

the evidence on the record and decide the appeal either for the appellant or for the respondents in accordance with its conclusions.

Accordingly I set aside the order of remand of the lower appellate court which allows the parties to produce additional evidence and I remand this case for disposal according to law as indicated. The costs hitherto incurred will abide the result.

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 MISCELLANEOUS CIVIL

Before Mr. Justice Harries

PURSHOTTAM DAS (APPLICANT) v. GORAKHPUR
 ELECTRIC SUPPLY COMPANY (IN LIQUIDATION)

 1938
 August, 25

(OPPOSITE PARTIES)*

Companies Act (VII of 1913), sections 158, 186(2)—Shareholder of fully paid up shares—Whether a “contributory”—Whether entitled to a set off.

A holder of fully paid up shares in a company was also a creditor of the company. On the other hand he owed the company for certain work done for him by the company, and also for electric current supplied to him. The company went into liquidation, and his name was entered in the list of contributories. As against the claim of the Official Liquidators for payment for the work done and the current supplied he claimed a set off in respect of the debt due by the company to him:

Held, that a holder of fully paid up shares in a company is a contributory within the meaning of section 158 of the Companies Act, and, being a contributory, he cannot, according to section 186(2) of the Act, claim any set off in the case of a limited company.

Mr. *Govind Das*, for the applicant.

Messrs. *I. B. Banerji* and *S. N. Gupta*, for the opposite party.

HARRIES, J:—This is an application by Babu Purshottam Das praying that this Court should direct the Official Liquidators to settle their bill for work done by the company for Rs.4,500 and to set off such sum against the amount due from the company to the petitioner and further to direct the Official Liquidators

*Application in Miscellaneous Case No. 450 of 1934.

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to set off the sums due monthly for electric current supplied against the balance due from the company to the petitioner.

Before this company went into liquidation the applicant had made a number of advances to the company and on the 21st of May, 1935, the company executed a promissory note for Rs.7,000 in favour of the applicant. This promissory note covered all past advances and an advance of Rs.3,500 odd made on the date upon which the note was executed.

It is the applicant's case that the company was doing a considerable amount of work for the applicant and was of course supplying him with electric current. It is alleged that an agreement was entered into between the parties whereby the company agreed to set off against its liability to the applicant all sums due from the applicant to it for work done and electricity supplied and there can be no doubt that various small sets off were made from time to time.

On the 18th of April, 1936, provisional liquidators were appointed, but it was not until the 2nd of September, 1936, that an order was passed by this Court compulsorily winding up the company. It appears that the provisional liquidators did not agree to this arrangement to set off mutual liabilities and informed the applicant that they would not make any set off in respect of any sums due from the applicant to them and this has been the position of the Official Liquidators since the order for winding up was passed.

I am not satisfied on the materials before me that the applicant and the company ever agreed to any sum due for work done, as opposed to current supplied, to be set off as against the liability of the company to the applicant. The applicant submitted a petition to this Court on the 8th of January, 1937, in which he sets out his claim to an adjustment or set off. In paragraph 1 of that application he sets out the advance of Rs.7,000 upon the promissory note. In paragraph 2 he alleges

that there was a contemporaneous agreement whereby the company agreed "to set off this liability under the aforesaid promissory note by setting off the money due by the applicant to the company on account of consumption of electricity supplied as it fell due." It is to be observed that in this application nothing is said as to any agreement by which sums due for work done were to be set off. This application was obviously settled after due consideration and it is impossible to hold in face of it that the agreement made by the applicant and the company ever covered anything more than a set off of the cost of electricity supplied.

The Official Liquidators repudiated this agreement and it is not suggested that they are bound by it so far as the period after the winding up order is concerned. They could have adopted it had they felt disposed, but this they did not do.

The Official Liquidators have refused to set off their claims against the applicant against the sum due from them to the applicant. I may observe at this stage that the bill for work done by the company for the applicant has now been settled at Rs.4,500 subject to the approval of the Court. It appears to me to be a perfectly reasonable settlement and I accordingly approve of it.

The only question therefore which I have to decide is whether the applicant can be called upon to pay this sum of Rs.4,500 and monthly sums for current supplied or whether the applicant is entitled to claim that those sums should be set off against the liability of the company to him under the promissory note. It would appear that the liability of the company under the promissory note at the present moment is Rs.6,000 odd.

The Official Liquidators refused to allow a set off upon the ground that they had no power to do so by reason of section 186(2) of the Indian Companies Act.

Section 186(1) of the Indian Companies Act is as follows: "The court may, at any time after making a

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winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act."

Sub-section (2) of this section is as follows: "The court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance."

The applicant Babu Purshottam Das is a shareholder of the company and held at the date of the liquidation a number of fully paid up shares. Further, I am informed that his name has been entered upon the list of contributories and this is a common ground. It is the case for the liquidators that Babu Purshottam Das is a contributory and as the company is a limited liability company no set off is permissible under section 186(2) of the Indian Companies Act.

