

(2006) 02 AP CK 0002

In the Andhra Pradesh High Court

Case No : Company Application No. 585 of 2005 in Company Petition No. 13 of 2002

Mamatha Chit Fund P. Ltd. (In Liquidation)

APPELLANT

Vs

Smt. Doure Swarropa Rani and Others

RESPONDENT

Date of Decision : 28-02-2006

Acts Referred:

Andhra Pradesh Court Fees and Suits Valuation Act, 1956 — Section 15, 19, 2(2), 20, 21
Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1913 — Section 153, 166, 177, 221
Companies Act, 1956 — Section 391, 397, 398, 433, 446
Court Fees Act, 1870 — Article 1 , 11

Citation : (2007) 136 CompCas 758 : (2007) 80 SCL 69

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : M. Anil Kumar, Official Liquidator, for the Appellant; Malipeddi Srinivasa Reddy, for the Respondent

Final Decision : Allowed

Judgement

T. Ch. Surya Rao, J.—The instant application has been filed u/s 446(2)(b) of the Companies Act. The applicant seeks a direction to the respondents to pay jointly and severally a sum of Rs. 35,163.80 ps. with interest at 12 per cent. per annum from September 17, 2000, till realisation.

2. By means of an order, dated March 20, 2002, in C.P. No. 13 of 2002, M/s. Mamatha Chit Fund (P.) Ltd. was directed to be wound up by this court and in sequel thereto the official liquidator attached to the company court was appointed as a provisional liquidator. As per the information contained in the statement of affairs of the company furnished on January 17, 2003, by its ex-managing director, the first respondent herein was a subscriber of the chit T. No. 21 of chit group No. LP17F, the value whereof was Rs. 1,00,000 to be paid at the rate of Rs. 2,000 per month within a duration of fifty months. Chit was

commenced in the month of March, 1998. Subsequently, the first respondent became the prized subscriber and he was paid the prize amount of Rs. 60,000 under a cheque bearing No. 510285, dated June 16, 1998, after deducting an amount of Rs. 150 towards verification fees and Rs. 1,300 towards arrears of subscription. Respondents Nos. 2 to 4 stood as guarantors to the first respondent and all of them together executed a joint promissory note in favour of the company, besides respondents Nos. 2 to 4 executing an agreement of guarantee in favour of the company. The first respondent from April 10, 1998, to September 17, 2000, paid in all a sum of Rs. 64,836.20 ps. towards the monthly subscriptions for 31 months inclusive of dividends. There remained a balance of Rs. 35,163.80 ps. to be paid for the remaining period of 19 months. The assistant official liquidator got a notice, dated May 30, 2003, issued to the first respondent demanding payment of the balance amount, which was served upon the first respondent. However, the first respondent failed to pay the said amount. The third respondent got a reply, dated June 7, 2003, issued through his counsel mentioning, inter alia, that he (third respondent) subscribed to the chit No. 32 of chit group No. LP19F ; the value whereof was Rs. 1,00,000 to be paid at the rate of Rs. 2,000 for fifty months ; and that he paid 18 instalments, which amount was not repaid to him by the company and therefore the third respondent requested the company to adjust the same against the amount to be paid by the first respondent.

3. As per the information contained in the chit ledger and other records of the company (in liquidation), respondent No. 3 was a subscriber as stated by him and he paid in all a sum of Rs. 28,000 inclusive of dividends and he was shown as a creditor for a sum of Rs. 19,120. The third respondent, however, has not furnished any information in support of his claim to the official liquidator and hence the claim.

4. The respondents although resisted the claim by filing a counter there has been no gainsaying about the claim of the applicant. However, the respondents pleaded for a set off of the amount covered by chit group No. LP19F:32 and agreed to pay the balance amount remained after such set off. However, the respondents have not paid any court fees while taking up the plea of set off, inter alia, in the counter. From the pleadings it is obvious that the claim of the applicant and the claim of the respondents as well are squarely admitted. No further proof is required than the unequivocal pleas taken by either of them in the respective pleadings. The only point germane in the context to be decided is as to whether the set off pleaded by the respondents requires the payment of necessary court fees or not.

