

Official Liquidator Vs. Pusha Mal Narendra Kumar and ors.

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Court : Rajasthan

Decided On : Feb-22-1985

Reported in : 1986(1)WLN148

Judge : Suresh Chandra Agrawal, J.

Appeal No. : S.B. Comp. Application No. 39 of 1981 and S.B. Comp. Petition No. 7 of 1978

Appellant : Official Liquidator

Respondent : Pusha Mal Narendra Kumar and ors.

Judgement :

Suresh Chandra Agrawal, J.

1. In all these applications, the question which arises for consideration is as to whether the non-petitioners are entitled to claim set-off in these proceedings initiated by the Official Liquidator under Sections 446 and 447 of the Indian Companies Act, 1956 (here in after referred to as 'the Act') 1956.

2. M/s Ganpathy Saving and Finance Co. Pvt. Ltd. (here in after referred to as 'the Company') was incorporated as a Private Limited Company under the Companies Act, 1956 (hereinafter referred to as 'the Act') on 31-10-1974. The main object with which the Company was incorporated was to carry on the business of Financing.

The Company used to enrol members under the Saving and Finance Schemes, namely, A-I Scheme and B-I Scheme initiated by it. Under A-I Scheme the member was required to deposit a sum of Rs. 10/- per month for 60 months and the member who failed to deposit in contribution continuously for three months his membership can be terminated and in his place some other member would be enrolled. Those members who discontinued depositing their contribution before the completion of the entire period would be refunded the amount deposited by them after deducting 25% at the end of the period of the scheme. The members of the Scheme were entitled to take loan from the Company. A member could take a loan upto 50% of amount deposited by him without furnishing any security. A member could take double the amount of his deposit as loan on furnishing the surety of two members of the scheme. Loan could also be advanced to a member on the security of Insurance Policies, Government securities, Plant and Machinery, House, Plot and agricultural land. On those loans the members were required to pay monthly interest of the prescribed rate. Under the B-1 scheme a member was required to deposit Rs. 15/- per month for a period of 50 months. The other conditions were the same as in the A-I Scheme.

3. The non-petitioners No. 1 in these applications were members of the Savings and Finance Schemes of the Company and they had taken loan from the Company under those schemes and at the time of taking the loan it was agreed that they would pay interest @ 18% per annum on the loans advanced to them. The other non-petitioners in these applications had stood as sureties for repayment of the loan advanced to non-petitioners No. 1.

4. In terms of resolution passed by the Board of Directors of the Company a petition was filed for winding up of the Company by a Director of the Company and in the said petition by order of this Court dated 29th January, 1975 the Official Liquidator was appointed as the provisional liquidator. On 19th December, 1980, an order was passed for the winding up of the Company. The Official Liquidator, thereafter filed these applications under Sections 446 and 447 of the Act for the recovery of the amounts payable by the non-petitioners towards loans which were advanced to non-petitioner No. 1 in these applications.

5. Notices were issued to the non-petitioners and in response to the said notices non-petitioner No. 1 in these applications have entered appearance. A reply has also been filed on behalf of non-petitioner No. 1 in Company Application No. 39/81.

6. On behalf of the said non-petitioners it has been submitted that the amounts that have been deposited by them as members of the Scheme as well as by the members of their family should be set off against the amount found recoverable towards the loan advanced to the said non-petitioners.

7. I have heard Shri V.L. Mathur and Shri G.K. Garg, the learned counsels appearing for the Official Liquidator, and Shri R.S. Mehta, Mr. J.P. Goyal and Mr. N.K. Mishra the learned counsels for the non-petitioners.

