

(1993) 02 KL CK 0080

In the High Court Of Kerala

Case No : C.P. Nos 8, 9 and 49 of 1981

The Sudarsan Chits (India) Ltd.

APPELLANT

Vs

Narasimhulu Chetty and another

RESPONDENT

Date of Decision : 24-02-1993

Acts Referred:

Banking Regulation Act, 1949 — Section 10, 22, 45D, 45F, 5(b)
Chit Funds Act, 1982 — Section 46, 47, 61
Civil Procedure Code, 1908 (CPC) — Section 11
Companies Act, 1956 — Section 441(2), 446(2), 446(2), 449, 457(1)(a)
Limitation Act, 1963 — Section 10, 15, 15(2), 15(3)

Citation : (1993) 2 KLJ 55

Hon'ble Judges : T.V. Ramakrishnan, J

Bench : Single Bench

Advocate : K.P. Dandapani, for the Appellant;

Final Decision : Dismissed

Judgement

T.V. Ramakrishnan J.

1. This is a claim filed by the Official Liquidator as the Provisional Liquidator of Sudarsan Chits (India) Ltd., (hereinafter referred to as the "Liquidator"). The claim is for the realisation of the amounts alleged to be due to the company in liquidation from the respondents, the liability of the respondents arose out of a Kuri conducted by the company in liquidation. The other details of the claim are not necessary for the disposal of the point arising for consideration and as such are not being referred to. The petition for winding up in this case was filed on 2.1.1981 and the winding up order was passed on 13.10.1981. On 13.10.1981 itself the Official Liquidator was appointed as the Liquidator of the company. The company filed appeals M.F.A. Nos. 518, 519 and 520 of 1981 against the order of winding up and the Division Bench in appeal by an interim order stayed the winding up order and directed the official liquidator to continue as the Provisional Liquidator of the company. Later while disposing of the appeals on 8.10.1982 the Division Bench kept the order of winding up in abeyance and directed the official

Liquidator to continue as the Provisional Liquidator. The company has filed SLP 7634-35-36 of 1983 against the decision of the Division Bench which was pending before the Supreme Court till 14.9.1992 on which day it was dismissed as not pressed. Thus the Official Liquidator is continuing as the Provisional Liquidator from 13.10.1981 onwards. The Liquidator so appointed was given sanction to file claims as required by Sections 446 (2) and 457(1) (a) of the Companies Act (for short "the Act") only on 16.8.1984 by the Supreme Court as per its decision reported in *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, . This claim is in respect of a liability due on the date of presentation of the winding up petition and was filed only on 6.12.1991, long after the expiry of 3 years from the date on which the Liquidator was accorded with necessary sanction for filing claims u/s 446(2) of the Act read along with Section 457(1) (a) of the Act. There are at present about 700 claims pending before this Court which are filed after 27.5.1989.

2. In *Sudarsan Chits (I) Ltd. v. Smt. Uma Sharma* (1992) 73 Com. Cases 381, John Mathew, J. in the case of a claim filed by the liquidator of this company itself, has held as follows:

Thus the claimant is entitled to exclude the period from the date of the winding-up order up to August 16, 1984, as well as the period from the date of commencement of the winding-up of the company to the date on which the winding-up order was passed (from January 2, 1981, to October 13, 1981, namely, 9 months and 11 days), and a further period of one year. Thus, the liquidator is entitled to 4 years, 9 months and 11 days from August 16, 1984. The present claim which was filed on July 22, 1988, is accordingly within time. The contention that it is barred by limitation is rejected.