5. Hitherto, no court fee has been paid any plea of set off or counter-claim bearing made by the respondents in various applications filed by the official liquidator before this court as a matter of practice and on the premise that there has been no such provision in the A.P. Court Fees and Suits Valuation Act, 1956 (for short "the A. P. Court Fees Act") mandating the payment of court fees on the

plea of set off or counter-claim taken before the company court. Inasmuch as it is of general importance and probably might arise time and gain in all applications of this sort, the matter requires a clinical examination of various provisions of the A.P. Court Fees Act and the Companies Act as well.

6. The substantial provision which needs to be noticed at the outset is Section 446 of the Companies Act, which confers the jurisdiction on the company court. It is expedient to except the provision for brevity and better understanding of the matter as under:

446. (1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of

(a) any suit or proceeding by or against the company ;

(b) any claim made by or against the company (including claims by or against any of its branches in India) ;

(c) any application made u/s 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company ;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

7. A bare perusal of the provision shows that after a winding up order has been passed by the company court and the official liquidator has been appointed as provisional liquidator in consequence thereof, no suit or other legal proceeding shall be commenced in any court by or against the company except with the leave of the company court and no suit or proceeding which is pending at the date of the winding up order shall be proceeded with without such leave of the court. Sub-section (2) confers jurisdiction upon the company court to dispose of

any suit or proceeding by or against the company; any claim made by or against the company; any application made u/s 391 of the Companies Act by or in respect of the company ; and any question of priorities or any other question whatsoever whether of law or fact which may relate to or arise in course of the winding up of the company. Section 446 is in two parts. Sub-section (1) thereof operates as stay of any suit or other legal proceeding either pending or to be instituted unless necessary leave is granted by the court subject to such terms it may impose. Sub-section (1) of Section 446 is akin to Section 171 of the predecessor Act of 1913, which was repealed u/s 644 of the present of 1956. Section 171 of the old Act only provided for stay of suit and proceedings pending at the commencement of winding up proceeding and created an embargo against the commencement of any suit or other legal proceeding against the company except with the leave of the court. With a little modification to Section 171, Section 446, Sub-section (1) was incorporated in the 1956 Act. However, no jurisdiction was conferred upon the company court analogous to the one conferred under Sub-section (2) of Section 446. In that view of the matter, Sub-section (2) was introduced to enlarge the jurisdiction of the company court so as to facilitate the disposal of winding up proceeding under the Companies (Amendment) Act, 1960. Thus, the jurisdiction of the company court was enlarged to meet any eventuality in the process of liquidation. Section 446 of the Companies Act is wide in terms and is not restricted to any category of suits or any class of plaintiffs. It is wide enough to cover all suits and other legal proceeding, whoever may be the plaintiffs.

8. Rule 6 of the Companies (Court) Rules, 1959, makes the provisions of the CPC (for short "the Code") apply to the proceedings under the Act before the company court. Therefore, the proceedings under the Act are to be regulated by the procedure prescribed under the Code save and except it is otherwise expressly provided under the Companies Act and in the absence of any contrary provision. It is beyond doubt for the said reason that the provisions of Order 8 of the Code would squarely apply to the proceedings before the court. The person against whom a suit or other proceeding instituted before the company court by the official liquidator can defend himself by filing a written statement and can also make a counter-claim or plead set off in accordance with the provisions contained in Order 8 of the Code.

9. Yet another substantial provision which mandates the payment of court fees on any document is Section 4 of the A.P. Court Fees Act. Section 4 reads as under:

4. Levy of fee in courts and public offices.--No document which is chargeable with fee under this Act shall

(i) be filed, exhibited or recorded in, or be acted on or furnished by any court including the High Court; or

(ii) be filed, exhibited or recorded in any public office, or be acted on or furnished

by any public officer, except on payment of the fee chargeable in respect of such document under this Act:

Provided that a document in respect of which the proper fee has not been paid may be filed or exhibited in a criminal court if the court deems it necessary in the interests of justice to do so.

10. It is obvious from the above that this section prohibits filing of any document in any court including the High Court unless the document is stamped, with the necessary court fees chargeable as per the provisions contained in the A. P. Court Fees Act. The expression "document" has not been defined under the said Act but obviously it includes the pleadings.

