

(1981) 10 KAR CK 0009

In the Karnataka High Court

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

Official Liquidator, High Court, Karnataka

APPELLANT

Vs

James Edwin and Others

RESPONDENT

Date of Decision : 30-10-1981

Acts Referred:

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

Citation : AIR 1983 Kar 24 : (1983) 54 CompCas 792(1) : (1982) 1 KarLJ 310

Hon'ble Judges : Chandrakantharaj Urs, J

Bench : Single Bench

Advocate : S. Vijayashankar, for the Appellant; Anasuya, for the Respondent

Judgement

1. This is an application u/s 446(2)(b) of the Companies Act, 1956, made by the Official Liquidator praying for an order directing respondents 1,2 and 3 to pay to 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., Smitha Chits and Trading Company Limited (hereinafter referred to as the Company).

2. Respondent-1 James Edwin was a member of the chit Group DD of the Company having Chit No.19 with the Chit value of Rs.2000/-. He was the highest bidder at the auction held for his Group on 21-2-1997 and he received the payment of the prize amount on 5-4-1977. On the same day, he executed a promissory note for Rs.1,500/- in favour of the Company. Respondent-2 David Franklin Soans and respondent-3, N. Basha joined the 1st respondent in the execution of the pronote as sureties. 2nd and 3rd respondents also signed on 8-3-77 surety and security proposal form of the Company agreeing to be sureties for respondent-1 repaying the chit value. Respondent-1 has subscribed Rs.360.25 including the dividends due to him in his chit group. The Official Liquidator issued notices to respondents on 19-5-1978 and 17-10-1979 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 18-1-1980. Official Liquidator"s claim is as follows :-

"Chit Value Rs. 2000.00

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. Book No.19). 360.25

Balance principal due : Rs. 1639.75

And :

Interests at 18% p.a. from

23-7-1977 to 16-12-1978 170.00

Interest at 6% per annum

from 17.2.1978 to 18.1.1980 189.00

Total amount due Rs. 1998.75."

Respondents entered appearance through counsel was represented by Shri C.S. Shantamallappa, while respondents 2 and 3 were represented by Smt G. Anasuya, Respondent-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 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.2000/-. 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 25-5-1977 and that amount is due and payable by the Company in liquidation to him. Similarly, it is stated that respondent-3 was a member of two other chits - Chit Group DF bearing number 49 and Chit Group DF bearing 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.1900/- and adjustment of their liability 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.1639.75 due by the 1st respondent to the Company in liquidation as the principal amount. They appear to have replied 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 to pay to them the difference between Rs.1900/- and Rs.1639.75.

3. Respondents 2 and 3 have examined themselves as R.W.1 and R.W.2 in support of their stand. Pass Book No.22 belonging to DF.No.1 has been marked as Exhibit-R1. Pass Book belonging to DF 49 has been marked as Exhibit-R2 and pass book belonging to Group DF 50 has been marked as Exhibit-R3. Exhibit R4 is a receipt for Rs.100/- issued to the 3rd respondent in respect of Group DF 49. Respondents 2 and 3 have admitted the execution of the promissory note Exhibit-P1 and have identified their signatures at Exhibit-P1 (a) and Exhibit-P1 (b). In Exhibit-R1 the closing entry is Rs.600.50 including the fifth dividend paid to the subscriber. In Exhibit-R2 the last entry is Rs.550/- including the dividends paid to the subscriber. In Exhibit-R3 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.

4. Official Liquidator has not adduced any oral evidence except to get the pronote marked through the respondents.

5. On the pleadings and the evidence as above in the case and having regard to the admissions of the respondents only the following points arise for determinations :

(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?

6. The first point should not detain me long. There is no serious challenge to the authenticity of Exhibits-R1 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 2 and 3 have subscribed in their respective chit groups in the company in liquidation the sum of Rs.600.50, Rs.550.00, Rs.550/- and Rs.100/- totalling Rs.1800.50.

7. Smt. Anasuya, learned counsel appearing for the contesting respondents has argued that having regard to the fact and position in law that surety's liability is co-extensive with the liability of the principal debtor and having regard to the provisions of Sec. 46 of the Provincial Insolvency Act (V of 1920) which are made

applicable to these proceedings by virtue of Sec. 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 other High Courts as well as this Court.

8. A Division Bench of this Court in the case of Official Liquidator v. B. Lakshmi Kutty (ILR (1979) Kant 1575) held that where there was mutuality of dealings between the debtor and the creditor in insolvency proceedings, Sec. 46 of the Provincial Insolvency Act 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 rules as such after considering several Indian and English decisions and after distinguishing the decision of the Supreme Court in the case of Union of India (UOI) and Another Vs. India Fisheries (P) Ltd., . The decision in Lakshmi Kutty's case has been affirmed by the Supreme Court. (See (1981) 2 Kant LJ 289 : (AIR 1982 SC 1483).

9. But Shri 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 Section 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 :

"Section 46. Where there have been mutual dealings between an insolvent and a creditor providing 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."

10. What is recognised 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.

11. Learned counsel for the Official Liquidator has pointed out that such a construction as above will give an advantage to sureties in a chit transaction who are subscribers (creditors) in as much 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 passu 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 taken upon themselves an additional risk and liability and therefore entitled to the benefit of Section 46 of the Provincial Insolvency Act and further they satisfy the test of mutuality of the dealings between themselves and the insolvent.

12. I am fortified in the conclusion reached, by three decisions of other High Courts 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.

13. In the case of D. Sundaravaradan Vs. R. Narasimhachari, Official Liquidator, 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 Sec. 46, 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 considerate 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 Order VIII, Rule 6 of the Code of Civil Procedure.

14. Independently, in the case of Travancore National and Quilon Bank Ltd., (reference) 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 (see AIR 1941 Mad 654).

15. 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 Sec. 47 of the Presidency Towns Insolvency Act, 1909, corresponding to Sec. 46 of the Provincial Insolvency Act held as follows :

"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 debt due to the surety by the company."

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

17. In the result, this application as allowed in part only after setting off the amounts subscribed by respondents in their respective chit groups. Thus, against the claim of Rs.1998.75 the respondents 2 and 3 are allowed to set-off Rs.1850.50 only and they together with respondent-1 shall pay the balance of

Rs.149.25 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.

18. Petition partly allowed.