APPELLATE CIVIL.

Before Mukerji A. C. J. and R. C. Mitter J.

1934

Aug. 10, 21.

KRISHNACHANDRA BHOWMIK

v.

PABNA DHANABHANDAR CO., LTD. (IN LIQUIDATION).*

Company—Winding up—Mutual dealings between company and third party, who happens to be a creditor—Liquidator, if can recover the whole amount due to company, which has also debts to pay—Money in court pending appeal—Right to restoration, when arises—Limitation—Indian Companies Act (VII of 1913), s. 229—Provincial Insolvency Act (V of 1920), s. 46—Presidency-towns Insolvency Act (III of 1909), s. 47—Indian Limitation Act (IX of 1908), Sch. I, Art. 181.

Where there are mutual dealings between a party and a company, which subsequently goes into liquidation, the party being in the position of a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings, although the debts may be unconnected with each other. In such cases, the balance of the account, after the sum due from the one party has been set-off against any sum due from the other party, and no more, has to be paid. The law *does not provide* that the liquidator can recover the full amount due to the company in liquidation, leaving the creditor to take a *pro rata* dividend only.

The principles of section 46 of the Provincial Insolvency Act and section 47 of the Presidency-towns Insolvency Act apply to companies in liquidation by virtue of section 229 of the Indian Companies Act, the only exception being that a shareholder cannot claim a set-off for any debt or dividend due to him against unpaid calls.

In re *Overend, Gurney, and Co.—Grissell's* case (1) referred to.

Even in cases, which do not come strictly within the terms of Order XXI, rule 19, an executing court can give effect to such a claim on general principles and in exercise of its inherent power.

James Young v. *Bank of Bengal* (2) and *In re Daintrey*. Ex. parte *Mant* (3) referred to.

The term 'mutual dealings' in section 46 of the Provincial Insolvency Act and section 47 of the Presidency-towns Insolvency Act includes not only the case where a person owes a debt to the insolvent, but also where there is a claim for unliquidated damages.

*Appeal from Original Order, No. 465 of 1932, against the order of S. S. R. Hattiangadi, Subordinate Judge of Pabna, dated Sep. 27, 1932.

(1) (1866) L. R. 1 Ch. 528. (2) (1836) 1 M. I. A. 87.
(3) [1900] 1 Q. B. 546.

Mersey Steel and Iron Co. (Limited) v. *Naylor, Benzon & Co.* (1), *Tilley* v. *Bowman, Limited* (2) and *Reference under Presidency Small Cause Courts Act* (3) referred to.

Article 181 of the Indian Limitation Act applies to applications for restoration of money recovered under a decree, and the right to withdraw it arises on the disposal of the final appeal.

APPEAL FROM ORIGINAL ORDER by the judgment-debtor.

The facts of the case and points raised in the arguments in the appeal are stated in the judgment.

Atulchandra Gupta, *Deeneshchandra Ray* and *Nagendranath Basu* for the appellant.

Krishnakamal Maitra for the decree-holder, respondents.

Cur. adv. vult.

MITTER J. This appeal is on behalf of the judgment-debtor, whose objection under section 47 of the Code of Civil Procedure has been rejected by the learned Subordinate Judge of Pabna. The appellant purchased, on the 26th June, 1924, at a revenue sale, a *zemindâri*, which belonged to the Pakrasis. The Pabna Dhanadhândâr Co., Ltd., which had not then gone into liquidation, had, before the revenue sale, advanced money to the Pakrasis on a mortgage of the said *zemindâri*. At the date of the revenue sale and at all material times, the position of the respondent company was that of a mortgagee. The appellant paid the whole of the purchase money, which remained in deposit in the Pabna collectorate.

The respondent company instituted, on the 10th July, 1925, a suit to set aside the revenue sale. In the said suit, the appellant was defendant No. 1 and the Pakrasis defendants Nos. 2 to 11. The learned Subordinate Judge decreed the suit with costs against the appellant, which cost was assessed at Rs. 989-11. The appellant before us preferred an appeal to this Court, which was dismissed on the 23rd May, 1928,

(1) (1884) 9 App. Cas. 434. (2) [1910] 1 K. B. 745.
(3) (1904) I. L. R. 28 Mad. 240.

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subject to the modification that the decree for cost against the appellant was set aside. An appeal was taken to His Majesty in Council by the appellant, but it was dismissed and the appellant was directed to pay to the respondent £247-16-3d. as cost. The net result was that the revenue sale was declared invalid, the decree for cost passed against the appellant by the Subordinate Judge was vacated and the appellant was directed to pay £247-16-3d. as cost incurred by the respondent in England in resisting the appeal to His Majesty in Council.

Shortly after obtaining the decree from the Subordinate Judge, the respondent-company applied for executing the decree for costs passed by the Subordinate Judge. The appellant moved this Court for stay. The material portion of the order passed on the 18th February, 1927, by this Court on the said application is in these terms:—

> The opposite party will be entitled to execute this decree for costs as against the petitoner before us, to be recovered out of the money now in deposit in the collectorate, which the petitioner paid as purchase-money for the sale of the property, which has now been set aside, the money being now held to the credit of the petitioner.