3. While holding so, the learned Judge has applied the provisions in Section 15 (2) of the Limitation Act and Section 458A of the Act and allowed the respective periods mentioned in the said Sections to be excluded while calculating the period for filing claims by the Liquidator on behalf of the company in liquidation. The total period thus found entitled to be excluded is 4 years, 9 months and 11 days from 16.8.1984. If that is the only period to be excluded, the last date for filing the claims on behalf of the company would expire by 27.5.1989 in respect of all debts due on the date of commencement of the winding-up in this case. In this case, as already pointed out, the claim was filed only on 6.12.1991 i.e., after 27.5.1989. There are several other claims also pending disposal before this Court which were filed after 27.5.1989. The question to be considered is whether the claims filed by the Liquidator on behalf of the company in liquidation after 27.5.1989 in respect of debts due as on 2.1.1981, the date of commencement of winding-up are barred by limitation or not?

4. In this regard, Shri K.P. Dandapani, the learned counsel for the Liquidator has advanced three contentions which were not considered in *Smt. Uma sharma's Case* (1992 73 Com, cases 381) in an attempt to save such claims also from the bar of limitation. (1) Thus it was contended that u/s 15(3) of the Limitation Act

the Liquidator of a company in liquidation is entitled to exclude the period beginning with the date of institution of winding up proceedings and ending with the expiry of three months from the date of appointment of the provisional Liquidator over and above the period liable to be excluded u/s 15(2) of the Limitation Act. (2) The second contention raised, which is an extreme contention, was that there is no limitation at all for filing claims by the Liquidator on behalf of the company in liquidation. While advancing the second contention, learned counsel for the claimant has taken up the stand that the company in liquidation is a banking company and as such the provisions in the Banking Regulation Act, 1949 (for short "the Regulation Act") especially Section 45-0 (1) of the said Act would apply in the matter of filing claims in the Winding up proceedings of this company also. (3) Thirdly, again an extreme contention has been taken to the effect that the claim is liable to be considered as a suit or proceeding governed by Section 10 of the Limitation Act and there is no limitation for such a claim. It was submitted that a subscriber who bids and receives money from the share holder company is liable to be treated as a trustee or constructive trustee as regards the money he receives from the company. The claim filed to realise such money is liable to be treated as a suit or proceeding for realisation of trust money in the hands of trustee or his legal representatives. It was argued that the chit or kuri conducted by the company in liquidation was a transaction by way of a trust or in the nature of a trust and the claim filed for the realisation of the amounts due on the basis of such a transaction is governed by Section 10 of the Limitation Act.

5. Section 15(3) of the Limitation Act is in the following terms:

In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

Sub clause (3) of Section 15 of the Limitation Act is a new provision added in 1963. The object with which the above provision was newly added in Section 15 as given in the objects and reasons is the following:

...Sub-clause (3) is new. It is common knowledge that by the time a receiver or liquidator is appointed in insolvency or in liquidation proceedings and the receiver or liquidator after getting information about the assets and liabilities of the estate sits down to the task of realising the assets of the estate, claims in favour of such estate or company get barred to the detriment of the persons entitled to the benefits of the assets. To avoid this hardship this sub-clause, provides that the period between the filing of the petition for winding up or adjudication and the appointment of the receiver (including interim receiver) or liquidator (including a provisional liquidator) and a period of three months thereafter (to

enable him to acquaint himself with the affairs of the estate) should be excluded.

The period liable to be excluded u/s 15(3) of the Limitation Act begins with the date of institution of the winding up proceedings and ends with the expiry of three months from the date of appointment of Liquidator. Based upon this provision the Liquidator has claimed the exclusion of the entire period specified in the provision or in the alternative a period of three months from the date of appointment of the Liquidator in addition to the period already allowed to the Official Liquidator as per Smt. Uma Sharma's Case. (1992) 73 Com, Cases 381)

