
(1971) 08 MAD CK 0028
In the Madras High Court
Case No : Company Petition No. 10 of 1971

Jacob Cherian

APPELLANT

Vs

K.N. Cherian and Others

RESPONDENT

Date of Decision : 19-08-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Companies (Court) Rules, 1959 — Rule 6, 88(2)
Companies Act, 1956 — Section 397, 398, 433

Citation : (1973) 43 CompCas 235 : (1973) 86 LW 250

Hon'ble Judges : Palaniswamy, J

Bench : Single Bench

Advocate : N.C. Raghavachari, N.S. Varadachari and T.K. Subramanian, for the Appellant; V.N.R. Rao and Gopinathan, for the Respondent

Judgement

Palaniswamy, J.—This petition is filed under Sections 397, 398 and 402(c) of the Companies Act, 1956 (hereinafter referred to as the Act).

The petitioner is one of the sons of the first respondent, the other sons being respondents Nos. 2 to 5. Thompson & Company (Private) Limited,

the sixth respondent, was incorporated in 1931. The main business of the company is to print and publish books and other materials. The shares of

the company have been held mostly by the members of the family of the first respondent. Alleging acts of mismanagement and oppression, the

petitioner and the fifth respondent filed C. P. No. 68 of 1969 on the file of this court for an order under Sections 397 and 398 of the Act. That

petition was opposed by respondents Nos. 1 to 4. That was being adjourned from time to time and finally the petitioner and the fifth respondent

took out Application No. 433 of 1969 under Rules 9, 11(b) and 88(2) of the Companies (Court) Rules, 1959, praying for leave to withdraw the

company petition. In the affidavit that was filed in support of that application, they stated that the respondents in that petition had agreed to purchase the shares of the present petitioner and set out certain terms for certain mutual domestic arrangements. That petition was not opposed, with the result C. P. No. 68 of 1969 was dismissed on December 4, 1969, as withdrawn. This petition was filed on 17th December, 1970, repeating the allegations of mismanagement and oppression which were set out in C. P. No. 68 of 1969 and further alleging that even after the dismissal of C.P. No. 68 of 1969 the affairs of the company are being mismanaged and that respondents Nos. 1 to 5 are guilty of several acts of oppression of the petitioner. It is also the case of the petitioner that respondents Nos. 1 to 5 failed to act up to the terms of the compromise. The main prayer of the petitioner is that an administrator may be appointed to take charge of the affairs of the company. His alternative prayer is to get relief as regards the terms, which, according to him, were agreed upon before he withdrew C. P. No. 68 of 1969.

2. The respondents oppose the petition contending, inter alia, that the petitioner is not entitled to any of the reliefs. Their contention is that this petition is the result of certain domestic quarrels and that the petitioner, after allowing C. P. No. 68 of 1969 to be dismissed, is barred from making the same allegation and inviting the court to hold an enquiry into those allegations. It is further contended that the petitioner is not entitled to the alternative relief also.

3. When the petition was taken for enquiry, a preliminary objection was raised on behalf of the respondents to the effect that the dismissal of C. P. No. 68 of 1969 was a bar to the maintainability of this petition. The argument was that though the petitioner took the leave of the court for the withdrawal of C. P. No. 68 of 1969, leave was not asked with liberty to file a fresh petition on the same allegations and that, therefore, the dismissal of the petition as withdrawn without reservation of liberty to file a fresh petition is a bar to the maintainability of this petition. Mr.

Raghavachari, appearing for the petitioner, on the other hand, contended that all that the petitioner was required to do before withdrawing C. P.

No. 68 of 1969 was to obtain the leave of the court and that inasmuch as such leave was obtained there is no bar for maintaining this petition based

upon allegations, some of which were allegations on which C. P. No. 68 of 1969 was also founded.

4. In exercise of the powers conferred by Section 643 of the Companies Act, 1956, the Supreme Court of India, after consulting the High Courts,

made the Rules called the Companies (Court) Rules, 1959. Rule 6 reads : ""6. Practice and procedure of the court and provisions of the Code to

apply.--Save as provided by the Act or by these Rules, the practice and procedure of the court and the provisions of the Code as far as

applicable, shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any document which is presented

otherwise than in accordance with these rules or the practice and procedure of the court.

