

(1951) 02 CAL CK 0039
In the Calcutta High Court
Case No : Appln. No. 56 of 1951

In Re: The Pioneer Bank Ltd. and B.N. De and Others

Date of Decision : 23-02-1951

Acts Referred:

Companies Act, 1913 — Section 229
Presidency Towns Insolvency Act, 1909 — Section 46, 47

Citation : AIR 1951 Cal 519 : (1952) 2 ILR (Cal) 16

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : A.C. Lahiri, for the Appellant; S. Mitra, for the Respondent

Judgement

Baghawat, J.—This is appln. by Sm. Annapurna Badrinarain Banerji for an order directing the Official Liquidator of the Pioneer Bank to set off the debt due to Badrinarain from the Bank under six fixed deposit receipts against a debt due to the Bank from the appcts. No objection is taken to the form of the prayer or to the maintainability of the petn. & I have been expressly invited by Mr. T. Banerjee who appeared on behalf of the Bank to adjudicate on the question of set off on this appln.

2. It is common case that Annapurna borrowed large sums of money from the Bank on an overdraft account & is indebted to the Bank personally. Badrinarain is a guarantor The petn. contains conflicting statements with regard to the nature of the guarantee. Mr. Lahiri appearing on behalf of the appct. has however formally admitted & it is now common case that Badrinarain guaranteed personally the entire amount of the debt due from Annapurna & as further security for the debt endorsed a Life Insurance Policy & also made over six Fixed Deposit receipts. Badrinarain executed letters of lien authorising the Bank to adjust the amount of the Fixed Deposit receipts against the debt due from Annapurna & until such adjustment it was agreed that the Bank would have a lien on the Fixed Deposit receipts. Under the Fixed Deposit receipts large sums of money are due to Badrinarain from the Bank on account of deposits made by him. The last of the fixed deposit receipts is dated 20-5-1948. The petn, for

winding up was presented on 3-1-1949 before which date all the fixed deposit receipts matured except one which matured on 20-5-1949. The bank was ordered to be wound up on 12-7-1949.

3. Certain interesting questions as to set-off arise in this case. The Co. is in winding up & is insolvent & therefore, by Section 229, Companies Act, the bankruptcy law as to mutual dealings & set-off is imported into the scheme of the winding-up.

4. If the debt. to an action by the Co. in liquidation had a right to set-off before the winding up, the right is not destroyed by the winding up. The set-off will still be a plea in bar & a defence pro tanto to the plaintiff's claim.

5. Formerly in England in an action for debt by the plaintiff. who had guaranteed a debt payable to the debt. by a third party the debt. could not set-off the amount of the debt of such third party, *Morley v. English* (1837) 4 Bing (N. C.) 58. This case approved of *Crawford v. Stirling*, 4 Esp. 207, where Lord Ellenborough gave the reason thus :

"He thought there was no foundation for the set-off claimed, as the sum claimed was unliquidated damages: That a guarantee was a contract of indemnity; it was to make good the default of another party, for whom the guarantee was given: That was not an absolute debt by the plaintiff. to the debt. but an engagement for the deficiency of Kirkpatrick only; it could therefore only be known to what extent the plaintiff. was liable, when it was ascertained how much was paid by Kirkpatrick's estate. This was therefore uncertain & unliquidated till that fact was known."

The language of the Rules of the S. C. O. 19 Rule 3 is very wide & there is opinion to the effect that now the liability of a surety under a guarantee may be set off. *Halsbury's Laws of England*, vol. 16, Article 89, p. 86 states thus:

"The surety's liability under a guarantee may be made the subject of a set-off or counterclaim by the creditor in an action brought against him by the surety; &, conversely, the surety, when sued on the guarantee, may raise a set-off or counter-claim against the creditor." It is also settled law that a joint debt & a several debt cannot be set off against each other. This is also acknowledged to be the law in India. See illustrations (f) & (g) to Order 8, Rule 6, Civil P. C. A joint & several debt may, however, be set off against a separate debt; *Halsbury's Laws of England*, vol. 29, Article 696, *Fletcher v. Dyche* (1787) 2 T. R. 32; *Owen v. Wilkinson* (1858) 5 C. B. (N. S.) 526. A joint & several debt is a separate debt of both the debtor?.

6. In India, in the absence of a contract to the contrary, a joint promise creates a joint & several obligation : Section 43, Contract Act. If A sues B & C who are jointly & severally liable, B can set off a debt due to him separately from A. On this point with respect I prefer the decision in *Re Travancore National and Quilon Bank Ltd.* A. I. R. 1941 Mad. 654, to the decisions in *Trimbak v. Ramchandra*, 45 Bom. 1219 & *Alliance Bank of Simla v. Mohanlal*, 8 Lah. 105. On the other hand,

if A & B sue C for the recovery of a debt due from C to A & B, C cannot set off a debt due to him from A alone. u/s 45, Contract Act, the claim of A & B is joint & to allow C to plead set off in such a case will be to enable C to obtain payment from B who is in no way indebted to C.