6. Thus, with reference to the facts of this case, the Liquidator has claimed exclusion of the entire period commencing from the date of winding up, namely, 2.1.1981 and ending with 14.12.1992 treating 14.9.1992 as the effective or final date on which he was appointed as the Liquidator of the company. In support of the said contention the learned counsel for the Official Liquidator has submitted that though the Official Liquidator was directed to continue as the Provisional Liquidator of the company by the Division Bench while disposing of M.F.As. No.518,519 and 520 of 1981, there was a SLP filed by the company pending before the Supreme court till 14.9.1992 and the same was disposed of finally only on that date. In view of the fact that the SLP was disposed of only on 14.9.1992 the Official Liquidator must be deemed to have been appointed as the Liquidator of the company, finally only on 14.9.1992. In the circumstances, the Liquidator is entitled to exclude the entire period commencing from 2.1.1981 ending with 14.12.1992. Alternatively it was contended that he is entitled to exclude at least a period of three months over and above the period already allowed to be excluded u/s 15(2) of the Limitation Act and Section 458A of the Act in Smt. Uma Sharma's Case (1992) 73 Com. Cases 381).

7. On the basis of the contention so raised in this regard two questions arise for consideration. One of the questions that arises for consideration is whether the Liquidator is entitled in law to exclude any further period of time u/s 15(3) of the Limitation Act other than the periods already allowed to be excluded in Smt. Uma Sharma's Case (1992) 73 Com. Cases 381)? The other question is when was the Official Liquidator appointed as the Provisional Liquidator of this company or whether 14.9.1992 is liable to be accepted as the date on which the Official Liquidator was appointed as the Liquidator of the company.

8. Taking up the 2nd contention for consideration first, it has to be pointed out in this case that the Official Liquidator was appointed as the Liquidator of the company on 13.10.1981. Of course, the Division Bench has by an interim order as well as by the final order passed in the appeals directed the official Liquidator to continue as the Provisional Liquidator of the company keeping in abeyance the order of winding up. Even though a SLP was filed in the Supreme Court and was pending till 14.9.1992, the Provisional Liquidator was allowed to continue as such and was also actually functioning through out the whole period. Thus the Liquidator is even now continuing as the Provisional Liquidator of the company from 13.10.1991 onwards. It is an indisputable fact that as per the order passed

by the Supreme Court on 16.8.1984 the Provisional Liquidator was granted sanction for filing claims on behalf of the company in liquidation. In the circumstances, in my view, there is no merit in the contention advanced by the counsel for the Official Liquidator that since the SLP was pending till 14.9.1992, the Official Liquidator must be deemed to have been appointed only on that date. In Smt. Uma Sharma's case (1992) 73 Com. Cases 381 this Court has for the purpose of Section 15(2) of the Limitation Act treated 16.8.1984 as the date on which sanction was accorded to the Provisional Liquidator for filing claims on behalf of the company in liquidation though the Official Liquidator was directed to be the Provisional Liquidator of the company as per the interim and final orders passed by this Court in M.F.A. Nos. 518, 519 and 520 of 1981. In the light of the above indisputable facts, I do not think that there is any legal justification to accept the contention that the date of appointment of the Official Liquidator as Provisional Liquidator of the company should be treated as 14.9.1992, the date on which SLP was dismissed as not pressed. Thus factually and legally the contention raised on behalf of the Liquidator that 14.9.1992 must be treated as the date on which he was appointed as the Provisional Liquidator of the company cannot be accepted at all.

9. In this case, the Official Liquidator must be deemed to have been appointed as the Provisional Liquidator with sanction to file the claims only on 16.8.1984, the date on which the Supreme Court has granted sanction to the Provisional Liquidator already appointed by the Division Bench of this Court in M.F.A. Nos. 518, 519 and 520 of 1981. In fact this is the date which was accepted by this Court in Smt. Uma Sharma's Case (1992) 73 Com. Cases 314) also for the purpose of Section 15 (2) of the Limitation Act. On that basis the Liquidator if at all can claim exclusion of any period u/s 15(3) of the Limitation Act, can claim only the period commencing from 2.1.1981 and ending with 16.11.1984. The further question to be considered is whether the Liquidator can in this case claim any period specifically u/s 15(3) of the Limitation Act apart from or in addition to the period which is already allowed to be excluded u/s 458A of the Act and Section 15(2) of the Limitation Act in Smt Uma Sharma's Case (1992) 73 Com. Cases 381).

