
(1978) 04 AP CK 0001

In the Andhra Pradesh High Court

Case No : Company Application No. 295 of 1976

Voluntary Liquidator, Linsen Finance and Trading Co. (P.) Ltd. APPELLANT
Vs
Aknar Dawood Ali Kassam Nathoo and Others RESPONDENT

Date of Decision : 20-04-1978

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 428, 458A, 470, 477, 478

Citation : (1982) 52 CompCas 503

Hon'ble Judges : Narasinga Rao, J; Madhava Reddy, J

Bench : Division Bench

Advocate : J.V. Suryanarayana and M. Venkateswarlu, for the Appellant; S. Parvatha Rao, for respondent Nos. 1 and 3 and None, for the Respondent

Final Decision : Dismissed

Judgement

Madhava Reddy, J.—This is an application u/s 518(1)(b) read with Section 470 and u/s 519 read with Sections 477 and 478 of the Companies Act, 1956 and Rule 9 of the Companies (Court) Rules, 1959, by the voluntary liquidator, Linsen Finance & Trading Co. Pvt. Ltd., Hyderabad (in liquidation), hereinafter referred to as "the voluntary liquidator", to direct the respondents to pay the amount found to be due by them to the company in liquidation together with interest at 12% per annum from July 1, 1974 (the date of commencement of winding up of the company till the date of payment). This petition was filed on November 16, 1976.

2. The Linsen Finance & Trading Co. Pvt. Ltd., Hyderabad, hereinafter referred to as "the company", was a private limited company carrying on chit fund business and having its registered office at Hyderabad with branches at various places in Maharashtra, Karnataka and Andhra Pradesh, The board of directors of the said company at its meeting held on September 25, 1974, adopted a resolution to call for a meeting of the creditors of the company to be held on July 1, 1974, for the purpose of adopting a resolution for taking the company into creditors' voluntary

winding-up. At the extraordinary general body meeting of the said company held on July 1, 1974, the board of directors unanimously passed a special resolution that the company should be taken into creditors' voluntary winding-up. The creditors of the company also held a meeting on July 1, 1974, and unanimously passed a resolution directing the company to be wound up voluntarily. The petitioner was appointed as the voluntary liquidator of the company.

3. It is the case of the voluntary liquidator that the company which had a branch at Warangal in the State of Andhra Pradesh, carried on chit fund business and that the 1st respondent herein is a member of group No. M.C.I., Chit Fund No. 16 conducted by the company. The total value of the chit was Rs. 5,000. The chit was for a period of 40 months and a sum of Rs. 125 per month was to be paid by each subscriber of the chit. The 1st respondent became a member on April 16, 1970, and paid Rs. 5 on that day and continuously paid Rs. 125 per mensem less the dividend earned at the monthly auctions. The 1st respondent had paid a sum of Rs. 3,000 by the date of the commencement of the winding-up. He had become the successful prize bidder in one of the auctions held in respect of this chit fund on July 19, 1971, and had withdrawn the prize amount. The 1st respondent was paid Rs. 5,000 on his executing a promissory note in favour of the company with interest at the rate of Rs. 18% per annum and on his furnishing two guarantors, respondents Nos. 2 and 3, to execute an agreement of guarantee in favour of the company. The petitioner, therefore, claims that after adjusting the amount of Rs. 3,000 paid by him, the 1st respondent is liable to pay Rs. 2,000. Hence, the petition for the recovery of the said amount of Rs. 2,000 and Rs. 15 being the charges for notice of demand together with interest at the rate of 12% per annum from January 1, 1974.

