

(1981) 10 KAR CK 0007

In the Karnataka High Court

Case No : Company Application No. 51 of 1980 and Company Petition No. 4 of 1978

In Re: Smitha Chits and Trading Co. P. Ltd., (In Liquidation)

Date of Decision : 30-10-1981

Acts Referred:

Companies Act, 1956 — Section 446 (2) (b), 529
Provincial Insolvency Act, 1920 — Section 46

Citation : (1982) 52 CompCas 281

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

Bench : Single Bench

Judgement

Chandrakantharaj Urs, J.—This is an application under s. 446(2)(b) of the Companies Act, 1956, made by the official liquidator praying for an order directing respondents Nos. 1, 2 and 3 to pay him the sum of Rs. 1,998.75 being the principal and interest thereon in respect of the chit transaction the 1st respondent had with the company in liquidation, viz., Smith Chits and Trading Company Limited (hereinafter referred to as "the company").

2. Respondent No. 1, James Edwin, was a member of the chit group DD of the company having Chit No. 19 with the chit value of Rs. 2,000. He was the highest bidder at the auction held for his group on February 21, 1977, and he received the payment of the prize amount on April 5, 1977. On the same day, he executed a promissory note for Rs. 1,500 in favour of the company. Respondent No. 2, David Franklin Soans, and respondent No. 3, N. Basha, joined the 1st respondent, in execution of the pronote as sureties. 2nd and 3rd respondents also signed on March 8, 1977, surety and security proposal form of the company agreeing to be sureties for respondent No. 1 repaying the chit value. Respondent No. 1 has subscribed Rs. 360.25 including the dividends due to him in his chit group. The official liquidator issued notices to the respondents on May 19, 1978, and October 17, 1979, calling upon them to pay the amounts due in respect of the chit transaction as they were jointly and severally responsible for the repayment of the chit value. Respondents having failed to pay the sum demanded, he has presented this application on January 18, 1980. The official

liquidator's claim is as follows :

Rs. "Chit Value 2,000.00 Less : Subscription paid up to 22-7-1977 inclusive of dividend of Rs. 38.31 credited to the account of 1st respondent (Chit Group DD, Boo No. 19) 360.25 ----- Balance principal due : 1,639.75 Add : Interest at 18 % p.a. from 23-7-1977 to 16-12-1978 170.00 Interest at 6 % p.a. from 17-2-1978 to 18-1-1980 189.00 ----- Total amount due : 1,998.75" -----

3. Respondents entered appearance through counsel. 1st respondent was represented by Shri C. S. Shantamallappa, while respondents Nos. 2 and 3 were represented by Smt. G. Anasuya. Respondent No. 1 showed no interest in the proceedings as also his counsel. He did not file any statement of objections to the claim though more than one opportunity was given. On the other hand, respondents Nos. 2 and 3 have filed their statement of objections to the claim and contested the claim. In the statement of objections filed by the 2nd and 3rd respondents they admit the claim transaction relating to the first respondent in chit group DD bearing No. 19 for Rs. 2,000. They also admit that they executed the pronote in respect of the transaction as sureties along with the first respondent. It is stated by them that the 2nd respondent was a member of the chit group DF-1 bearing No. 22 and that he had subscribed Rs. 600 towards that chit till May 25, 1977, and that amount is due and payable by the company in liquidation to him. Similarly, it is stated that respondent No. 3 was a member of two other chits-chit group DF bearing No. 49 and chit group DF bearing No. 50 and had subscribed Rs. 650 and Rs. 550, respectively, and the said amounts are due and payable by the company in liquidation to him. Therefore, the 2nd and 3rd respondents claim a set-off in the sum of Rs. 1,900 and adjustment of their liabilities as sureties. They also claim that interest charged at 18 per cent. is excessive. In fact they have made a counter-claim for the balance due after deducting the sum of Rs. 1,639.75 due by the 1st respondent to the company in liquidation as the principal amount. They appear to have replied to the notices issued by the official liquidator stating their above stand. In these circumstances, they have prayed for the dismissal of the claim of the official liquidator and for a direction that the official liquidator do pay to them the difference between Rs. 1,900 and Rs. 1,639.75.

4. Respondents Nos. 2 and 3 have examined themselves as R.W.I and R.W. 2 in support of their stand. Pass book No. 22 belonging to DF No. 1 has been marked as Ex. R-1. Pass book belonging to DF No. 49 has been marked as Ex. R-2 and pass book belonging to group DF No. 50 has been marked as Ex. R-3. Exhibit R-4 is a receipt for Rs. 100 issued to the 3rd respondent in respect of group DF No. 49. Respondents No. 2 and 3 have admitted the execution of the promissory note, Ex. P-1, and have identified their signatures at Ex. P-1(a) and Ex. P-1(b). In exhibit R-1, the closing entry is Rs. 600.50 including the fifth dividend paid to the subscriber. In Ex. R-2 the last entry is Rs. 550 including the dividends paid to the subscriber. In Ex. R-3 the last entry is Rs. 550 including the dividends paid to the subscriber. The oral evidence in substance supports the averments in the

statement of objections.

5. The official liquidator has not adduced any oral evidence except to get the pronote marked through the respondents.

6. On the pleadings and the evidence as above in the case and having regard to the admissions of the respondent only the following points arise for determination :

1. Whether, the 2nd respondent and the 3rd respondent were independent subscribers in their respective chit groups in the company in liquidation ? and,

2. If they were, whether they are entitled to claim set-off in respect of their subscriptions against their joint and several liability against the claim of the official liquidator ?