10. In this connection it is relevant to note Section 458A of the Act, which is in the following terms:

458A. Exclusion of certain time in computing periods of limitation:-

Notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound-up by the Court, the period from the date of commencement of the winding-up of the company to the date on which the winding-up order is made (both inclusive) and a period of one year immediately following the date of the winding-up order shall be excluded.

This is also a provision newly included in the Companies Act, 1960 with the following object.

The committee feel that in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound-up by the Court, the period from the date of commencement of the winding-up of the company to the date on which the winding-up order is made (both inclusive) and a period of one year immediately following the date of winding-up order should be excluded. This should hold good irrespective of anything to the contrary contained in any other law.

11. Under the above provision also, the period from the date of commencement of the winding-up of the company (which as per Section 441(2) is the date of presentation of the petition for winding up) to the date on which the winding up order is made and a period of one year immediately following the date of winding up order is liable to be excluded while calculating the period of limitation.

12. In this connection it is to be noted that except in cases where the Official Liquidator is appointed as the Provisional Liquidator before a winding up order is made the date of winding up order will normally be the date of appointment of the Liquidator also in view of the provision contained in Section 449 of the Act which is to the effect that on a winding up order being made in respect of a company, the Official Liquidator shall by virtue of his office will become the Liquidator of the Company.

13. From the statements of objects and reasons quoted above, it is clear that the object with which the above two provisions are incorporated in the two Statutes; one general and the other special, is the same. From the above two provisions it is evident that the period to be excluded u/s 15(3) of the Limitation Act is a period which overlaps the longer period mentioned in Section 458A of the Act and liable to be excluded under that Section. The two periods commences from the same date and the period u/s 15(3) of the Limitation Act which is a shorter and overlapping period gets automatically excluded while excluding the period u/s 458A of the Act in cases where that Section applies. Since the Liquidator has already been permitted to exclude the longer period available to him u/s 458A of the Act, there is no justification to allow him to exclude either the whole period or even the period of 3 months from the date of appointment of the Liquidator once again applying Section 15(3) of the Limitation Act. In this connection it is relevant to note that Section 15(3) of the Limitation Act is a provision which is generally applicable to all Liquidators appointed in liquidation proceedings under various enactments such as Co-operative Societies etc., and not only to the Liquidator appointed under the Act. For a Liquidator appointed under the Act, Section 58A of the Act specifically allows a longer period than the period generally allowed to all other Liquidators u/s 15(3) of the Limitation Act. This is the only conclusion possible on this point applying the principle that a special law will prevail over the general law in cases where both are found to have application. In this view, I would hold that the Liquidator in this case is not

entitled to exclude any further period u/s 15(3) of the Limitation Act over and above the period liable to be excluded u/s 458A of the Act.

14. The second contention that there is no limitation at all for filing claims by the Liquidator on behalf of the company in question cannot also be sustained in law. It is a contention raised on the basis that the company in liquidation which was mainly carrying on business in chits is a "Banking Company" as defined under the Regulation Act. In substantiation of the said contention, the learned counsel has mainly relied upon certain provisions in the Chit Funds Act and the Regulation Act apart from relying upon the decisions reported in *C. Varamani David v. Bank of Madurai Ltd.* (AIR 1983 Madras 15) and *C.A.Venkatesh v. Azad Commercial Chit Fund* (1990) 68 Com. Cases 10). On that basis it was further argued that applying Section 45-0(1) of the Regulation Act, there is no limitation at all for filing claims in this case. From the submissions so made it is clear that if only the company in liquidation is a Banking Company and the liquidation proceedings are governed by Section 45-0(1) of the Regulation Act, the above extreme contention can be upheld.

