

(1934) 08 CAL CK 0020
In the Calcutta High Court

Krishna Chandra Bhoumick

APPELLANT

Vs

Pabna Dhanabhandar Co. Ltd.

RESPONDENT

Date of Decision : 21-08-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Companies Act, 1956 — Section 229
Limitation Act, 1963 — Article 181
Presidency Towns Insolvency Act, 1909 — Section 47

Citation : AIR 1935 Cal 225 : 155 Ind. Cas. 991

Hon'ble Judges : Mukerjee, Acting C.J.; Mitter, J

Bench : Full Bench

Judgement

Mitter, J.—This appeal is on behalf of the judgment-debtor whose objection u/s 47, Civil P. C, has been rejected by the learned Subordinate Judge of Pabna. The appellant purchased on 26th June 1924, at a revenue sale, a zamindary which belonged to the Pakrasis. The Pabna Dhanabhandar Co. Ltd. which had not then gone into liquidation, had before the revenue sale advanced money to the Pakrasis on a mortgage of the said zamindary, At the date of the revenue sale and at all material times the position of the respondent company was that of a mortgagee. The appellant paid the whole of the purchase money which remained in deposit in the Pabna Collectorate.

2. The respondent company instituted on 7th July 1925 suit to set aside the revenue sale. To the said suit the appellant was defendant 1 and the Pakrasis defendants 2 to 11. The learned Subordinate Judge decreed the suit with costs against the appellant, which costs was assessed at Rs. 989-11-0. The appellant before us preferred an appeal to this Court which was dismissed on 23rd May 1928, subject to the modification that the decree for costs against the appellant was set aside. An appeal was taken to His Majesty in Council by the appellant but it was dismissed and the appellant was directed to pay to the respondent ? 247-16s-3d as costs. The net result was that the revenue sale was declared invalid, the decree for costs passed against the appellant by the Subordinate

Judge was vacated and the appellant was directed to pay ₹247-16s-3d as cost incurred by the respondent in England in resisting the appeal to His Majesty in Council. Shortly after obtaining the decree from the Subordinate Judge the respondent company applied for executing the decree for costs passed by the Subordinate Judge. The appellant moved this Court for stay. The material portion of the order passed on 18th February 1927 by this Court on the said application is in these terms:

The opposite party will be entitled to execute this decree for costs as against the petitioner before us to be recovered out of the money now in deposit in the Collectorate, which the petitioner paid as purchase money for the sale of the property which has not been set aside, the money being now held to the credits of the petitioner.

3. The respondent company accordingly withdrew on 12th July 1927 from the said deposit a sum of money sufficient to cover their decree for costs, giving security for the due performance of the decree that may be passed by this Court. The appellant also paid revenue and cess amounting to Rs. 543-5-6 that fell due from the date of his purchase at the revenue sale. The respondent company has since gone into liquidation. The said company represented by the liquidator applied on 30th May 1932 for execution of the decree for costs awarded, by His Majesty in Council. The appellant preferred objections u/s 47 of the Code and of the many objections he preferred, only one is now for consideration before us, namely whether he is entitled to claim a deduction of the sum of money recovered on account of the decree for costs awarded by the Subordinate Judge, which decree was ultimately reversed, and of the sum of money paid by him on account of revenue and cess with interest. The Subordinate Judge overruled this claim assigning two reasons for his decision. He held that the appellant ought to have filed an application for restoration as soon as the High Court set aside the decree for costs passed by the Subordinate Judge and his claim was barred by limitation. He further held that the fact that the respondent company had gone into liquidation had introduced a complication and to allow the claim of the appellant would be to give him a preference.