7. Similarly, if a Bank is liable under a fixed deposit receipt payable to either A or B or survivor in a suit for recovery of the deposit by B the Bank cannot set off a separate debt due from A to the Bank (Simla Banking Co. v. Bhagwan Kuar A. I. R. 1928 Lah, 316) unless the deposit though standing in the name of A & B is really & truly the property of A. Panikar v. Travancore National and Quilon Bank Ltd. AIR 1942 Mad. 351.

8. The right of set-off given by the bankruptcy law is wider than that given by the general law. The Bankruptcy Acts generally enlarge the scope of the subject-matter of the plea of set-off : see Sovereign Life Assurance Co. v. Dodd (1892) 2 Q. B. 573

9. The right of set off in the case of insolvency in Presidency Towns is given by Section 47, Presidency Towns Insolvency Act, which reads thus :

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

Provided that a person shall not be entitled under this section to claim the benefits of any set off against the property of an insolvent in any case where he had at the time of giving credit to the insolvent notice of the presentation of any insolvency petn. by or against him,"

By Section 229, Companies Act, this section is imported into the winding-up of an insolvent company.

10. The Presidency Towns Insolvency Act does not state on what date the right of set off is to be ascertained. Section 46 of that Act, however, shows that all debts & liabilities to which the debtor is subject when he is adjudged an insolvent may be proved. The dividing line, therefore, in the case of a proof of debt is the date of adjudication.

11. Wright J., in Re Daintrey (1900) 1 Q. B. 546 gives cogent reason why the same dividing line should be taken for the purpose of ascertainment of the date of set-off. He says thus:

"Prima facie it would seem that the line which is drawn for defining what debts are to be provable in the bankruptcy must be also the line for defining what cross claims are to be set off in the case of a creditor whose set-off is not stopped at an earlier date by notice of an act of bankruptcy. If the line were to be drawn at

different times for the two purposes of proof & set-off the result might be unjust."

12. The equivalent of adjudication in the case of a Co. is the order for winding-up. The right of proof & set-off in the case of an insolvent Co. in the course of winding up in a Presidency Town in India must, therefore, be defined & ascertained at the date of the order of winding up. The right of set off may be stopped earlier by notice of the presentation of the winding up petn. in Presidency Towns. In England the dividing line in the case of Bankruptcy Act is the date of the receiving order, yet it has been held there that the date of the order of winding up is the dividing line for set off in the case of winding up of an insolvent company: *Re National Benefit Assurance Co.* (1924) 2 Chn. D. 339

13. Section 47, Presidency Towns Insolvency Act, is positive & absolute rule of law. A set off so far as, it is available under that section is equivalent to payment & a creditor by claiming to prove necessarily causes satisfaction of his debt so far as the set off extends. *Re Deveze; Ex parte Barnett* (1874) 9 Chn A. 293

14. In bankruptcy & winding up ordinarily a joint debt & a separate debt cannot be set off against each other. Halsbury, Laws of England, Edn. 2, vol. 2, Article 377. In *re Pennington & Owen, Ltd.* (1925) Chn. 825.

15. In the case of a guarantee the right of set off will depend upon the form of the guarantee & the nature of the equities arising in the case.

16. The guarantee may take the form of a joint promise by the surety & the principal debtor. Although ordinarily a joint debt cannot be set off against a separate debt the surety may insist that a separate claim of the principal debtor against the creditor must be set-off against a claim on the joint promise. The reason is that in equity the surety is entitled to call upon the principal debtor to exonerate him. Story, Equity Jurisprudence 1442. *Becherbaise v. Lewis* (1872) 7 C. P. 372. In *Ex parte Hanson*, (1811) 18 ves. Jur. 232, Eldon L. C. observed as follows :

"The joint debt was nothing more than a security for the separate debt; & upon equitable considerations a creditor, who has a joint security for a separate debt. cannot resort to that security without allowing what he has received on the separate account, for which the other was a security."

17. The guarantee may be in the form of a joint & several promise by the surety & the principal debtor. In such a case even in England the liability under the joint & several promise may be set off against a separate debt due to the surety. *Ex parte Stephens* (1805) 11 ves. 24 as explained by Jessel M. R., in *Middleton v. Pollock* (1875) 20 Eq. 515 Rowlett, Principal and Surety, Edn. 2, p. 139.