4. Respondent No. 1, the member of the chit, and respondent No. 3, one of the guarantors of the 1st respondent and who is no other than the father of the 1st respondent, filed a common counter opposing the claim of the voluntary liquidator. It is their case that they are not aware of any resolution for voluntary winding up of the company and that no notice of the meeting of the company was given to them. It is their specific case that they are not members of the company and that no amount is due from them to the company and in any case they are "not liable to contribute to the assets of the company in liquidation". In short the contention on the 1st respondent is that he is not a "contributory" of the company. The 1st respondent, while admitting that he and his father joined as subscribers of the chit fund, group No. M.C.I., the total subscribers of which were forty, stated that the serial number of the 1st respondent was 16 and that of the 3rd respondent was 15. The company was to act as the foreman of the chit fund in consideration of a commission (c)f 5% reserved to it. It was the responsibility of the company to conduct the chit fund, collect the subscriptions and conduct the auctions regularly for the full period of the chit, i. e., forty months. The company was thus in the position of a trustee and was liable to render the above service in consideration of the commission reserved to it. They admit that the 1st respondent was the successful prize bidder at the auction held

on July 19, 1971, and that he having offered a bid of Rs. 2,200 was actually paid Rs. 2,550 after deduction of the commission due to the company and the discount offered by him. But they deny having committed default in the payment of any subsequent instalments. They aver that the company suddenly closed its Warangal office without notice to any of the subscribers after holding the auction in April, 1972. It collected the 24th instalment from all its subscribers but failed to conduct any auction thereafter. The company thus committed a breach of the terms of the chit fund agreement which constitutes a branch of fundamental stipulation of the contract between the company and its subscribers resulting in the frustration of the contract. The respondent Nos. 1 and 3 contend that the undertaking to pay future instalments is inextricably linked up with the scheme of chit running its full course. Each of the subscribers had undertaken to pay the monthly instalments on the specific condition that auctions would be held regularly and each of the subscribers would get the benefit of the discount earned thereat. The company having failed to conduct the chit in accordance with the terms for the full period of 40 months, they claim that the company is liable to pay back the commission amount collected by it to each of the subscribers including the 1st respondent and restore the subscribers to their original position. He contends that divorced from the other terms and conditions of the chit, the liability arising under the said promissory note cannot be enforced.

5. The 3rd respondent, a guarantor of the 1st respondent was also a subscriber of the said chit fund group and he had also subscribed 24 monthly instalments. Just like the 1st respondent, he had actually paid Rs. 1,724.26 after the deduction of total dividend of Rs. 1,275.74. In view of these facts, it is alternatively claimed that since the 3rd respondent not having bid at any auction is entitled to receive a sum of Rs. 3,000 from the company, the same may be adjusted towards the amount of Rs. 2,000 which is alleged to be due from the 1st respondent and the balance may be returned to the 3rd respondent. To this course the 3rd respondent is also agreeable.

6. It is the further case of both respondents that the claim of the company is barred by limitation inasmuch as the amount was advanced on July 19, 1971, and the last instalment under the said chit was due and payable on July 16, 1973, while the present petition was filed on November 16, 1976.

7. The voluntary liquidator of this very company had earlier filed Applications Nos. 71/76 and 108/76. In Company Application No. 108/76 some of the respondents therein, who were sought to be made liable as contributories, raised somewhat similar contention. Our learned brother, Sambasiva Rao J. (as he then was), considered these contentions and held by his order dated July 30, 1976, that " this transaction cannot be and is not a loan transaction...Consequently, the prize bidding is more in the nature of a sale transaction " and that " the liability of the prized subscribers to pay future instalments is unconditional and unqualified and they are liable to pay them even if the chits fail before their completion. Therefore, in law and in justice the liability of the prized subscribers

to pay the future instalments, can be enforced ". In Company Application No. 71/76 the same contentions as are raised in this application, viz., that the liability of the prized bidder is that of a debtor and creditor, and he does not come within the category of a " contributory liable to contribute to the assets of the company in liquidation " and that the claim is barred by limitation, were raised--and were considered by our learned brother, Sambasiva Rao J. He was of the view that the subscriber of a chit is a " contributory " within the meaning Section 428 of the Companies Act. The liability of the subscriber is the liability of a " contributory " and it is payable only when the calls are made on him for enforcing the liability, He also held that the amount advanced to successful prize bidder is a debt due from him at the time when his liability commenced but is payable at the time specified in the calls made on him for enforcing the liability. Hence, the application filed within three years of the notice to contribute is within time. However, the correctness of the said view was once again canvassed by the petitioner herein before our learned brother, Sambasiva Rao J. (as he then was), and he was of the opinion, that the matter deserved to be considered by a Division Bench, this application comes up before us.