15. In this connection the learned counsel for the Liquidator has strongly relied upon the provisions in Section 46 and 47 of the Chit Funds Act, 1982 (Act 40 of 1982) by which the Reserve Bank and Registrar of Chits appointed u/s 61 of the Chit Funds Act have been wide powers to control the conduct of the chits by the Foreman. Under the above provisions, the Registrar and the Reserve Bank have been given powers to inspect the books and records of the Foreman and to issue directions to the Foreman to take necessary action to cure the defects noted in the conduct of chits. On the basis of the above position it was submitted that whatever may be the position of the Foreman of chit funds prior to the commencement of the Chit Funds Act, their position is entirely different under the present Act. These provisions would according to the learned counsel, indicate that if a company is the Foreman of a chit fund functioning under the provisions of the Chit Funds Act such a company is bound to be considered as a Banking company to which all the provisions in Chapter IIIA of the Regulation Act would apply including the provisions contained in Section 45-0 in case such Foreman company goes into liquidation. The learned counsel submitted that it is necessary to examine the above contention keeping in mind the above far reaching changes effected in the field of chit fund transactions by the New Chit Funds Act, 1982.

16. It is difficult to understand how the provisions in Sections 46 and 47 of the Chit Funds Act, 1982 which only gives to the Reserve Bank and the Registrar of chits certain powers of inspection of the books and records of the Foreman of a chit fund, would help the Liquidator to establish that the Foreman company is a "Banking Company" coming within the purview of the Regulation Act and to which Section 45-0 of the Regulation Act is applicable. The fact that statutorily the Reserve Bank and Registrar of chits have been given powers to inspect the books and records of the Foreman of a chit fund and issue necessary directions

to set matters right if there is any irregularity or illegality in the conduct of the chits is no ground to hold that a particular Foreman if it is a company, is liable to be treated as a Banking Company as defined under the Regulation Act and in case such company is wound up Section 45-D of the Regulation Act would automatically apply to all proceedings initiated under such winding up proceedings. Moreover in this case, the provisions of Chit Funds Act, 1982 as such may not have any application to transactions entered into by the company as Foreman prior to the date of winding up order, namely, 13.10.1981 and long before the commencement of the Chit Funds Act, 1982 which was actually brought into force in Tamil Nadu only on 1.11.1984 and has not been so far brought into force in Kerala.

17. Now the main question to be considered is whether the company in liquidation is a Banking Company governed by the provisions in the Regulation Act including Section 45-0 of that Act. The words "Banking" and "Banking Company" have been defined in Section 5 (b) & (c) of the Regulation Act respectively in the following manner.

b) "Banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise;

(c) "Banking company" means any company which transacts the business of banking in India.

Section 45-0(1) of the Regulation Act is a provision contained in Part IIIA of the Regulation Act. The provisions contained in the said Part are special provisions intended for the speedy disposal of the winding up proceedings of a Banking Company as the heading of that Chapter itself would indicate. Section 45-0(1) of the Regulation Act is in the following terms:

Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (9 of 1908), or in any other law for the time being in force, in computing the period of limitation prescribed for a suit or application by a banking company which is being wound up, the period commencing from the date of the winding-up of the banking company shall be excluded.

From the above provision it is clear that Section 45-0 (1) of the Regulation Act may have application only in winding up proceedings of Banking Companies coming within the purview of the Regulation Act. As such the primary question to be decided is whether the company in question is a Banking Company governed by the Regulation Act?

18. I do not think that it is necessary to go elaborately into the question whether the chit fund transaction is a transaction coming within the word "banking" as defined in the Regulation Act in this case for the purpose of deciding whether the company in question is a "Banking Company" to which Section 45-0 (1) of the Regulation Act would apply. The word "banking" as defined in the Regulation Act