4. The appellant has urged before us that both the grounds mentioned by the Subordinate Judge are erroneous. The advocate for the respondent, besides supporting the reasons of the Subordinate Judge, has urged before us a further ground, namely that the claim of the appellant is in substance a claim to a set off which, he says, an executing Court cannot entertain. We consider the last point urged by him to be of no substance. If an order for restoration had been passed the executing Court would have been bound to give the appellant credit for the sum of money recovered by the respondent in execution of the Subordinate Judge's decree under Order 21, Rule 18 of the Code. The legislature has recognized the principle that an executing Court can entertain a claim to set off (O. 21, Rule 19), and although the case before us does not come within the strict terms of Order 21, Rule 19 we are of opinion that on general principles and in

the exercise of its inherent power such a Court can give effect to such a claim. We do not also consider that the winding up of the respondent company has any effect on the claim of the appellant and that if he is otherwise entitled to have credit for the moneys paid by or recovered from him, the fact that the company has gone into liquidation would not stand in his way.

5. Long before the making of statutory provisions on the subject it was the practice in bankruptcy, where there was debtor and creditor account between the bankrupt and another person, to take the account between them and to adjust the balance, provided that the debts were connected with each other: see *Young v. Bank of Bengal* (1875) 1 MIA 87. The statutory provisions on the subject extended the same rule to cases where the debts were unconnected with each other. This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice; otherwise the receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take a pro rata dividend only. Section 46, Provincial Insolvency Act, and Section 47, Presidency Towns. Insolvency Act deal with this matter in the way indicated above. In *re, Daintry Ex parte Mant* (1900) 1 QB 546 it was argued that the trustee in bankruptcy could recover 20 shillings in the pound from Messrs. Mant and say that Messrs. Mant must be content with a dividend on the debt due to them from the bankrupt, but Lindley, M.R. repelled the contention as unarguable. The term "mutual dealings" has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt to the insolvent but also where there is a claim for unliquidated damages. Damages for breach of covenant can be set off under the said provisions against a claim for rent and in the law reports diverse other cases can be found: see *Mersey Steel & Iron Co., Ltd. v. Naylor, Benzon & Co.* (1884) 9 AC 434, *Tilley v. Bowman Ltd.* (1910) 1 KB 745 and Reference under Presidency Small Cause Courts Act (1905) 28 Mad 240. Section 229, Companies Act, makes these principles applicable to a company in liquidation. The only exception to these rules is the case of a contributory. A share-holder of a limited company, who is also a creditor of the same, in the event of the company being wound up, is not entitled to set off the debt due to him against the calls, nor set off against the calls a dividend which may come to him thereafter: In *re, Overrend Gurney & Co., Grissel's case* (1866) 1 Ch A 528. We are accordingly of opinion that the second ground assigned by the Subordinate Judge for overruling the claim of the appellant cannot be sustained.

6. The rejection of his claim on the ground of limitation cannot also in our opinion be sustained. The ownership of the money in deposit in the Collectorate, from which the respondent withdrew a sum of money to satisfy his decree for costs, was not set at rest till the decision of the Judicial Committee. If the sale had been affirmed the surplus would have belonged not to the appellant but to the Pakrasis. If the decree setting aside the sale stood confirmed then and then

only the said surplus would have belonged to the appellant and could have been regarded as his money. During the pendency of the appeals or before filing them the appellant could not have withdrawn the same without seriously imperilling his appeals. If after the decree of the High Court he had made the application to get the money back from the respondent his position would not have been happier. We think that in the circumstances of this case the right to apply accrued to the appellant under Article 181, Lim. Act, when the Judicial Committee disposed of his appeal. We accordingly hold that the appellant is entitled to set off against the respondent's claim the sum of Rupees 989-11-0, which the respondent took out of the surplus sale proceeds.

7. The claim for the sum of money, paid by the appellant on account of revenue and cess stands on a different footing. The respondent who was a mortgagee was not under a liability to pay the same. The liability is an eventual liability of the Pakrasis. We accordingly modify the order passed by the Subordinate Judge and allow the appellant credit for the aforesaid sum of Rs 989 11-0 only. The parties to bear their respective costs throughout.

Mukerjee, Ag. C.J.

8. I entirely agree.