8. The facts leading to the filing of this petition already noticed above are not in dispute. Hence, the principal questions that fall for consideration are:

" (1) What is the nature of the chit fund transaction and the amount advanced to the successful prize bidder at an auction held by the foreman of the chit, principally whether it is a debt ?

(2) Whether the present petition under the Companies Act for the recovery of the prize amount without conducting the chit for the full period is maintainable ?

(3) Whether the subscriber who has become a successful prize bidder is a " contributory " within the meaning of the Companies Act ?

(4) Whether the petition is within time ? "

9. Points I and 2 : Chit Fund No. 16 of M.C.I, group with which we are presently concerned, is of the value of Rs. 5,000. Each subscriber of the chit was liable to pay a sum of Rs. 125 per mensem for a period of 40 months. Each of the subscribers was given the right to bid at the end of every month for the prize amount offered by the company conducting the chit. Whoever among the subscribers chose to participate in the auction and offered to pay the highest amount of discount would become the successful prize bidder and entitled to draw the chit amount subscribed by all the members, less than the discount offered by him and 5% commission payable to the company which was the foreman of the chit. Correspondingly, the amount of Rs. 125 which each member was required to subscribe in the following month was reduced by the amount of discount earned by the chit fund less the commission of 5% which was reserved to the company conducting the chit. The discount offered by the successful prize bidder was thus profit earned by all the subscribers of the chit. The person who had offered the highest bid would receive the prize amount, but he was still

under an obligation to pay the instalments less the discount similarly earned at the auction for the prize amount offered every month successively over the full course of 40 months for which the chit was to run. A subscriber who had once become a successful bidder and had received the prize amount was ineligible to bid at the subsequent auctions which were to be held during the remaining period of the chit. Thus, every subscriber was given an opportunity to become the successful prize bidder once and receive the amount, and correspondingly every subscriber was given the benefit of the discount earned by the chit fund by collecting from him a lesser amount than Rs. 125. While a subscriber, who had not chosen to bid for the prize amount during the period of that - chit had the option to stop payment of the chit amount at his discretion, the subscriber who had become the successful " prize bidder " was required to subscribe for the chit for the entire period and thus repay the prize amount for which purpose a promissory note and two surety bonds were taken from him. The successful prize bidder is a subscriber like any other subscriber ; only his liability to subscribe is irrevocable. The successful prize bidder undertakes the liability to repay the said amount on demand, by executing a promissory note, and furnishing two guarantors and a further security bond. The promissory note executed by the first respondent herein promising to repay the sum of Rs. 5,000 in cash by way of monthly subscription of Rs. 125 p.m. for 40 months to chit No. 16 is marked Ex. A-4 while the security bond and the agreement of guarantee executed by the two guarantors is marked as Ex. A-3 and the security bond is marked Ex. A-2. The minutes recorded in this behalf are marked Ex. A-1.

10. It is no doubt true that the promissory note which is obtained from the successful prize bidder is for a sum of Rs. 5,000. But his liability to pay the amount thereunder is by way of a subscription to the "chit fund and he is to pay the monthly chit of Rs. 125 p.m. less the discount earned every "month during the remaining period of which, in this case of M.C.I. Chit Fund No. 16, is 40 months. While the total value of the chit is Rs. 5,000 by the date he bid for the prize amount, the respondent had already paid Rs. 2,000 towards the chit. He was further liable to pay only Rs. 3,000 and that too after deducting the amount of commission earned by the chit fund at the subsequent auctions. But under the promissory note itself he undertook to repay Rs. 5,000 which is stated to be the value of the chit amount received in the auction held on July 19, 1971, under group M.C.I. In other words, the sum of Rs. 5,000 was offered to all the subscribers who had not so far been the successful bidders. Whoever offered the highest discount was to be given that amount. On that date, the future instalments due at Rs. 125 p.m. under the said chit was Rs. 3,125. The liability to subscribe to the chit and pay that amount of Rs. 3,125 is not extinguished in relation to the successful prize bidder. But at the same time, he was entitled to receive the benefit of the discount earned at the subsequent monthly auctions. The amount which the subscriber who has become the prize . bidder undertakes to pay is the liability which he incurs on account of the bid offered by him, and not merely because he was a subscriber. This privilege to offer a bid for the prize