8. The question with regard to claim for set-off in winding up proceedings has been considered by a Division Bench of the Kerala High Court in Gokul Chit Funds and Trades Pvt. Ltd. v. Thoundasserri Kochu Ouseph Vareed and Ors. (1977) 47 Comp. Cases 264. In that case, the Companies under liquidation were engaged in the business of conducting Chit Funds and the respondents were persons who had joined as subscribers in Some of the kuries conducted by those companies and had been allowed to draw the amounts due on prized tickets in some of the chit fund series against promissory notes or mortgage bonds executed by them to secure due payment of the future instalments. Before all the instalments in those kuries had become due or were paid, the companies went into liquidation. The Official Liquidator preferred claims against the respondents for recovery of the balances due from them under the prized chit accounts. The respondents contended that they were entitled to set off the amount due by them, The said' claims for set off fell into three categories (i) Cases where the claim made against the concerned respondents was for the recovery of the instalments outstanding as due in respect of a prized ticket and the respondents sought to set-off the amounts paid by them to the concerned company by way of subscription in an unprized chit which they had joined in the same chit fund series; (ii) Cases where, in defence to claim for recovery of the amount due by way of instalments on a prized ticket belonging to one particular chit fund series the respondent sought to set off

amounts paid by him to the company by way of subscriptions in the account of an unprized chit in a different series; and '(in) Cases where a prized subscriber from whom the amounts of unpaid instalments was claimed by the liquidator, sought a set-off in respect of amounts which he had deposited with the company under liquidation by way of term deposits. The Division Bench of the Kerala High Court held that by virtue of Section 529 of the Act and Section 47 of the Kerala Insolvency Act, 1955 (which was identical in terms with Section 46 of the Provincial Insolvency Act, 1920) was applicable and that under Section 47 of the Kerala Insolvency Act provision was made that where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under the said Act, an amount 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. The Kerala High Court has held that 'mutual dealings' referred to in Section 47 of the Kerala Insolvency Act, 1955 may consist of several distinct or independent transactions entered into between the same parties functioning in the same right or capacity, and that it is not necessary that the debts or claims sought to be set off against each other should have arisen out of one and the same transaction. The Kerala High Court has further held that the existence of a Security will not affect the statutory right of set off conferred by the section. In this view of the matter the Kerala High Court has held that the respondents were entitled to the set off in all the three categories of cases. The same view has been taken by the Karnataka High Court in *Official Liquidator v. Smt. Lakhmityty* (1975) 45 Company Cases 679.

9. In view of the aforesaid decisions it must be held that in winding up proceedings set off can be claimed under Section 46 of the Provincial Insolvency Act, 1920 in respect of claims arising out of mutual dealings and the said mutual dealings need not be confined to one and the same transaction but would cover several distinct or independent transaction entered into between the same parties functioning in the same right or capacity. This would mean that a member of the Savings and Finance Scheme of the Company who has taken loan under the said scheme is entitled to claim set off in respect of any money deposited by him with the

company under the said scheme or under any other scheme 'The said set off will, however, be confined only to deposit made by the member who has taken the loan and set off cannot be claimed in respect of deposits made by the family members or other relatives of such members. The member cannot, therefore, claim set off in respect of the amounts deposited by other relatives of the member in their capacity as members of the Savings and Finance Scheme. In cases where a member is entitled to claim set off in respect of the amounts deposited by him with the Company, the Official Liquidator would not be entitled to claim interest on that part of the loan in respect of which no set off is claimed from the date of the said deposit.

10. Since the amount in respect of which each member in these applications is entitled to claim set off would need examination of relevant documents it would be more appropriate that the said matter is considered by the Official Liquidator. The non-petitioner members of the Saving and Finance Scheme may file their claims before the Official Liquidator in respect of the amounts deposited by them under the Savings and Finance Scheme of which they were members within a period of 15 days. The Official Liquidator shall consider the said claims and the documents produced in support of the claims and on being satisfied about the aforesaid claims the Official Liquidator shall allow set off to the extent the claim is proved by the members concerned. The Official Liquidator may dispose of each such claim within a period of three months from the date the claim is filed.

11. Put up for orders after four months.

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