

1938

Present : Moseley J.

CANAGARATNE *et al.* v. CHELLIAH.

7—C. R. Jaffna, 11,357.

Set-off—Action by liquidator of Cheetu Club—Claim by surety to set off amount paid by him to Club against his liability as surety—Set-off not permitted.

Where the plaintiffs as liquidators of a Cheetu Club sued the defendants, the first defendant as principal and the second and third defendants as sureties to recover a sum of money under an agreement in respect of a cheetu-purchased by the first defendant; and where the second defendant sought to set off against the amount claimed a sum of money which he had contributed to the club.

Held, that the second defendant was not entitled to the set-off.

A PPEAL from a judgment of the Commissioner of Requests, Jaffna.

W. W. Mutturajah, for plaintiff, appellants.

No appearance for defendants, respondent.

Cur. adv. vult.

August 3, 1938. MOSELEY J.—

The plaintiffs (appellants) in their capacity of liquidators of a cheetu company sued the defendants (respondents), the first defendant as principal and the second and third defendants as sureties, for the sum of Rs. 70 due under an agreement in respect of a cheetu purchased by the first defendant.

Judgment went by default against the third defendant. The second defendant claimed that he was entitled to set off against the amount claimed a sum of Rs. 105 which he had contributed to the plaintiff company and the case went to trial on that issue.

The learned Commissioner held that the second defendant was entitled to set off as claimed, and gave judgment against the first defendant as prayed, and ordered that, if the judgment was not satisfied by the first defendant, the second defendant should set off against the decree the amount due to him by the Company, and that the third defendant as a joint and several guarantor should enjoy the benefit of the said set-off.

The plaintiffs appealed on the ground that the second and third defendants are not entitled to a set-off.

Counsel for the appellants argued that in a question of set-off it is essential that the two demands should be of such a character that the general principles of set-off apply (*Buckley—The Law and Practice under the Companies Acts, 11th ed., p. 442*), that is to say, that they must be due to and from the same persons in the same right (*Leake on Contract, 8th ed., p. 782*). In the case of *In re Pennington and Owen, Ltd.*¹ it was held by Pollock M.R., that “a joint debt cannot be set off against a separate debt nor a separate debt against a joint debt. . . .”

In my view, however, the most cogent argument against allowing a set-off in this case is that to do so would amount to giving a creditor in a winding-up preferential treatment.

In the case of *Provincial Bill-posting Co. v. Low Moor Iron Co.*² the plaintiffs sued the defendants for damages for tort and the defendants claimed to set off a sum due to them by the plaintiffs under a contract. Buckley L.J., in the course of his judgment said—“In these circumstances, if we were to allow a set-off, the result would be that a particular creditor of the plaintiff company would receive 20 shillings in the pound in respect of his debt, and would thus be preferred to the other creditors. That being so, it seems to me that we ought not to allow that set-off”.

I prefer to decide this appeal on the authority just mentioned. In my view, the learned Commissioner was wrong in allowing the set-off.

I would therefore allow the appeal with costs. The judgment of the Court of Requests is set aside and judgment will be entered for the plaintiffs as prayed in the plaint with costs. It is open for the second defendant to prove in the liquidation for the amount which he claims in reconvention.

Appeal allowed.