amount is restricted to the subscribers. But no subscriber is bound to offer a bid and become the prize subscriber. He can bide his time, pay the instalments of Rs. 125 less the discount earned by him and take the amount at the end of the 40 months" period of the chit. The liability to repay the prize amount which a subscriber has purchased by offering the highest bid is thus a liability incurred by the subscriber on account of becoming the successful prize bidder. It is for securing repayment of this amount that the promissory note and the surety bonds are taken from the prize bidder by collateral security.

11. A Bench of the Madras High Court in P.N. Raghavan Pattar and Others Vs. S. Arumugham by his mother and guardian Singammal and Another, held (head note):

" A chit fund transaction is different from a loan transaction. It is not a case of borrowing. At the auction the person bidding the highest discount is regarded as the purchaser of the subject of the auction, i. e., a present sum of money. The contract is one of sale, the auction purchaser purchasing the subject-matter of the chit immediately by offering, (1) the highest discount, and (2) a bond for the future payments of instalments. These two things together constitute the consideration for the purchaser. "

12. The same view was taken by our learned brother Sambasiva Rao J. (as he then was), in Company Application No. 108/73. None the less, though the transaction is one of sale, what is purchased is the amount of Rs. 5,000 offered as the prize amount by deducting the amount of discount offered by the subscriber. The bond that is given is a bond to pay the future instalments which are stipulated under the chit of which he is the subscriber. While the other subscribers have option to pay or not to pay the future monthly instalments of the chit, the prize bidder in view of the undertaking given by him is under an obligation to pay the said instalments, without default. This liability to pay the instalments undertaken by the prize bidder is undoubtedly a liability which can be enforced. Though it is not a case of borrowing simpliciter, yet it is a liability incurred which can be enforced against the prize bidder in appropriate proceeding. The question really is whether that liability could be enforced without conducting the chit for the full period of 40 months as envisaged under the particular chit fund scheme No. 16 of M.C.J. or whether it could be enforced on the strength of the promissory note and the surety bond without conducting the chit for the full period is the real question. One thing, however, is clear that the subscriber by offering the highest discount and becoming the prize bidder is liable to pay the amount to the chit fund and this liability could be enforced. This liability, however, is enforceable not on the ground that he is a subscriber of a chit, for, no subscriber is bound to pay the entire 40 instalments and he has the option to stop payment at any stage of the chit without incurring any further liability except that of forfeiting certain amount from out of the instalments already paid by him as per the conditions of the particular chit. The liability of the successful prize subscriber becomes enforceable on account of the terms

subject to which he had offered the bid. One of the principal terms thereof was that he would subscribe for the remaining period of the chit. The liability of the successful prize bidder cannot be determined solely on the basis of the promissory note, the guarantee and surety bond. The amount paid thereunder is not a lending by the company. It is not lent to any and every person; it is paid only to the subscribers of the chit. Then the total amount of Rs. 5,000 is not paid to the executant of the promissory note; the amount paid is less the discount offered by him. The liability of the subscriber also is not to repay the full amount of Rs. 5,000 mentioned in the promissory note but is to pay the said amount less than the discount earned by each subscriber of the chit at the monthly auctions held during the course of the chit. The amount advanced to the successful prize bidder and the transaction evidenced by the promissory note cannot, therefore, be considered in isolation and divorced from the chit fund scheme which the company had undertaken to execute for the full period of 40 months. The mutual obligations arising between the company and the successful prize bidders have to be determined treating the entire chit fund scheme, promissory note and the surety bonds as constituting part of a single scheme; The rights and obligations of each of the parties thereto being inter-dependent, in our view, the liability under the promissory note and the guarantee and surety bonds cannot be enforced by the company, and now by the liquidator, without conducting the chit for the full period. In a sense the successful prize bidder is a debtor ; but as discussed above his liability to repay the amount cannot be enforced independently of the liability to conduct the chit for its full period. Points Nos. 1 and 2 are answered accordingly.

