
(1965) 10 MAD CK 0005
In the Madras High Court

S. Vanchesan and Others

APPELLANT

Vs

Brahmayya and Co., and Others

RESPONDENT

Date of Decision : 22-10-1965

Acts Referred:

Companies Act, 1913 — Section 235

Citation : (1968) ILR (Mad) 378 : (1966) 79 LW 444 : (1966) 2 MLJ 20

Hon'ble Judges : K.S. Venkataraman, J

Bench : Division Bench

Judgement

K.S. Venkataraman, J.—These are applications for leave to appeal to the Supreme Court against a common judgment and decree dated 1st

May, 1963 passed by a Bench of this Court in appeals preferred against the judgment and decree dated 16th October, 1959 passed by

Subrahmanyam, J., in Application No. 2826 of 1950 That was an application u/s 235 of the Companies Act, 1913, by the. Official Liquidators in

the liquidation of the Hanuman Bank Ltd., Tanjore. The respondents to the application were the Directors (Respondents 1 to 10), officers

(Respondents n to 29) and the Auditor (Respondent 30) of the company. Various acts of misappropriation and misfeasance were alleged and the

several respondents were sought to be made liable in respect of several transactions. Subramanyam, J., found that there were several

misappropriations, irrecoverable advances and unauthorised declaration of dividend out of capital. In respect of them all, the Managing Director,

K.V. Krishnamurthy Iyer (2nd respondent in the misfeasance application) (hereafter the parties will be referred to Only with reference to their

position as repondents in that application) was held uniformly liable. But, so far as the other directors were concerned the learned Judge held only

some of them liable and that too only to a limited extent. We are now concerned with three of the directors who were respondents 5, 8 and 9 (Dr.

T.S. Varadachari, K.V. Ganapathisubramania Iyer and A. N. Srinivasa Iyer). So far as S. Varadachari and Ganapathisubramani Iyer are

concerned, the learned Judge fastened a liability of Rs. 10,000 on them jointly and severally with some of the other directors as compensation for

advances made subsequent to 7th March, 1947 (vide Clause 27(a) of the decree). He similarly fastened a liability of Rs. 22,000 in respect of

wrongful payment of dividend out of capital On 7th March, 1947 there was a meeting of the Board of Directors at which the several

misappropriations and irregularities were discussed. The learned Judge held that the Directors must therefore be held responsible for the

irrecoverable loans advanced after that date and the wrongful payment of dividends after that date. But in respect of the misappropriations and

other irregularities prior to 7th March, 1947, the learned Judge held that the Directors in question could not be held liable, because they did not

have sufficient notice of the misappropriations and irregularities. So far as the 9th respondent A.N. Srinivasa Iyer was concerned, the learned

Judge held him not liable because he had retired on 28th December, 1946.

2. Among the persons who were arrayed as respondents 11 to 29 before the learned Judge, we are now concerned only with three, namely,

respondent 11 V. Ganesa Iyer, respondent 12 S. Vanchesan, and respondent 13 R. Appaswami Iyer. The learned Judge held that each of them

must be considered as an officer of the company within the meaning of Section 235 of the Act along with the Managing Director and since they

also aided the misappropriation of the funds and the irregular advances, they must also be held liable at least to some extent. Respondent 11 was

held liable for a sum of Rs. 40,400 under Clauses 5, 6, 7, 8 and 11 of the decree. Respondent 12 was found liable for a sum of Rs. 35,950 under

Clauses 5, 6, 9, 10 and 11 of the decree. Respondent 3 was held liable for a sum of Rs. 13,450 under Clauses 5 and 6 of the decree.