11. Section 8 of the A.P. Court Fees Act ordains payment of court fees on the set off or counter-claim, in the same manner as a plaint. A perusal of these two provisions makes it obvious that court fee shall be paid on the pleadings. Set off or counter-claim shall have to be regarded for that purpose as a plaint and that is the reason why Section 8 prescribes the payment of court fees on the set off or counter-claim in the same manner as a plaint.

12. Section 15 of the A.P. Court Fees Act provides for the payment of court fees on petitions, applications and other proceedings in the same way as they apply to the determination and levy of fee on the plaints in the suits. Various other provisions incorporated in the Act prescribe the payment of court fee on variety of suits to be filed. In addition thereto, a residuary provision has been provided in the Act in Section 50 which takes care of the payment of court fees in respect of the matters which are not specifically provided for under the Act.

13. As per Section 19 of the A.P. Court Fees Act, the fee payable under the Act shall be computed in accordance with the provisions contained in Chapter IV, Chapter VI, Chapter VII and Schedules I and II of the A.P. Court Fees Act. Chapter IV contains Sections 19 to 49. Chapter V contains Section 50, the residuary provision. Chapter VI, however, deals with probate and letters of administration. Chapter VII deals with refunds and remissions. Schedule I appended to the A.P. Court Fees Act contains various articles prescribing proper fee to be paid. Article 1 prescribes the fee payable on the plaint or written statement pleading a set off or counterclaim depending upon the value claimed. This fee is payable on the plaint or written statement pleading a set off or a counter-claim on ad valorem basis. Schedule II, however, provides for payment of fixed court fees on various categories of petitions, memorandum of appeal and other miscellaneous matters.

14. Article 11 of Schedule II prescribes the payment of court fees on the applications filed. Clause (r) thereof prescribes court fee to be paid on petitions under Sections 153, 166 and 221 of the Indian Companies Act, 1913. It may be reiterated that the Indian Companies Act, 1913, was repealed under Act, 1956. The A.P. Court Fees Act was enacted in the year 1956 and came into force on March 16, 1956, whereas the Companies Act, 1956, which is a Central Act, came

into effect on April 1, 1956. Obviously, by the date of enactment of the A.P. Court Fees Act, the Companies Act, 1956, was not in vogue. Under the old Act of 1913, there was no provision akin to Section 446, Sub-section (2) of the new Act. The only applications envisaged under the old Act to be taken note of by the court are applications filed for winding up and claiming oppression and mismanagement. Civil suits used to be filed in regular municipal courts pertaining to the company matters. It is only for the first time under Sub-section (2) of Section 446 of the Companies Act, jurisdiction has been conferred upon the company court to take cognizance of such matters filed before it and it excludes the jurisdiction of the civil courts.

15. Payment of court fees is a matter in respect of which the State Legislature has exclusive power to make laws, since it is covered by Entry 3 in List 2 of the VII Schedule to the Constitution. Therefore, although Companies Act is a Central Act, when the question of payment of court fee comes, since it is within the exclusive competence of State Legislature and the State Legislature having passed the A.P. Court Fees Act, the provisions would govern the payment of court fees even in respect of the matters covered by the Companies Act. It is no doubt true that under Sub-section (2) of Section 2 of the A.P. Court Fees Act makes the provisions of the said Act subject to the provisions contained in any other law relating to the levy of fee in respect of proceedings under such law. It is obvious that the Companies Act has not provided for any provision prescribing the court fee to be levied on the documents to be filed under the said Act.

16. In *Official Liquidator, High Court of Mysore v. T. Muniswamy Achary* AIR 1967 Mys 190 : [1970] 40 Comp Cas 489, a learned single judge of the Mysore High Court held that the applications filed by the official liquidator which was in the nature of the suits should be treated as regular suits for the purpose of court fee and court fee paid accordingly thereon under the Mysore Court Fees and Suits Valuation Act, 1958.