Point No. 3 :

13. The next question and the more important one for the disposal of the present petition is whether a successful prize bidder is a " contributory " within the meaning of the Companies Act. A " contributory " is denned u/s 428 of the Act as under :

" The term " contributory " means every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid up; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory."

14. Though this definition is in pan materia with the definition of a " contributory " contained in Section 213 of the English Companies Act, it is somewhat different in that the holder of fully paid Up shares is also included within the definition of a " contributory " u/s 428. It is significant to note that it is not every person who is liable to pay any amount to the company that is included in -the definition of a " contributory ". Only a person liable to contribute to the assets of a company in the event of its being wound up would be a contributory. The only other category of persons who are included in the definition of a " contributory " are holders of

any shares which are fully paid up. In a company the liability of whose members is limited by the shares held by them, a member holding fully paid up shares is not liable to pay any amount in the event of the said company being wound up. But none the less they are included within the definition of a "contributory" obviously because a contributory is not only liable to contribute to the assets of the company but is also entitled to receive the surplus amounts realised by the liquidator in the process of winding up of the company. It is for that purpose that a holder of shares which are fully paid up although not liable to contribute any amount, is included in the definition of " contributories ". Any person other than the holder of fully paid up shares, in order that he may be deemed to be a contributory must satisfy one essential attribute and that is, he must be liable to contribute to the assets of the company. It is, therefore, necessary to ascertain as to what an " asset " of the company is. The company in the course of its dealing would be receiving large amounts but all such receipts do not form part of the assets of the company. For, all the amounts received by the company in the course of its transactions cannot be retained by the company ; out of these amounts the company would have to pay to others. Even from out of the profits earned as a result of these several transactions, the company may have to pay dividends to its members. Such dividends not having been retained by the company, do not constitute the assets of the company. The company being a separate legal entity by itself, as distinct from its members, the principal asset, which it can claim and which it cannot shed, is its share capital unless of course the company resolves to reduce its share capital. Once the liability of the company is limited and the shares are not fully paid up, each of the members of the company or shareholders as they are generally termed, would be liable to pay the balance of the unpaid share money when the company makes a call. When these members are called upon to pay the unpaid share capital and the same is paid, that forms the asset of the company. In the event of the company going into liquidation voluntary or under orders of the court, the liquidator is entitled to call upon the members to pay the unpaid share capital. Every member of the company by becoming its member, undertakes only to pay the balance of the amount due in respect of the shares held by him. The only mode of becoming a member is by purchasing the shares of that company and the liability incurred by the member thereby is to subscribe by paying the full amount of the face value of the shares held by him. His liability does not extend beyond that. Thus, the liquidator is entitled to call upon the shareholders of the company to pay the uncalled share money in respect of the shares held by each of the members. Every member who is thus liable to contribute to the assets of the company would undoubtedly be a " contributory " within the meaning of Section 428. If that be so why then, it may be postulated, " is the holder of fully paid up shares also deemed to be a "contributory" ? " But the reason is not far to seek. Section 475 of the Companies Act declares that the court shall adjust the rights of the contributories among themselves and distribute any surplus among the members entitled thereto. If in the course of liquidation proceedings any surplus is left with the liquidator after discharging all the liabilities of the company, all the

shareholders would be entitled to share the surplus pro tanto to the shares held by them. Thus, although the holder of fully paid up shares is not liable to contribute to the assets of the company, he is specifically included in the definition of a "contributory". The liquidator is required to prepare a list of contributories and the court is entitled to settle the said list as laid down in Section 467 of the Companies Act. That list is in two parts, A list and B list. A list contains only the contributories who are liable to contribute forthwith and B list of such other contributories who are liable to contribute if the amount realised from the contributories of A list is not sufficient to discharge the liabilities of the company. However, for the inclusion in any of these two lists, one must be liable to contribute to the assets of the company.