18. In India, a joint promise is also a several promise & in a suit to enforce such promise the surety can set off a separate debt due to him. There are mutual dealings between the surety & the bankrupt co. in liquidation & such dealings must be set off against each other u/s 229, Companies Act read with Section 47, Presidency Towns Insolvency Act. *Re: Travancore National & Quilon Bank Ltd. A.*

I. R. 1941 Mad. 654. With respect I agree with this decision. This decision is followed in *New Bank of India v. Banwarilal* (1949) comp. cas. 236 To the same effect is the decision of *Gentle J. D. Sundaravaradan Vs. R. Narasimhachari*, Official Liquidator, .

19. The guarantee may not be in the form of a joint & several promise but as in this case it may be in form of an engagement for the default of a third party. In such a case the liability of the guarantor is neither joint nor several. His is a contract to perform the promise of another on his default: Section 126, Contract Act. The question whether a debt due to the surety may be set off against his liability on the guarantee in an ordinary action must be solved in England with reference to *R. S. C. O. 19*, Rule 3 & in India with reference to *Order 8*, Rule 6, Civil P. C., 1908. In bankruptcy & in winding up of insolvent companies the subject-matter of set off is wider & unliquidated damages may be set off against a debt: *Sir Dinshaw Mulla's Law of Insolvency*, Article 470, p. 308, *Jeffery v. Official Assignee of Rangoon*, 6 Rang. 46, *Jack v. Kipling* (1878) 9 Q. B. D. 113; *Re. National Benefit Assurance Co.* (1924) 2 Chn. D. 339 There is, therefore, no doubt that in bankruptcy & in winding up of insolvent companies the surety's liability under a guarantee may be set off against a debt due to the surety.

20. The fact that the debt is not payable on the date of the winding up is wholly immaterial. A debt payable in future may be set off--*Ex parte Prescott* (1758) 1 Atk. 230. Indeed this was conceded before *Gentle J.* In *Re: Travancore National and Quilon Bank Ltd., S. Barkatally and Others*, .

21. If as security for the debt of A, B charges in favour of C the creditor of A debt due to B from C without incurring any personal obligation for the repayment of the debt of A, no doubt B is a surety for some purposes--*Smith v. Wood* (1929) 1 chn. 14, *Jagjibandas Jethalal v. King Hamilton & Co.* 55 Bom. 677. It has, however, been held that on the bankruptcy of C. A cannot set off the debt due to B from C against the debt due to C from A: In *Re Travancore National & Quilon Bank Ltd.* A. I. R. 1941 Mad. 622. In this case it is not necessary to decide this point & I express no opinion.

22. In the case before me on the date of the order for winding up of the bank *Badrinaayan Banerjee* was a guarantor for the whole of the debt due to the bank from *Annapurna* & was liable personally to the bank for the repayment of such debt. At the same time, the bank was on that date indebted to *Badrinarayan*. There is no doubt, therefore, that there were mutual dealings between *Badrinarayan* & the bank & the debt due to him from the bank must be set off against his liability as guarantor for the debt of *Annapurna*.

23. The fact that one of the fixed deposit receipts fell due after the date of the petn. for winding up is immaterial. The dividing line is the date of the order of winding up and the debt fell due before such date. Besides even a debt payable after the date of the order for winding up may be set off.

24. I, therefore, declare that *Badrinarayan Banerjee* is entitled to set off the

amount due to him under the several fixed deposit receipts mentioned in Para. 7 of the petn. against the claim of the bank against him as guarantor & only the balance remaining on such set off & no more shall be payable by Badrinarayan to the bank. Of course ex concessis the principal debtor Sm. Annapurna is also liable to pay such balance to the bank.

25. The petncs. also asked for an order directing the liquidator to compromise the matter on certain terms. Such order cannot be made as the liquidator is not agreeable to compromise on those terms.

26. Having regard to all the circumstances of this case, I direct the appcts will bear & pay their own costs of the appln. & the liquidator will be at liberty to retain the costs of this appln. out of the assets. I got much assistance from Mr. T. Banerjee & I will allow him fees as if he is an Advocate.

27. Having regard to my judgment it is now agreed between the parties that the balance due to the bank on such set off will be paid by Sm. Annapurna & Badrinarayan in the following manner: Rs. 6000 will be payable in the course of the day & the remaining balance will be payable in monthly instalments of Rs. 500, the first of such instalments will be payable by 7-4-1951 & thereafter every month & no interest from to-day will be charged if payment is punctually made in accordance with these terms. But if default is made in payment of any one of these instalments, the whole of the amount then remaining unpaid will become due & the liquidator will be entitled to realize the same forthwith. Leave to the liquidator is given to compromise on the above terms.