may perhaps be wide enough to comprehend the activity of conducting chits as has been held in the decision reported in *C.Varamani David v. Bank of Madurai Ltd.* (AIR 1983 Madras 15). What has been decided in the above decision is only that the chit fund transaction is in its essence a transaction of a kind which a Banking Company can legitimately undertake within the governing provisions of the Regulation Act. Learned Judge in that decision has relied upon Section 6 of the Regulation Act also to come to the said conclusion. That may be so. But such a decision may not by itself be sufficient to treat the company in question as a "Banking Company" liable to be wound up under the provisions of the Regulation Act in which case alone the provisions in Chapter IIIA of the Regulation Act including Section 45-0 may have application. The said decision cannot in the circumstances be relied upon to contend that all companies carrying on chit transaction are Banking Companies to which Section 45-0 of the Regulation Act is applicable. So also the decisions reported in *C.A. Venkatesh v. Azad Commercial Chit Fund* (1990) 68 Com. Cases 10 and *Nadir Ali v. State of U.P.* (AIR 1960 Allahabad 103) may not also be helpful to the claimant in this case.

19. Sections 7 and 22 of the Regulation Act, on the other hand, would show that the company in liquidation cannot be considered as a "Banking Company" for the purpose of the Regulation Act. For Section 7 of the Act in terms provides that no company other than a Banking Company shall use as part of its name any of the words "banks" or "banking" and no company shall carry on the business of banking in India unless it uses as part of its name at least one of such words. The name of the company in question is only Sudarsan Chits (India) Ltd. and there is also no specific allegation anywhere in the proceedings that the company is "Banking Company" subject to the provisions of the Regulation Act. The winding up ordered in respect of the company was also specifically one under the Act. There was no proceedings for winding up under the Regulation Act. Further Section 22 of the Regulation Act would show that that no company can carry on banking business in India unless it holds a licence issued in that behalf by the Reserve Bank. In the case of this company there is no case for the Liquidator that it was holding a licence issued by the Reserve Bank u/s 22 of the Regulation Act. Hence in the light of the provisions in Sections 7 and 22 of the Regulation Act, the company in question cannot be held to be a "Banking Company" to which Section 45-0 (1) of the Regulation Act would apply. If that be so, the second contention is also without any merit and has only to be rejected. I do so.

20. As regards the third point, the submission of the learned counsel can be summarised thus : The company as Foreman of the kuri in which respondent was a subscriber has paid the prize amount to him on bidding the kuri. The prize amount so paid is money collected from all other subscribers in that kuri and Foreman was in the position of a trustee as far as such amount was concerned. On receipt of the prize amount, the respondent who is a paid up subscriber becomes liable to pay all further instalment amounts duly without any default. Thus when prize amount is paid to a bidder, it becomes property vested in him in trust for a specific purpose, namely, repayment of future instalment amounts.

Thus the paid up subscriber becomes a trustee or at least a constructive trustee as regards the future subscription amounts. In support of the above argument the learned counsel has relied upon the decisions reported in Venkatanarasimha v. Gangamma (AIR 1954 Madras 258), Padmanabha Pillai v. Secy., T. D. Board (AIR 1957 TC 269) and In re Chanbali Steamer Service Co. (AIR 1959 Calcutta 646) and a passage from U. N. Mitra's Law of Limitation which is to the following effect:

The possession of a person purporting to possess property on behalf of another with reference to whom he would be a constructive trustee is not adverse and hence limitation will not run against such person so long as he purports to hold as constructive trustee.

(10th Edn. Vol. T Page 272)

21. The above argument though ingenious cannot be accepted as legal. A five Judge Full Bench of this Court had occasion to consider elaborately the nature of the relationship between the subscriber and Foreman in Janardhana Mallan v. Gangadharan (1983 KLT 197 (F.B.)). Though the specific question considered was different, various conclusions reached in that decision are relevant in this case while considering the nature of the relationship between the Foreman and the subscriber of a kuri. The following observations of the Bench which brings out the different views expressed about the relationship in question are particularly relevant.

There were different views on the relationship between the subscribers and the foreman. At one time it was assumed that there was a sort of partnership arrangement between the subscribers. Yet another view was that the foreman was a Trustee in regard to the subscriptions due to him from prized subscribers and as a Trustee he was to see that this was utilised for discharging the dues of non-prized subscribers. Yet another view was that the fund arising by reason of the subscriptions was a common or mutual fund from out of which loans were being advanced to prized subscribers. None of these concepts arose from the terms of the contract between the foreman and the subscribers nor did they arise on the terms of any statutes...