15. Section 439 which enumerates the persons who may file a petition for winding up, does not specifically include a "debtor", but it includes a "contributory". If a debtor were to be included within the definition of a "contributory" he would also be entitled to file a petition for winding up of the company which is his creditor. Such a position could not be countenanced. For a debtor is liable to repay the debt. Whether the liability is a debt simpliciter or a liability to repay the money had and received, it is a liability which has to be discharged towards the company irrespective of whether it is in liquidation or it continues to be a going company. The amount which a debtor may repay does not necessarily go towards the assets of the company. It is a liability which has nothing to do with the liquidation proceedings or winding up of a company. It is also significant to note that every "contributory" is declared entitled, under Sub-section (3) of Section 439, to file a petition for winding up of a company. It could never have been the intention of the Legislature that a debtor or any person liable to pay any amount to the company should also be entitled to file a petition for winding up. Such a person has no interest in the company or its working and cannot have a say in the matter of winding up of the said company. Sub-section (2) of Section 440 declares that the court shall not make a winding up order on a petition presented to it for voluntary winding-up unless it is satisfied that the voluntary winding-up or winding up subject to the supervision of the court cannot be continued with due regard to the interest of the creditors or contributories or both. It is significant to note that there is no reference in Section 440(2) to the debtors of the company. The interests that have to be safeguarded are those of the creditors or the contributories. Obviously there is no interest of the "debtor" that needs to be protected in the course of winding-up proceedings. Section 447, which declares that an order for winding up of a company shall operate in favour of all the creditors and of all the contributories of the company, as if it had been made on the joint petition of a creditor and of a contributory, also discloses the intention of the Legislature to the effect that the "debtor" of a company even in its broadest sense is not included within the definition of a "contributor" for, no question of making any order "in favour of" a debtor would arise. If at all, the only order that could be made against a debtor is to direct the recovery of the amount due from the debtor. That is certainly not

an order in favour of the debtor. So also, Section 460 makes provision for a meeting of the contributories and creditors. Certainly the debtors can have no say in the matter of distribution of the assets of the company among the creditors or the contributories. But if a debtor were to be included in the definition of "contributory ", he would also be entitled to participate and have a say in the administration of the assets of the company as envisaged by Section 460. A clear indication that a debtor could never be included in the definition of a " contributory " and what is paid by a debtor in discharge of his liability is not a contribution to the assets of the company in the event of its being wound up, can be gathered by Section 469. That provision enables the court to make an order against a " contributory " to make payment of the money due by him to the company. In other words, if he is first a contributory, then the money due from such a contributory may be ordered to be paid. This provision takes within its ambit the members whose liability is unlimited. Obviously, in the case of a limited company, the liability of its members cannot extend beyond paying the unpaid share money in respect of the shares held by them. The liability incurred by the member or shareholder of a company to contribute is because he is a shareholder. The liability of a third party is that of a debtor and not the liability of a "contributory ".

16. In *Re: Lakshmi Flour Mills Co.*, the question whether a " debtor " of a company could be deemed to be a contributory directly arose for consideration. Mukerjee J., with reference to Section 158 of the Indian Companies Act (7 of 1913) which contained a definition of the term "contributory " in words identical to the definition in Section 428, held that " a mere debtor of a company in liquidation is not a "contributory" of the company ". The principal reason for coming to this conclusion was stated thus:

" A debtor of a company is liable to pay at all times, never mind whether the company is going on or it has gone into liquidation. If that be so, it cannot be said that the debtors are liable to contribute to the assets of the company, in the event of its being wound up,"

17. It is well known that the Indian Companies Act is based on the Companies Act of England, In England the term " contributory " was never understood as including a mere debtor.

18. In *Halsbury's Laws of England*, 4th Edn., Vol. 7, p. 1212, it is stated thus :

" Since every member of the company is primarily liable to contribute, subject to the proviso limiting the amount which he can be called upon to pay, a holder of fully paid up shares is a contributory. Since he is no longer liable to make any contribution to the assets, a holder of fully paid shares will not, however, be placed on the list of contributories, except at his own desire, or in a case where there is a likelihood of the return of surplus assets. "

19. It is further noticed in Vol. 7 of *Halsbury's Laws of England* at p. 1212 thus:

"A person who is merely a debtor to the company.....is not a contributory.....This liability is subject to special provisions relating to directors or managers whose liability is unlimited, and to the following qualifications. In the case of a company limited by shares, no contribution can be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. In the case of a company limited by guarantee, the liability of a member is limited to the amount of his guarantee and, in the case of such a company having a share capital, any sums unpaid on shares held by him,....." member " is not confined to the persons whose names were, actually on the register as present or past members, when the winding up commenced, but includes persons whose names ought then to have been on it, and also persons to whom shares may have been validly transferred after the winding up commenced."