17. In *Punjab Finance Private Ltd. Vs. Malhara Singh and Others* (No. 2), , a learned single judge of the Punjab and Haryana High Court had taken a different view that it was only when the proceeding was filed in the form of a suit that the court fee should be paid as provided in Article 1 of Schedule I of the Court Fees Act, 1870, otherwise the application would have to be stamped as an application under the Companies Act as provided in Article 1(d) of Schedule II of the Court Fees Act, 1870.

18. The *raison d'être* seems to be that the object of giving jurisdiction to the High Court to decide the matters covered by Section 446(2) is to provide a speedy and cheap remedy to the official liquidator and if the official liquidator is called upon to pay full court fee on the application u/s 446(2)(b), like a suit, the very purpose of the enactment would be lost.

19. In *Sudarsan Chits (I.) Ltd. v. G. Sukumaran Pillai* [1985] 58 Comp Cas 633, at page the apex court held thus:

Before we advert to the question of construction of Section 446, it would be advantageous to notice the historical evolution of the provision as well as its present setting. Section 171 of the Indian Companies Act, 1913, the predecessor of Section 446(1), did not contain any provision similar or identical to that of Section 446(2). Section 171 only provided for stay of suits and proceedings pending at the commencement of winding up proceeding, and embargo against the commencement of any suit or other legal proceedings against the company except by the leave of the court. This provision with little modification is re-enacted in Section 446(1). There was no specific provision conferring jurisdiction on the court winding up the company analogous to the one conferred by Section 446(2). Sub-section (2) was introduced to enlarge the jurisdiction of the court winding up the company so as to facilitate the disposal of winding up proceedings. The provision so enacted probably did not meet with the requirement with the result that the committee appointed for examining comprehensive amendments to the Companies Act in its report recommended that "a suit by or against a company in winding up should, notwithstanding any provision in law for the time being, be instituted in the court in which the winding up proceedings are pending." (see paragraph 207 of the Company Law Committee Report). To give effect to these recommendations, Sub-section (2) was suitably amended to bring it to its present form by the Companies (Amendment) Act, 1960. The Committee noticed that on a winding up order being made and the official liquidator being appointed a liquidator of the company, he has to take into his custody company property as required by Section 456. Section 457 confers power on him to institute or defend any suit, prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the company. Power is conferred upon him to sell the properties, both movable and immovable of the company, and to realise the assets of the company and this was to be done for the purpose of distributing the assets of the company amongst the claimants. Now, at a stage when a winding up order is made, the company may as well have subsisting claims and to realise these claims, the liquidator will have to file suits. To avoid this eventuality and to keep all incidental proceedings in winding up before the court which is winding up the company, its jurisdiction was enlarged to entertain a petition, amongst others, for recovering the claims of the company. In the absence of a provision like Section 446(2) under the repealed Indian Companies Act, 1913, the official liquidator in order to realise and recover the claims and subsisting debts owed to the company had the unenviable fate of filing suits. These suits, as is not unknown, dragged on through the trial court and courts of appeal resulting not only in multiplicity of proceedings but in holding up the progress of the winding up proceedings. To save the company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding up proceedings, Parliament devised a cheap and summary remedy by conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and, therefore, it must receive such construction at the hands of

the court as would advance the object and at any rate not thwart it.

20. From the above, it is obvious that jurisdiction has been conferred upon the company court to adjudicate a suit or proceeding by or against the company, any claim made by or against the company, any application made u/s 391 by or against the company and any question of priorities or any other question whatsoever that might arise in the course of winding up of the company. Although Clause (a) of Sub-section (2) of Section 446 of the Act speaks of filing any suit or proceeding by or against the company, which is in the nature of a cheap and summary remedy, if the official liquidator were to file the suit before the company court, the evil of prolixity cannot be avoided and would be expensive. Instead of filing the suit, the official liquidator can be permitted to file an application, which is in the nature of suit. Since Rule 6 of the Companies (Court) Rules, 1959, makes the provisions of the Code apply to the proceedings before the company court, that application to be filed by the official liquidator can be adjudicated as if it were a suit while following the procedure envisaged in regard thereto in the Code. Even as regards the payment of court fees, since the claim would be in the nature of an application, it is appropriate to direct the payment of the court fees as an application as envisaged under Schedule II, but not as a suit directing the payment of court fees as per the Schedule I on ad valorem basis. Such a construction, in my considered view, would subserve the object in bringing out amendment to the A.P. Court Fees Act as discussed hereinabove and would make the functioning of the company court smooth.