(emphasis supplied)

After stating so, the Bench has carefully analysed all the decisions of the Travancore, Cochin, Travancore-Cochin, Kerala and Madras on the point and has ultimately substantiated its view expressed in the underlined portion of the passage quoted above. Further on the basis of the analysis of the decisions till then rendered by different Courts, the Bench found that there is no logical basis for the assumption of a common fund in a Chitty and advance of any loan to a subscriber of such common fund. The Bench also found thus:

In the light of the above discussion we do not think that it would be possible to say that on entering into the chitty agreement a debt is incurred by the

subscriber for the amount of all the future instalments and in respect of such amount there is a debtor - creditor relationship. As we have stated earlier in this judgment the chitty variola only embodies a promise to pay on future dates. That is not a promise to repay an existing debt, but to pay in discharge of a contractual obligation. For similar reasons neither the prizing of the chitty nor the execution of the security bond would give rise to a debt, for, the prize amount is not received as a loan, but as of right by virtue of the terms of contract between the parties....

(emphasis supplied)

22. These observations and findings of the Full Bench in my view is sufficient to negative the contention that the paid up subscriber must be considered either as a trustee or at least as a constructive trustee. The entire relationship is based on contract and the mutual rights and duties of the parties to the transaction are contractual in nature and contents and cannot be considered as creating any kind of trusteeship. The fact that the Foreman collects subscription amounts from all the subscribers of the chitty or kuri and pays the prize amount to the prized subscriber or the fact that there is an obligation on the part of the paid up subscriber to pay future instalment amounts without default etc., may not be sufficient to hold that the position of the paid up subscriber is that of a trustee or constructive trustee. In this view, I do not think that it is necessary to discuss the point any further with reference to the textual authorities and decisions relied upon by the learned counsel for the Official Liquidator. Thus I hold that Section 10 may not have any application in the matter of deciding the question of limitation in the facts and circumstances of the case.

23. In the light of the above discussion it has to be held that the Liquidator is entitled to exclude only a period of 4 years, 9 months and 11 days as found by this Court in Smt. Uma Sharma's Case (1992) 73 Com. Cases 381). If that be so, this claim filed dated 27-5-1989 in respect of a claim enforceable as on the date of commencement of the winding up is clearly barred by limitation and is liable to be dismissed as such. No other special circumstances justifying a finding that the claim is not barred by limitation on grounds like valid acknowledgement of the liability or renewal of the liability etc., are pleaded and proved in this case. This will be the position generally in respect of all claims filed by the Liquidator after 27-5-1989 in the absence of special circumstances justifying a finding that the claim is not barred by limitation on grounds like valid acknowledgment of the liability or renewal of the liability etc.

24. In this case, the respondents have filed a written statement contending that the claimant company had already filed a suit as O.S. No. 567 of 1980 on the file of the District Munsiff, Madanapalle which was contested by the defendants and the suit was ultimately dismissed on 10-11-1982 and that dismissal has become final. On the basis of the dismissal of the said suit, the respondents have specifically pleaded that the present suit is barred by limitation u/s 11, C.P.C. There are certain other contentions also raised in the written statement. In the

view which I have taken on the question of limitation, it is unnecessary to go into the merits of the said contention and enter a finding thereon.