5. Rule 88 deals with petitions u/s 397 or 398. Sub-rule (2) of that rule, inter alia, states that a petition u/s 397 or 398 shall not be withdrawn

without leave of the court. Similar provision is made in Rule 100(1) which says that a petition for winding up shall not be withdrawn after

presentation without the leave of the court. Relying upon rule 6 it is contended on behalf of the respondents that by virtue of Section 141 of the

Code of Civil Procedure, the procedure laid down in the Code in regard to suits shall be followed as far as it can be made applicable in all

proceedings in any court of civil jurisdiction. The argument is that under Order 23 of the Code if a plaintiff wants to withdraw a suit or abandon a

part of his claim with liberty to institute a fresh suit in respect of the subject-matter of such a suit or such part of the claim, the plaintiff should obtain

the permission and that if he fails to obtain the permission and withdraws the suit, he is precluded from instituting a fresh suit in respect of such

subject-matter or such part of the claim. It is contended that this provision which is applicable to a suit is equally applicable to all proceedings in

any court of civil jurisdiction by virtue of Section 141 of the Code and that reading these provisions with Rule 6 of the Companies (Court) Rules, it

would follow that if a petitioner withdraws a petition filed under Sections 397 or 398 without obtaining the leave of the court reserving his right to

institute a fresh petition on the same cause of action, he is precluded by reason of Order 23 of the Code from instituting a fresh petition upon the

same allegations, though the petition might have been withdrawn with the leave of the court as required under Rule 88(2).

6. Counsel appearing on both sides conceded before me that there is no direct authority bearing upon this question. On behalf of the respondents, decisions were cited to show that certain provisions of the Code have been held applicable to proceedings under the Companies Act and that on the same analogy it should be held that Order 23 of the CPC is also applicable to proceedings under the Companies Act. In *Hindustan Bank v. Mehraj Din*, AIR 1920 Lah. 51 it was held that the court, under the Companies Act, 1882, is a court of civil jurisdiction and is governed by the general provisions of the CPC as made applicable by Section 141 of the Code and that the court should, in dealing with ex parte orders, proceed under Order 9, Rule 13, mutatis mutandis. In *Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co., Ltd. Vs. President, Council of Regency*, the applicability of Section 86 of the Code of Civil Procedure, dealing with suits against foreign Rulers, Ambassadors and Envoys, was considered. By virtue of Section 141 of the Code it was held that proceedings u/s 187 of the Companies Act, 1913, are proceedings in a court of civil jurisdiction. But it is pointed out that from that position it does not follow that the court can bring under its jurisdiction persons who are declared to be outside the jurisdiction of British courts subject to certain reservations as made in Section 86 of the Code. It was held that the court cannot pass an order unless it has jurisdiction to enforce the personal liability of the sovereign prince or the ruling chief who are given certain privileges u/s 86 of the Code. In *Atma Ram Sahni Vs. Chitra Production Co. and Another*, 5 an application for winding up by a creditor was filed and the company did not contest its liability. Then followed the order of winding up. But when the petitioning creditor applied to the official liquidator to have his claim admitted, one of the directors of the company raised objection regarding the truth of the debt. It was held that the winding up having been ordered without contest, it amounted to a constructive decision of the question of the petitioner being a creditor and of the amount claimed by him and that the principle of *res judicata* enunciated in Section 11 of the CPC would be attracted. In *Exchange Bank of India and Africa Ltd. Vs. Venkatesh B. Kulkarni and Others*, it was held that misfeasance proceedings u/s 235 of the Companies Act, 1913, are legal proceedings in a Court of civil jurisdiction within the meaning of the expression in Section 141 of the Code and that the liquidator has power u/s

234 of the Companies Act, 1913, to compromise a misfeasance claim subject to the sanction of the court.

7. Mr. Raghavachari, appearing for the petitioner, cited the decision of the Allahabad High Court in *Official Liquidator Vs. Liaqat Husein*, by a

single judge. In that case the court held that a misfeasance proceeding u/s 235 is merely an examination by the court into the conduct of an officer

of the company, and as a result of that examination the court may order the officer to restore the money or the property of the company, as the

court may think just, and that such proceedings cannot be said in any way to be "a suit or other legal proceeding" within the meaning of Section

280 of the Companies Act, 1913. But in that case the learned judge did not consider the effect of Section 141 of the Code. The matter was

considered only with reference to Section 280 of the Companies Act, 1913.

8. This distinction was pointed out by a Bench of the Bombay High Court in *Vadilal Chatrabhuj Gandhi Vs. Thakorelal Chimanlal Munshaw and*

Others, . Referring to the said decision of the Allahabad High Court. Chigla C.J., observed at page 32:

In that case the court was primarily concerned to construe Section 280 of the Companies Act and the words used in that section, viz., any suit or

other legal proceeding. The court was not considering whether misfeasance proceedings were proceedings within the meaning of Section 141 of

the Code. The language used in Section 280 and the language used in Section 141 are different. Whereas in Section 280 the words used are "in

any suit or other legal proceeding," the words used in Section 141 are "in all proceedings in any court of civil jurisdiction." Therefore, the words

used in Section 141 are wider in their connotation than the words used in Section 280, and although the decision of the Allahabad High Court may

be correct, with respect, as far as Section 280 is concerned, it has no bearing whatever upon the construction we must put upon the language used

in Section 141.