20. In *Re European Society Arbitration Acts: Ex parte Liquidators of the British Nation Life Assurance Association* [1878] 8 Ch D 679 dealing with the question whether the transferee of certain shares of a company holding the shares under a void transfer, could be included in the list of contributories of the company whose shares are so transferred and which had gone into liquidation, it was held that " the transfer of the shares to the company being ultra vires and invalid, the transferee-company could not be placed on the list of contributories of the company in liquidation ". That emphasises the fact that unless a person holds any shares of the company, he could not be validly placed on the list of contributories. Repelling the contention that all persons legally or equitably liable to contribute to the assets are contributories and may be put on the list as such, the court held (p, 708);

" It is impossible to hold that any person who is a debtor to the company in liquidation can be put on the list of contributories. He is bound to pay moneys, which moneys, when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the Act. Again, a person who has taken shares in the name of a trustee is, as between him and his own trustee, the person liable to contribute, but that does not make him a contributory as between him and the company. The company may get at him, as it has in several instances, through and in the name of the trustees. But still the equitable liability is to the trustee only, and there is no privity or direct right of any kind as between the company and the cestui que trust. If an officer of the company has misappropriated assets, he may be made to refund them to the liquidator as part of the assets, but that does not make him a contributory."

21. As held by the Supreme Court in *Howrah Trading Co. Ltd. Vs. Commissioner of Income Tax, Central, Calcutta.*, :

" A glance at the scheme of the Indian Companies Act, 1913 (as also of the Companies Act of 1956) shows that the words " member ", " shareholder " and " holder of a share " have been used inter-changeably in that Act. Indeed, the

opinion of most of the writers on the subject is also the same. Buckley on the Companies Acts, 12th Edition, page 803, has pointed out that the right of a transferee is only to call upon the company to register his name and no more. No rights arise till such registration takes place."

22. Thus, both under the Indian Companies Act as well as the English Companies Act, in order that a person may be included within the definition of a "contributory" he must be liable to contribute to the assets of the company in the event of its liquidation. A debtor or a person who is liable to pay any money in discharge of his liability other than that of a member of the company is a person who is liable irrespective of whether the company is under liquidation or not. What he contributes may or may not go to the assets of the company. All payments by persons other than members do not necessarily constitute assets of the company. They may be mere receipts. Such persons are, therefore, not "contributories" within the meaning of Section 428.

23. A successful prize bidder who has incurred the liability to pay by offering the highest discount at the auction is not a member of the company which is running the chit fund as its foreman. He is only a member of the particular chit, in this case, M.C.I. Chit Fund No. 16. If the chit runs its full course, what he contributes goes to the benefit of the members of the particular chit. Any profit earned as a result of the discount offered by the prize bidder goes to the benefit of the other subscribers of that particular chit and not towards the assets of the company. The company only receives such profit as it may make by running such chit by collecting 5% of the amount and other amounts as stipulated in the various chits. It is the company that is being wound up because it has not been liable to discharge its liabilities. The subscribers of the various chits conducted by this company are not the members of the company and are not liable to "contribute" to the assets of that company. They are liable to subscribe to the particular chits run by the company. Such subscribers, whether they are subscribers simpliciter of the particular chit or subscribers who have become the prize bidders, are not members of the company and are not concerned with the assets and liabilities of the company. In the event of the company being wound up the liability incurred by them by becoming the successful prize bidders, and which they are bound to discharge irrespective of whether the company is a going concern or has gone into liquidation, is not a "contribution" to the assets of the company by the members of the company, but the discharge of their own liability as debtors or otherwise. Therefore, they are not "contributories" within the meaning of Section 428 of the Companies Act. The liquidator, therefore, is not entitled to include them in the list of contributories or call upon them to pay the amount by way of a petition u/s 518(1)(b) read with Section 470 and Section 519 read with Sections 477 and 478 of the Act. However, they are certainly entitled to recover the amounts due from the successful prize bidder as stated above for they have undertaken to repay the amount as per the terms and conditions stipulated therein. Whether there has been a breach of the terms and conditions subject to which they undertook to repay the amount or not, is a

matter with which we are not concerned presently in these petitions. We are also not concerned with the question whether these amounts could be otherwise recovered and hence we express no opinion thereon. On point No. 3 we hold that the subscriber who has become a successful bidder is not a " contributory " within the meaning of the Companies Act.