3. The Official Liquidators filed O.S.A. No. 8 of 1961 against four of the Directors, namely, respondents 5, 7, 8 and 9, contending briefly that

they should be made liable even in respect of the misappropriations, and irrecoverable advances made prior to 7th March, 1947 and that their

liability after 7th March, 1947 should be fixed at a greater amount than Rs. 10,000. Ganesa Iyer, the 11th respondent, filed O.S.A. No. 62 of 1960

questioning the liability fastened on him. Vanchesan and Appaswami Iyer (respondents 12 and 13) similarly filed O.S.A. No. 17 of 1961 The

appeals were heard together. In the appeal of the Official Liquidators against the Directors, the Division Bench agreed with Subrahmanyam, J.,

except in the case of Dr. T.S. Varadachari, the 5th respondent, that there were not sufficient materials before the meeting of 7th March, 1947 to

put the directors on notice of the misappropriations and irregular advances. So far as the 5th respondent Dr. T.S. Varadachari was concerned,

however, the Bench pointed out that there was some material which put him on notice of the misappropriations and irregularities. In respect of

such advances prior to 7th March, 1947, a liability of Rs. 10,000 was fastened on Dr. T.S. Varadachari, under Clause 1 of the decree dated 1st

May, 1963. In respect of the irregular advances made after 7th March, 1947, the liability of Rs. 10,000 which had been fixed by Subrahmanyam,

J., under Clause 27(a) of his decree was increased to a sum of Rs. 18,758. But instead of a joint and several liability, this liability was split up.

Respondent 5 Dr. T.S. Varadachari was directed to pay Rs. 2,000, respondent 7 Rs. 6,758 and respondent 8 Ganapathi Subramania Iyer Rs.

10,000. The liability of Rs. 22,000 fixed by Subramanyam, J., under Clause 27(b) of his decree for wrongful payment of dividend out of capital

was confirmed, but the joint and several liability was split up. Respondent 5 Dr. T.S. Varadachari was directed to pay a sum of Rs. 3,000,

respondent 7 Rs. 4,000 and respondent 8 Rs. 15,000. In other respects, the decree of Subrahmanyam, J., was allowed to stand. This meant that

the Official Liquidator's appeal was dismissed so far as the 9th respondent A. N. Srinivasa Iyer was concerned. The appeals O.S.A. No. 62 of

1960 (of Ganesa Iyer the 11th respondent) and O.S.A. No. 17 of 1961 (of the 12th and 13th respondents) were dismissed.

4. S.C.P. No. 152 of 1964 has been filed by the Official Liquidators against respondents 5, 8 and 9 (Dr. T.S. Varadachari, Ganapathisubramania

Iyer and A.N. Srinivasa Iyer) on the ground mainly that they should be held liable even for the misappropriations and advances made prior to 7th

March, 1947 and that a greater liability should be fixed on the respondents 5 and 8. S.C.P. No. 143 of 1964 has been filed by respondents 12

and 13 (Vanchesan and Appaswami Iyer). S.C.P. No. 160 of 1964 has been filed by the 11th respondent (Ganesa Iyer), All these applications have been filed only under Article 133(1)(a) of the Constitution and that raises two questions, (1) whether the value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal to the Supreme Court was and is not less than Rs. 20,000, and (2) whether the judgment or decree appealed from affirms the decision of Subrahmanyam, J., and if so, whether the appeal concerned involves some substantial question of law. For answering these questions, it is sufficient to refer to the decision of the Supreme Court in T. Rajaram v. Radhakrishnayyd (1962) 1 S.C.J. 568 : (1962) 1 M.L.J. (S.C) 248 : (1962) 1 A. W.R. 248 : AIR 1961 S.C. 795 (1798).

5. The appellant in the Supreme Court, Tirumalachetti Rajaram filed a suit for partition in the Sub-Court of Chittoor for his half-share in some properties which once belonged to the joint family consisting of himself and his father, and he impleaded his father and several alienees from him.

He contended that the alienations effected by his father and the sales held in execution proceedings against his father were not binding on him. The

trial Court rejected his contention in toto and dismissed the suit. On appeal, the High Court of Madras reversed the trial Court's decree in respect

of alienations of some of the items and held that those alienations did not bind the appellant's share. A preliminary decree was accordingly passed

in his favour in respect of the said items. But the rest of the decree passed by the trial Court was confirmed. The appellant applied to the High

Court for a certificate under Article 133(1) of the Constitution. The application was rejected on the ground that the decree sought to be appealed

from was one of affirmance and there was no substantial question of law raised by the proposed appeal. Against that an appeal Was taken to the