9. Mr. Raghavachari, counsel for the petitioner, cited *Syed Mohamed v. Sunday murthy*, [1958] 28 Comp. Cas. 554; AIR 1958 Mad. 587 in

which a Bench of this court considered the powers of a company court in dealing with compromise in a petition filed under sections 397, 398 and

402 of the Companies Act, 1956. The question was whether the court was bound

to record the compromise irrespective of the interest of the company. In dealing with that question, the Bench held that proceedings under Sections 397 and 398 of the Companies Act are not like suits between private parties which could be compromised in any manner they choose, that the interests of the company are paramount and that the proceedings should not be conceived as a mere dispute between individuals. It is further pointed out that any compromise suggested should be acceptable to the court whose powers are set out in Section 402. Strong reliance was placed upon the observation "" proceedings under Sections 397 and 398 of the Companies Act are not like suits "" in support of the argument that a petition withdrawn without leave to file a fresh petition on the same cause of action is not a bar for the maintainability of a fresh petition. I am unable to accept this argument. The limited scope of the question which arose for consideration before the Bench was as to the powers of the court in dealing with compromise in a petition under Sections 397 and 398 of the Companies Act, In an ordinary suit all that the court is concerned, in considering the question of compromise, is to see, whether to the satisfaction of the court the suit has been adjusted wholly or in part by any lawful agreement or compromise or whether the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit. If this condition is satisfied, the court is enjoined with a duty to order such agreement, compromise or satisfaction to be recorded. But in the case of a compromise in a proceeding under Sections 397 and 398 of the Companies Act, the court is not merely required to record or embody the terms agreed upon between the parties to the proceeding but should see that the interest of the company which is the primary consideration is safeguarded.

10. The decision of the Allahabad High Court in *Garni Shankar Jalan v. Official Liquidator*, [1965] 1 Comp.L.J. 99 (All.) on which the petitioner's counsel placed reliance, lays down the principle that where a case can be dismissed on two grounds, its dismissal on one ground alone does not operate as *res judicata* in respect of the other ground. That principle is not applicable to the present case.

11. Mr. Raghavachari next cited certain decisions dealing with the withdrawal of probate proceedings without leave of the court in support of his

argument that absence of reservation of right to file a fresh petition under the Companies Act is not a bar for the maintainability of the subsequent

petition. In *Jamuna Dasya v. Kailash Chandra*, [1945] 49 C.W.N. 636 it was held that, if a case for probate of a will is withdrawn and dismissed,

a fresh application for probate will lie, even though no leave to file a fresh application was obtained. The view taken in that case was that Order 23,

Rule 1, of the Code of Civil Procedure, is not applicable to probate proceedings, that probate proceedings are not suits and that, therefore, the

provisions of the Code are not to be followed in contentious probate proceedings. In *K.V.R.Narasimha Rao v. K. Vimalavati*, [1967] 2 A.W.R.

199 (A.P.). : ILR (1896] Mad. 458 it was held that succession proceedings are summary proceedings and that no permission of the court is

necessary under Order 23, Rule 1, of the Code of Civil Procedure, for withdrawing proceedings under the Succession Act, 1925. In *Pakiam Pillai*

v. Innasi Fernand a person applied for probate of a will but withdrew the application before the proceedings became contentions. It was held that

the applicant was entitled, as caveator, to propound the same will in opposition to an application for grant of letters of administration to the estate

of the deceased. In my view, these decisions under the Succession Act are not relevant for consideration of the issue in this case, because, we are

concerned with the application of Rule 6 of the Companies (Court) Rules, which has made specific provision for the applicability of the CPC to all

proceedings under the Companies Act in so far as the provisions of the Code are applicable. Mr. Raghavachari next cited a decision of a Bench of

this court in *Periyakarupa Thevar and Others Vs. Vellai alias Ocha Thevar and Others*, in which it was held that the provisions of Section 141 and

Order 9, Rule 13, of the Code of Civil Procedure, do not apply to proceedings in a civil court on a reference u/s 146 of the Code of Criminal

Procedure. It was held that the procedure to be followed by the civil court in a reference u/s 146 of the Criminal Procedure Code is just what is

contained in that provision itself and that it is not possible to enlarge the scope of that procedure by resorting generally to the provisions of the Civil

Procedure Code. It was, therefore, held that a petition under Order 9, Rule 13, to set aside an ex parte order and an application to bring on

record the legal representatives of a deceased party could not be maintained. Mr. Raghavachari fairly brought to my notice the decision of the

Supreme Court in Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another, in which the Supreme Court referred to with

approval the decision of Ramachandra Iyer J., as he then was, in Kochadai Naidu v. Nagayasami Naidu, A.I.R 196 Mad. 247 in which it was held

that a proceeding before a civil court arising out of a reference to it u/s 146(1), Criminal Procedure Code can be transferred by the High Court or

District Court u/s 24, Criminal Procedure Code. Their Lordships of the Supreme Court held that such a proceeding is a civil proceeding as

contemplated u/s 141 of the Code of Civil Procedure. In view of this decision the aforesaid decision of the Bench cannot be considered as laying

down the correct law.

