entitled to a set-off in respect of the two inasmuch as Section 46, Provincial Insolvency Act is applicable to winding up proceedings by virtue of Section 229, Companies Act above quoted. It is contended on behalf of the plaintiff that there is here no question of any mutual dealings, but only the case of moneys advanced on the security of fixed deposits.

He also relies on the fact that while the plaint in terms was based on the allegation that there was a mutual open and current account between the bank and the defendant, the defendant in his written statement repudiated it. So far as this last argument is concerned, I do not think that in a matter like this, which depends on the legal view to be taken on certain undisputed facts, mere allegations and cross-allegations in the pleadings should be treated as sufficient to deprive the party to a right to relief if otherwise made out. In fact, if the plaintiff relies on the denial of the defendant in his statement, the defendant can equally rely upon the affirmance of the plaintiff in his plaint. It has also been attempted to be argued on behalf of the plaintiff that there can be no question of mutual accounts, unless the transactions between the two are such as to result in shifting balances. It appears to me that it is unnecessary to go into the question whether or not the criterion of shifting balances is the test for an open mutual and current account, as that term is used under Article 85, Limitation Act. What is necessary for the present purpose is whether or not dealings between

the plaintiff and the defendant in this case fall within the category of the phrase "mutual dealings" u/s 46, Provincial Insolvency Act. The leading case on the subject is -- "Rose v. Hart", (1813) 129 ER 477 (A) to be found also in the II Volume of Smith's Leading Cases, p. 271, 12th Edition. It would appear from a consideration of that case and the cases following the same, for instance "Naoroji v. Chartered Bank of India", (1868) 3 C.P. 444 (B) and -- "Palmer v. Day" (1895) 2 QB 618 (C), that mutual credit or mutual dealings simply mean reciprocal demands which must be naturally terminated in a debt. There can be no doubt that with reference to I that test the present case must be taken to be one of mutual dealings between the parties, since there are reciprocal demands, which must I in the normal course terminate in a debt owing by one party to the other.

The present is a Simple case which is not in any way complicated by considerations whether the debt on one side is an individual debt and on the other side either a joint debt or a debt in the representative capacity or of some other different character. See for instance, -- "Nur Husan v. Mt. Ghulam Zobra", AIR 1922 Lah 222 (D); -- A.S.S.R. St. Veerappa Chettiar Vs. J.V. Pirrie and Another, and -- G. Samuel Vs. Cyril Gill and John Stanley Goodwin, Official Liquidators, . In fact, the above cases themselves clearly show that in a case where there are reciprocal demands available by one party against the other in the same capacity, it is a clear case of mutual dealings in which a Set-off is a matter of course. The case in -- D. Sundaravaradan Vs. R. Narasimhachari, Official Liquidator, is also a clear authority in favour of this position.

16. The only point about which I have had some doubt on this portion of the case is whether the fact that at the date when the application, for winding up has in fact been made, viz., 24-7-47, the two fixed deposits had not matured and were not therefore payable on that date, would make any difference. The leading case in -- "(1818) 129 ER 477 (A), relies on the English statutory provision which refers to "mutual debts between the bankrupt and any other person "at any time before" such person becomes bankrupt" indicating that the date of becoming bankrupt which in the present case must be taken to be the date of application for winding up order, would be the material date. That the date of the insolvency would be material for the purpose of set off would also appear from a case in -- "Radha Kishen v. Gangaram Radha Kishen", AIR 1914 Lah 317 (I), where an assignment of a debt after the commencement of the insolvency, though the debt itself was one which arose before the insolvency, was not recognised as being available for set off. It appears to me however that the principle as to the right to set off being determined with reference to the date of the bankruptcy, does not stand in the way of the defendant in this case. The fact that the fixed deposits had not matured by the date of the application for winding up does not affect the character of the fixed deposit as a debt payable by the bank to the defendant. It may be only a future debt and not a present debt by that date, but it is a debt none-the-less at the date of the bankruptcy and there is no reason why it should not still be available for set off as a debt. All that the leading case in -- "(1818) 129 ER 477 (A)" requires is that there must be credits on each

side, which must in their nature terminate in debts. On this principle, a delivery of property with directions to turn it into money has been considered as a credit available for set off though in fact the property had not been so converted by the date of the bankruptcy. See -- "(1895) 2 QB 618 (C). A future but ascertained debt cannot stand on a worse footing-.

I can see therefore no reason for depriving the defendant of the equitable relief by way of set off in respect of the fixed deposits though in fact, the deposits had not matured. Indeed, it appears to me that the case in -- "Baker v. Lloyd's Bank Ltd.", (1920) 2 KB 322 (J) is a case where a set-off was allowed in respect of a debt which may be called a future debt by the relevant date. Similarly the case in -- "Gibson v. Bell", (1835) 131 ER 1303 (K) and also the case in -- "Alsager v. Currie", (1843) 152 ER 1402 (L) would also on facts appear to be cases where the set-off was allowed in respect of debts which by the date of the bankruptcy must be considered to be future debts. I am therefore of the opinion that in the present case, the defendant would be entitled to a set-off in respect of the fixed deposit amounts under Exts. B and B-1, though they had not matured by the date of the application for winding up and though the factum of adjustment pleaded by him is found not to have been proved.

17. Having regard to the letter, Ext. A dated 18-9-1945, interest payable on the fixed deposit amounts would be 7 per cent, as from the date of that letter, but no interest will run from the date of the application for winding up.

18. In the result, therefore, the plaintiff will have a decree for an amount to be recalculated on the basis of my findings above as regards the right to a set-off and the interest payable on the overdraft account and on the fixed deposit amounts with reference to Ext. A dated 18-9-1945. Since the defendant has set up a plea of adjustment, which has not been substantiated on facts, and which has occasioned the trial he will pay the costs of the plaintiff in the suit, though he has succeeded on the point of law raised.