25. Before parting with this case, I would like to observe that the facts and circumstances of this case bring out forcefully the immediate need to bring out an amendment to the Companies Act by incorporating a new provision similar to that contained in Section 45-0 of the Regulation Act in the place of Section 458A of the Act which allows only exclusion of a limited period, while calculating the period of limitation. Such an amendment alone can remove the difficulty felt by the Liquidator in this case. In fact prior to the 1953 amendment of the Regulation Act by incorporating Section 45-0 and other Sections in Chapter IIIA of the Regulation Act the corresponding provision in the Regulation Act was Section 45 - F which granted exclusion only of a period of one year immediately preceding the date of the order of winding up. It was this provision which was substituted by Section 45 - 0 on the basis of the report of the Banking Companies Liquidation Proceedings Committee. 1952 which recommended the incorporation of a new provision in the Regulation Act to the effect that limitation will stop running against a Banking company from the date of the winding up order. In this connection it is relevant to note the following observations of the Supreme Court in *Sree Bank Ltd. Vs. Sarkar Dutt Roy and Co.*, wherein the Supreme Court has indicated the logic and justification for incorporating a provision like Section 45-0 totally excluding the period after the date of presentation of the winding up petition.

..It appears that the Legislature mostly accepted this view of the Committee and enacted Section 45-0 providing mainly that there would be no running of limitation against the banking company subsequent to the date of the petition for winding up with the result that limitation would run in the ordinary course upto the winding up petition. There is much logic behind it. Non-action upto the date of the petition for winding up was on account of the mismanagement of the banking company. The debtor of the banking company gets advantage of the negligence of the company to sue him or apply against him within the period of limitation. Since the presentation of the petition for winding up of the company, the Court gets control over the affairs of the company and supervises the acts of the liquidator, in accordance with the provisions of the Act which, to secure necessary action in all matters within a reasonable time, provide certain period for certain actions to be taken by the liquidator of the Court. It is to be presumed, therefore, that any delay in the taking up of any legal action by the banking company would be for good reasons. The Legislature seems to have been of the opinion that the interests of the banking companies, especially of its depositors should not suffer on account of the delay which could not be avoided even when the Court was in charge of the affairs of the banking company. Viewed in this perspective, it should appear that the relevant date for considering whether action can be taken by the banking company by suit or application is the date of presentation of the winding up petition. If the banking company had a right to sue or to apply on the date the petition for winding up was presented,

that right should not be lost to it.

If this is the logic and justification found by the Supreme Court for the incorporation of Section 45-0 of the Regulation Act, the same logic and justification will be available in an abundant measure for incorporating a provision like Section 45-0 in the Companies Act applicable to non-banking companies also in general or at least in the case of companies like the one on hand where the company was carrying on business very similar or akin to the business conducted by the Banking Companies licensed under the Regulation Act. In fact in the instant case lakhs and lakhs of subscribers in the kuries conducted by the company can legitimately be considered "as depositors of all their savings in the various kuries conducted by the company. The company's affairs from 1981 onwards is under the direct supervision and control of this Court. The creditors of the company have agreed to a scheme framed for discharging the liabilities of the company. The scheme is being worked out under the supervision and orders of this Court. The company has filed a statement before this Court on 5-12-1992 submitting that an amount of Rs. 12,41,72,029.49 has been disbursed to 77363 creditors and still there is a huge amount to be paid to a number of subscribers in kuries who have not been so far paid any amount. In the circumstances, it is of utmost importance to have effective legal provisions which will enable the Liquidator who is functioning under the direct control of the Court to realise all the dues due to the non-banking companies in liquidation also without any bar of limitation, so as to avoid situations like the one in the present case where it has not been possible for the Liquidator to file the claims in time and the claims are bound to fail merely on the ground of limitation. In the facts and circumstances of the case, I feel that the liquidator can legitimately place all the relevant facts and circumstances before his Department and move the Department to take initiative in persuading the Central Government to bring out necessary amendments in this regard to the Companies Act. As the winding up proceedings are likely to continue for sometime more, the company in liquidation may also move the Central Government in this regards that the company can also take advantage of such legislation if enacted before the termination of the winding up proceedings. If such an approach is made, I would hope that the Central Government will bestow its best attention to the problem in all its seriousness.

Subject to the above observations the claim is dismissed as barred by limitation. In the circumstances of the case, there will be no order as to costs.