12. Rule 6, inter alia, says that the provisions of the Code, so far as applicable, except as provided by the Companies Act and the Rules shall

apply to all proceedings under the Act and the Rules. It cannot be denied that by virtue of this provision, Order 23, Rule 1, of the Code of Civil

Procedure, can be applied to all proceedings under the Companies Act unless its application for any reason is to be held as unreasonable or

impracticable or barred. The fact that specific provision is made in Sub-rule (2) of Rule 88 prohibiting the withdrawal of the petition under Sections

397 and 398 without the leave of the court does not necessarily mean that the petition so withdrawn without liberty to file a fresh petition on the

same cause of action is not open to the defect arising out of the withdrawal without leave as required under Order 23. The leave contemplated in

Sub-rule (2) of rule 88 is only a leave to withdraw the petition. The framers of the Rules have presumably thought that inasmuch as the interest of

the public is also involved, the leave of the court is necessary before withdrawal is made. But that provision cannot in any way affect the

applicability of Order 23 of the Code of Civil Procedure. If a petitioner seeking the leave of the court for withdrawal for any reason whatsoever,

had felt that an occasion arise for him to approach the court again with a similar petition on the same allegation, it is incumbent upon him to ask the

court to grant him liberty to file a fresh petition on the same cause of action. Such a procedure is in no way inconsistent with the Companies Act or

the rules framed thereunder. The expression "" as far as applicable "" occurring in Rule 6 is indeed very wide in its scope and it means "" as far as

reasonably applicable ". It cannot be said that requiring a petitioner to obtain the leave of the court to file a fresh petition on the same cause of action would be unreasonable. To hold that the requirement is necessary if he should approach the court with a petition on the same cause of action, is in no way inconsistent with the rules. Such a view is necessary in the interest of the company and those who are in charge of the affairs of the company against whom relief can be claimed under Sections 397 and 398. It would be abuse of the process of the court to allow a person to drag to court the company and those in charge of the affairs of the company by filing a petition under Sections 397 and 398 after withdrawing a petition founded on the same allegations, without the express orders of the court granting leave to file a fresh petition, whatever be the reason for the withdrawal. The motive for the withdrawal is irrelevant in considering the maintainability of the subsequent petition. If a petition filed under Sections 397 and 398 is unconditionally withdrawn, the petitioner, in my view, is, by virtue of Order 23, Rule 1, precluded from instituting a fresh petition on the allegations upon which the earlier petition was founded. In this view, I uphold the preliminary objection in respect of the allegations upon which C. P. No. G8 of 1969 was founded. The petitioner is precluded from asking the court to investigate into the truth of those allegations. But he is, however, entitled to have an enquiry upon the other acts of mismanagement and oppression, which, according to him, occurred after the dismissal of C. P. No. 68 of 1969.

13. Alleging that the company was liable to be wound up, the petitioner had filed C. P. No. 49 of 1970, u/s 433(e) and (f) before filing this petition under sections 397 and 398. Before this petition was taken up for hearing on the preliminary issue regarding its maintainability, Mr. Raghavachari, counsel for the petitioner, stated that C. P. No. 49 of 1970 may be dismissed as not pressed and accordingly that petition was dismissed. On account of that dismissal it was contended on behalf of the respondents that the petitioner was not entitled to ask for an enquiry u/s 397 and that the petition survives only as regards the case u/s 398. The argument was that relief u/s 397 can be granted only if the petitioner establishes that to wind up the company would unfairly prejudice him but that otherwise the facts would justify the making of a winding up order on the ground that it

is just and equitable that the company should be wound up, that if a petition filed specifically asking for winding up is not pressed, it should be

taken as conceded that no ground exists to wind up and that the court cannot, therefore, be called upon to consider the question whether it is just

and equitable to wind up the company. I am unable to accept that argument. The relief that could be granted u/s 397 and that which could be

granted u/s 433 are different. The proceedings are distinct and separate, and one does not depend upon the other even though the ground urged

for winding up may be that it is just and equitable, which is no doubt a ground which should be established to sustain the petition u/s 397 also. The

fact that such a ground is common is no bar for the prosecution of this petition u/s 397.

14. The petition is adjourned to September 6, 1971, for holding an enquiry into the allegations of mismanagement and oppression which, according

to the petitioner, were committed after the dismissal of C. P. No. 68 of 1969.