21. I am reinforced in my above view by the judgment of the Full Bench of the Delhi High Court in *Jaimal Singh Makin v. Official Liquidator, Majestic Financiers P. Ltd.* [1978] 48 Comp Cas 419, wherein at page 425 it was held thus:

Once it be held that the present petition could be filed u/s 446(2)(b) of the Companies Act, the question of court fees answers itself. The application filed by the official liquidator would have to be stamped as an application under the Companies Act as provided in Article 1(d) of Schedule II to the Court-fees Act which prescribes that the fee payable on an application presented to the High Court under the Companies Act for taking some judicial action other than the order for winding up is Rs. 13. The application, in the instant case, filed by the official liquidator was directly covered by that clause of Article 1 of Schedule II and, therefore, the payment of Rs. 13 as court fee was correct.

22 The Full Bench sought to place reliance upon the judgment of the Punjab and Haryana High Court in *Punjab Finance P. Ltd. (in liquidation) v. Malhara Singh (No. 2)* [1975] 45 Comp Cas 261 : [1975] Tax LR 1670 and distinguished the judgment of the Mysore High Court in *Official Liquidator, High Court of Mysore v. T. Muniswamy Achary* AIR 1967 Mys 190 : [1970] 40 Comp Cas 489 . As can be seen from the matrix in *Jaimal Singh Makin Vs. The Official Liquidator of Majestic Financiers (P) Ltd.*, , the official liquidator filed a petition u/s 446(2)(b) of the Companies Act, in the instant one, for recovery of Rs. 1,11,866.30 from three persons including the appellant.

23. From the above, it is obvious that the applications to be filed by the official liquidator u/s 446(2)(b), having regard to the object behind the incorporation of the said provision into the statute, should be treated as petitions rather than the regular suits, although for all practical purposes they are in the nature of suits. But, having regard to the fact that they are in the nature of a cheaper and effective remedies provided under the statute, the court fee shall have to be paid as if they are the applications but not as suits. However, it is quite inescapable conclusion that the court fee shall have to be paid on such applications.

24. After the advent of the new Act of 1956, suitable amendment should have been brought into the A.P. Court Fees Act incorporating the provisions prescribing court fees to be paid on various applications to be filed before the company court u/s 446(2)(b) of the Act or other provisions under the Act. This has not attracted obviously the attention of the Legislature so far. It is high time that the A.P. Court Fees Act shall be amended incorporating suitable provisions prescribing court fees to be paid on various matters being filed under the Companies Act before the company court other than the three categories of petitions envisaged under the provisions of 1913 Act, which are now akin to Sections 397, 398 and 433 of the new Act. In fact, provisions of Article 11, Clause (r) shall be suitably amended substituting the provisions under the new Act. It is quite surprising that these matters failed to draw the attention of the Legislature for nearly five decades. A copy of the present judgment therefore, shall have to be communicated to the chief secretary of the State so as to enable him to take appropriate measures by bringing it to the notice of the Legislature so that the necessary amendment can be brought into the A. P. Court Fees Act, in so far as the matters to be filed before the company court are concerned. Till such time Schedule II appended to the A.P. Court Fees Act is suitably amended, the court fee shall have to be paid under the residuary Article 11(u) in respect of other matters other than the applications filed under Sections 397, 398 and 433 of the Companies Act.

25. For the above reasons, the applications filed u/s 446(2)(b) and the plea of set off taken, inter alia, in the written statement as well require the court fee to be paid as per Article 11(u) till such time the Schedule II is suitably amended and court fee is fixed by the State Legislature.

26. In the result, the company application is allowed and there shall be a decree in favour of the applicant for a sum of Rs. 35463.80 as against the respondents. Respondents are entitled to set off Rs. 19,120 after giving credit to that amount, there remains balance of Rs. 16,043.80. The respondents are liable to pay the said amount with interest at 6 per cent, per annum from the date of decree till realization. The decree in favour of the applicant as well as the decree of set off shall come into operation only on payment of the requisite court fees as discussed hereinabove.