7. The first point should not detain me long. There is no serious challenge to the authenticity of Exs. R-1 to R-4 in the cross-examination of R.W. 1 and R.W. 2 by the counsel appearing for the official liquidator. I am inclined to accept the documents as genuine and hold that respondents Nos. 2 and 3 have subscribed in their respective chit groups in the company in liquidation the sums of Rs. 600.50, Rs. 550, Rs. 550 and Rs. 100 totalling Rs. 1,800.50.

8. Smt. Anasuya, learned counsel appearing for the contesting respondents, has argued that having regard to the fact and position in law that the surety's liability is co-extensive with the liability of the principal debtor and having regard to the provisions of s. 46 of the Provincial Insolvency Act (V of 1920), which are made applicable to these proceedings by virtue of s. 529 of the Act, the respondents-sureties must be allowed to set off their subscriptions in their respective chit groups against the company's claim liability of the first respondent, the principal debtor. She has relied upon a number of decisions of the other High Court as well as this court.

9. A Division Bench of this court in the case of Official Liquidator v. V. Lakshmikutty ILR [1979] Kar 1575 : [1981] 51 Comp Cas 567 (Kar), held that where there was mutuality of dealings between the debtor and the creditor in insolvency proceedings, s. 46 of the Provincial Insolvency Act, 1920, was attracted and the sum due by the other party and the balance of the account, and no more, shall be claimed or paid on either side. The Division Bench ruled as such after considering several Indian and English decisions and after distinguishing the decision in Lakshmi Kutty's case has been affirmed by the Supreme Court. (See Official Liquidator, High Court of Karnataka v. Smt. V. Lakshmikutty [1981] 51 Comp Cas 566 : [1981] 2 Kar LJ 289).

10. But S. Vijayashankar, learned counsel for the official liquidator, has attempted to distinguish that decision on the ground that in Lakshmi kutty's case, the courts were dealing with the case of a principal debtor herself claiming set-off and whether sureties could claim the privilege of set-off was not considered by the courts. I am of the view that the distinction sought to be made

is too thin to be taken serious notice of. The language of s. 46 of the Provincial Insolvency Act does not brook of such distinction. The said section speaks of mutual dealings between the insolvent and the insolvent's creditors and not of the liability of the principal debtors and their sureties. For purposes of the section, there must be relationship of creditor and debtor and there must be mutuality of dealings between them directly in whatever capacity. Section 46 of the Provincial Insolvency Act is as follows :

"46. 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 one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

11. What is recognise in the section is a right in equity and, therefore, the widest meaning must be given to the words "mutual dealings" and "creditors and debtors". The meanings should not be restricted as the plain language of the section does not permit it.

12. Learned counsel for the official liquidator has pointed out that such a construction as above will give an advantage to the sureties in a chit transaction who are subscribers (creditors) inasmuch as they would have been paid in full without waiting in the queue, while subscribers (also creditors) who are not sureties for some one else, have to wait for pari pasu payment by the official liquidator which may not be the full amount due to them from the insolvent. This cannot be avoided. Subscribers to a chit fund or kuri who offer themselves as sureties take upon themselves an additional risk and liability and, therefore, are entitled to the benefit of s. 46 of the Provincial Insolvency Act and further they satisfy the test of mutuality of the dealings between themselves and the insolvent.

13. I am fortified in the conclusion reached by three decisions of other High Court directly on the point. Two of them are rendered by the High Court of Madras and one by the Calcutta High Court. I will refer to them chronologically.

14. In the case of *Sundaravaradan v. Official Liquidators, Travancore National Bank Subsidiary Co. Ltd.* [1940] 10 Comp Cas. 87 (Mad), the learned company judge held that where a surety whose obligation was to pay to the company the debts of another person, himself had money owing to him by the company in a separate dealing or transaction, the moneys due to the surety on the one hand and from him to the company on the other, were mutual dealings as contemplated by s. 46 of the Provincial Insolvency Act and he had the right to set off against his indebtedness to the company the moneys due to him when the obligation to the company by the debtor and the surety was one which was joint and several. It was so held by the learned judge after having considered several Indian and English decisions and expressly dissenting from the decision of the

Bombay High Court in the case of Trimbak Gangadhar Gokhale Vs. Ramchandra Trimbak Kirtane, which was solely decided with reference to O. VIII, r. 6, of the CPC.

15. Independently, in the case of Travancore National and Quilon Bank Ltd. AIR 1941 Mad 654, in an application filed by I.S. and C. Machado against the official liquidator, Venkataramana Rao J. (as he then was) came to the same conclusion.

16. Similarly, in the matter of the In Re: The Pioneer Bank Ltd. and B.N. De and Others, , Bachawat J. (as he then was) construing s. 47 of the Presidency Towns Insolvency Act, 1909, corresponding to s. 46 of the Provincial Insolvency Act, held as follows (headnote) :

"Thus, in bankruptcy and in winding-up of insolvent companies the subject-matter of set-off is wider and unliquidated damages may be set off against a debt There is, therefore, no doubt that in bankruptcy and in winding-up of insolvent companies, the surety's liability under a guarantee may be set off against a debt due to the surety by the company."

17. As can be seen from the above, the preponderance of decisions are in favour of the stand taken by respondents Nos. 2 and 3 and, therefore, they should succeed.

18. In the result, this application is allowed in part only after setting off the amounts subscribed by the respondents in their respective chit groups. Thus, against the claim of Rs. 1,998.75, respondents Nos. 2 and 3 are allowed to set off Rs. 1,850.50 only and they together with respondent No. 1 shall pay the balance of Rs. 149.50 to the official liquidator together with interest at 6 per cent. per annum from date of application till date of realisation. It is accordingly ordered.