The respondent-company, accordingly, withdrew, on the 12th July, 1927, from the said deposit, a sum of money, sufficient to cover their decree for costs, giving security for the due performance of the decree that may be passed by this Court. The appellant also paid revenue and cess amounting to Rs. 543-5-6, that fell due from the date of his purchase at the sale.

The respondent-company has since gone into liquidation. The said company, represented by the liquidator, applied, on the 30th May, 1932, for execution of the decree for costs awarded by His Majesty in Council. The appellant preferred objections under section 47 of the Code and, of the many objections he preferred, only one is now for consideration before us, namely, whether he is entitled to claim a deduction of the sum of money recovered on account of the

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decree for costs awarded by the Subordinate Judge, which decree was ultimately reversed, and of the sum of money paid by him on account of revenue and cess with interest. The Subordinate Judge overruled this claim, assigning two reasons for his decision. He held that the appellant ought to have filed an application for restoration as soon as the High Court set aside the decree for costs passed by the subordinate Judge and his claim was barred by limitation. He further held that the fact that the respondent-company had gone into liquidation had introduced a complication and to allow the claim of the appellant would be to give him a preference.

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

We do not also consider that the winding up of the respondent-company has any effect on the claim of the appellant and that, if he is otherwise entitled to have credit for the monies paid by or recovered from him, the fact that the company has gone into liquidation would not stand in his way.

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Long before the making of statutory provisions on the subject, it was the practice in bankruptcy, where there was a debtor and creditor account between the bankrupt and another person, to take the account between them and to adjust the balance, provided that the debts were connected with each other [see *James Young* v. *Bank of Bengal* (1)]. The statutory provisions on the subject extended the same rule to cases where the debts were unconnected with each other. This statutory extension is that where there are mutual dealings between an insolvent and a creditor, an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice; otherwise the receiver in insolvency would be able to recover the full amount due to the insolvent, leaving the other person to take a *pro rata* dividend only. Sections 46 of the Provincial Insolvency Act and 47 of the Presidency-towns Insolvency Act deal with this matter in the way indicated above. In the case of *In re Daintrey. Ex parte Mant* (2), it was argued that the trustee in bankruptcy could recover twenty shillings in the pound from Messrs. Mant and say that Messrs. Mant must be content with a dividend on the debt due to them from the bankrupt, but Lindley M.R. repelled the contention as unarguable. The term "mutual dealings" has been given by the decisions a very extended meaning. It includes not only the case where a person owes a debt to the insolvent, but also where there is a claim for unliquidated damages. Damages for breach of covenant can be set-off under the said provisions against a claim for rent and in the law reports diverse other cases can be found. [See *Mersey Steel and Iron Co. (Limited)* v. *Naylor, Benzon & Co.* (3), *Tilley* v. *Bowman, Limited* (4) and *Reference under Presidency Small Cause Courts Act* (5)]. Section

(1) (1836) 1 M. I A. 87, 142-3.
(2) [1900] 1 Q. B. 546.
(3) (1884) 9 App. Cas. 434.
(4) [1910] 1 K. B. 745.
(5) (1904) I. L. R. 28 Mad. 240.

229 of the Indian Companies Act makes these principles applicable to a company in liquidation. The only exception to these rules is the case of a contributory. A share-holder of a limited company, who is also a creditor of the same, in the event of the company being wound up, is not entitled to set-off the debt due to him against the calls, nor set-off against the calls a dividend, which may come to him thereafter. [*In re Overend Gurney, and Co.—Grissell's* case (1)]. We are, accordingly, of opinion that the second ground assigned by the Subordinate Judge for over-ruling the claim of the appellant cannot be sustained.

The rejection of his claim on the ground of limitation cannot also, in our opinion, be sustained. The ownership of the money in deposit in the collectorate, from which the respondent withdrew a sum of money to satisfy his decree for costs, was not set at rest till the decision of the Judicial Committee. If the sale had been affirmed, the surplus would have belonged not to the appellant but to the Pakrasis. If the decree setting aside the sale stood confirmed, then and then only the said surplus would have belonged to the appellant and could have been regarded as his money. During the pendency of the appeals or before filing them, the appellant could not have withdrawn the same without seriously imperilling his appeals. If, after the decree of the High Court, he had made the application to get the money back from the respondent, his position would not have been happier. We think that, in the circumstances of this case, the right to apply accrued to the appellant under Article 181 of the Limitation Act, when the Judicial Committee disposed of his appeal. We, accordingly, hold that the appellant is entitled to set-off against the respondent's claim the sum of Rs. 989-11-0, which the respondent took out of the surplus sale proceeds.

The claim for the sum of money paid by the appellant on account of revenue and cess stands on a

(1) (1866) L. R. 1 Ch. 528.

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

MUKERJI A.C.J. I entirely agree.

Appeal allowed in part.

A.A.