Point No. 4 :

24. The last question that remains to be considered is whether the claim by the liquidator is within time. If the prize bidder is not a " contributory " but is liable to pay the amount, the question is as to when the liability to pay the amount commenced. As per the promissory note, Ex. A-4, he was liable to repay the amount on demand, in fact, it was to be collected by way of subscription under M.C.I., Chit Fund No. 16. The last instalment due in accordance with the scheme of the said chit was July 16, 1973. The company went into liquidation on July 1, 1974, and the notice calling upon the prize bidder to pay the amount was issued by the liquidator on August 3, 1974. A further call to pay the amount was made by the liquidator on November 3, 1976, and the present application was filed on February 2, 1977. It would be seen that the application, though filed within three years of the date of liquidation, is beyond three years from the date on which the last instalment became due under the aforesaid chit, i.e., July 16, 1973. The amount itself was paid to the successful prize bidder on execution of the promissory note on September 7, 1971. If the period of limitation began to run from the date of the promissory note itself, the present petition is certainly barred by time. Even if it is assumed that the liability was only to pay the amount in monthly instalments, the recovery of all instalments beyond three years of the present petition would be barred by limitation. Inasmuch as the last instalment under the chit fell due on July 16, 1973, the entire amount had become payable more than three years prior to the filing of the present petition. This petition is, therefore, clearly barred by time.

25. It is, however, contended by Mr. J.V. Suryanarayana, learned counsel for the petitioner-liquidator, that the amount that is sought to be recovered is by way of a call during the course of the liquidation proceedings and as such time would begin to run from the date of the call and not from the date when the amount became payable or when the last instalment fell due. We are unable to agree with this contention. As discussed above, the amount that is sought to be recovered is not an amount due from a " contributory ". As already held by us a successful prize bidder of a chit fund cannot be deemed to be a " contributory " within the meaning of Section 428 of the Companies Act. Consequently the date on which the call was made by the liquidator is not the date on which the right to file the petition arose or the time began to run. Further, the present call is purported to be pursuant to resolution for voluntary winding up ; it is not a case of winding up by court at the instance of the creditors. Section 458A of the Act makes a special provision in the matter of exclusion of time in computing the period of limitation only in the case of winding up by the court in the following

words :

" 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 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."

26. This is the only provision for excluding certain period in computing the period of limitation prescribed for any suit or application by or in the name of the company. There is no provision in the Companies Act for excluding any period in the case of voluntary liquidation. On the other hand, Section 458A gives an indication that in the case of voluntary winding up, no period could be excluded. A Full Bench of the Madras High Court in *Muthuswami v. Official Assignee*, Madras AIR 1936 Mad 778 dealing with a case arising under the Presidency Towns Insolvency Act, 1909, held that an official assignee in an application under Sections 7 and 36 of the Act " could receive rents and profits only for the period of three years immediately preceding his application and could not recover rents for the period beyond three years before the application ". The same principle, in our view, would apply to the case of a company under voluntary liquidation. No amount beyond three years of the application could be recovered by the voluntary liquidator. That being so, the amount due from the successful prize bidder, though not a debt simpliciter, became due and payable even as per the undertaking given under the promissory note (Ex. A-4) at least by July 16, 1973. Any petition or suit for recovering that amount ought to have been filed within three years thereof, i.e., on or before July 16, 1976. As the present petition is filed on February 22, 1977, it is held to be barred by time. Point No. 4 is answered accordingly.

27. In the result, the petition fails and is accordingly dismissed, but in the circumstances, without costs.