It is to be observed that this sub-section permits a limited right of set off in the case of a contributory where the company is unlimited and no mention whatsoever is made as to his rights where the company is limited. In my view as this sub-section gives the contributory a right only in the case of an unlimited company it follows that he has no such right of set off if the company be limited. This was the view of JESSEL, M. R., in the case of *In re Whitehouse & Co.* (1). In dealing with a similar provision in the English Companies Act, 1862, JESSEL, M. R., observed (page 602):

(1) (1878) 9 Ch.D. 595.

“Therefore this section empowers the court to direct payment of any debt of the company, and it may allow, where the company is not limited, a set off. Surely that does not allow the court to do it where the company is limited. If there is any implication to be drawn from the section at all, it is that set off is not to be allowed when the company is limited. . . .”

Accordingly the liquidators contend that the applicant has no right to a set off and that they have no power to grant the same. On the other hand the applicant contends that he is not a contributory and therefore section 186(2) of the Indian Companies Act does not apply to this case.

The term “contributory” is defined in section 158 of the Indian Companies Act in these terms: “The term ‘contributory’ means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.”

As I have stated previously the applicant owns fully paid up shares and therefore it is argued that he is under no liability to contribute to the assets of the company in the winding up. At first sight this appears an attractive argument but it has been held time and again by the Courts in England and by some Courts in this country that the term “contributory” as defined in section 158 of the Indian Companies Act includes a shareholder who holds fully paid up shares only. In the case of *In re National Savings Bank Association* (1) it was held that a fully paid up shareholder in a limited company could present a petition under the Companies Act, 1862, for winding up the company, because he was a contributory within the meaning of the term as used in the English Companies Act, 1862. In the case of *In re Anglesea Colliery Company* (2) it was again held

(1) (1866) 1 Ch.Ap. 547.

(2) (1866) 1 Ch.Ap. 555.

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that a holder of fully paid up shares in a limited company is a "contributory" within the meaning of the Companies Act, 1862. It was accordingly held that where under a voluntary winding up all debts had been provided for, the Liquidators were justified in making a call upon the partly paid up shareholders for the purpose of adjusting the rights between them and the fully paid up shareholders. Modern English text book writers on Company Law hold the view that these two cases apply with equal force to the present Companies Act in force in England though the wording of the statutory definition of a contributory has been altered slightly. I may add that the definition of a "contributory" in the present English Companies Act is very similar to that given in section 158 of the Indian Companies Act. The only material difference between the old and the present statutes appears to be that in the Companies Act, 1862, which gave rise to the two cases to which I have referred, contributory was defined to be "Every person liable to contribute to the assets of a company under this Act in the event of the same being wound up" whereas in the present English Statute and the Indian Statute contributory means "Every person liable to contribute to the assets of the company in the event of its being wound up." The phrase "under this Act" seems to have been omitted. In my view the omission of that phrase cannot make any difference because the liability to contribute to the assets of a company in the event of its being wound up is a liability which is imposed by the Companies Act and by no other law.

The English cases to which I have referred were followed by the Punjab Chief Court in the case of *Imperial Oil, Soap and General Mills Co. v. Ram Chand* (1) SHADI LAL, J., held that a fully paid up shareholder of a company is a contributory within the meaning of section 158 of the Indian Companies Act and may, subject to certain conditions, present a petition for winding up of the company.

It appears to me that I am bound to follow these cases and to hold that a holder of fully paid up shares in a company is a contributory within the meaning of section 158 of the Indian Companies Act. Where a term has been defined in a Statute it must be given that meaning throughout the Statute unless some provision makes it clear that for certain purposes the term must be given another meaning. It appears to me that I am compelled to hold that the term "contributory" as used in section 186(2) of the Indian Companies Act includes a fully paid up shareholder and accordingly such a shareholder cannot, where the company is limited, claim a set off in the circumstances of the present case. It may well be argued that in the particular circumstances of this case the decision of the Official Liquidators works an injustice, but be that as it may they had no alternative in my view but to reject this claim to a set off. They can only allow a set off in the terms of the Statute and in my view the express term of the Indian Companies Act prohibits a set off in this case.

For the reasons which I have given this application fails and is dismissed.

APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Misra

KUNDAN (APPLICANT) *v.* AISHA BEGAM (OPPOSITE PARTY)*

1938
August, 29

Guardians and Wards Act (VIII of 1890), section 17—Selection of guardian—Personal law of minor cannot be overridden even in the interests of the minor—Muhammadan law—Mother cannot be appointed guardian of daughter if mother has married a person who is not related to the daughter within the prohibited degrees.

Section 17 of the Guardians and Wards Act does not permit the court to subordinate the personal law to which the minor is subject, to the consideration of what will be for the minor's welfare.

According to the Muhammadan law the mother cannot be appointed the guardian of her minor daughter if the mother

*First Appeal No. 98 of 1937, from an order of Harish Chandra, District Judge of Moradabad, dated the 10th of April, 1937.