Supreme Court. The Supreme Court held that the decree of the High Court was not one of affirmance of the trial Court and since the valuation test

was satisfied there was a right of appeal to the Supreme Court, even though no substantial question of law was involved. The argument which had

prevailed in the High Court in refusing the certificate was that the appeal proposed to the Supreme Court related only to some of the items of

properties and in respect of them, both the trial Court and the High Court had agreed that the alienations and sales bound the appellant. Their

Lordships of the Supreme Court observed that this view was wrong and that though several items of properties were involved and several different

defendants were in possession of the properties, there was only one decree of the High Court and since that decree had varied the decree of the

trial Court, the decree was not one of affirmance and that it was immaterial that the variation was in favour of the appellant. At page 1798, they

observed:

The normal, natural and reasonable construction to place on the first part of the relevant clause is to hold that it refers not merely to that part of the

decree which is sought to be challenged in the appeal but the entire decree from which the appeal arises or the decree giving rise to the appeal. On

this construction the clause ""appealed from "" is not a clause of limitation. It is merely a descriptive clause and it describes the decree as one from

which the appeal arises. If that be so, in determining the character of the decree it would be necessary to take the decree as a whole and enquire

whether it is a decree of affirmance or not.

It was urged before their Lordships that this construction would be inconsistent With the provision made by Article 133(1)(a) in regard to the value

of the subject-matter in dispute., In rejecting this argument, their Lordships observed:

The argument is that if for determining the value of the subject-matter it is necessary to consider only that part of the decree and subject-matter

which are actually proposed to be brought to this Court in appeal, in interpreting the word ""decree"" in the relevant clause a similar approach should

be adopted and only that part of the decree should be considered which is proposed to be brought to this Court in appeal. We do not see the

materiality of this consideration nor even its relevance. The test prescribed by Article 133(1)(a) is an independent additional test and its effect has

to be judged by interpreting the words used by the relevant clause. If the said clause refers to the amount of the value of the subject-matter still in

dispute on appeal quite plainly we must take into account only the subject-matter in dispute in appeal and nothing more. The words used in this

connection are clear and unambiguous but they cannot reasonably control the meaning of the word ""decree"" in the relevant clause which provides

for an additional and an independent condition.

At page 1801 they say:

We would accordingly hold that in determining the question as to whether the appellate decree passed by the High Court affirmed the decision of

the trial Court the appellate decree must be considered as a whole in relation to the decision of the trial Court similarly considered as a whole. That

is the proper approach in applying the test of affirmance. If there is a variation made in the appellate; decree in the decision of the trial Court it is

not a decree of affirmance and this is not affected either, by the extent of the variation made or by the fact that the variation is made in favour of the

intending appellant and not against him.

At page 1803 again, after referring to the decision of the Privy Council in Anncipurnabai's case L.R. 51 I.A. 319 : ILR 51 Cal. 969 their

Lordships observed:

... that subsequently became the starting point of elaborate discussion in which legal subtlety was pressed into service and distinction was made

between action; arising on a single cause of action and giving rise to a single claim and actions in which different causes of action were combined

against different persons and different reliefs were claimed.

Their Lordships of the Supreme Court disapproved of this distinction.

6. Now, applying this test laid down by their Lordships, it is clear that in this case there was only one decree of Subrahmanyam, J., and only one

decree dated 1st May, 1963 of the Bench of this Court and this latter decree was not one of affirmance of the trial Court's decree. In S.C.P. Nos.

152 and 160 of 1964 the test of valuation is also satisfied, because the value of the subject-matter in dispute in the Court of first instance and in the

proposed appeal to the Supreme Court was and is more than Rs. 20,000. In S.C.P. No. 143 of 1964 the test of valuation is satisfied in the case

of the 12th respondent Vanchesan, but is not satisfied in the case of the 13th respondent Appaswami Iyer, because his liability was fixed by

Subrahmanyam, J., at Rs. 13,450 and that was affirmed by the Bench and that is the value of the subject-matter of his proposed appeal to the

Supreme Court. This means that the certificate has to be granted in S.C.P. Nos. 152 and 160 of 1964 and so far as Vanchesan is concerned in

S.C.P. No. 143 of 1964 : we shall deal with the case of Appaswami Iyer later.

7. Though the above conclusion seems to clearly follow from the decision and observations of the Supreme Court in the decision referred to

Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty, arguments to the contrary have been advanced before us and it is sufficient to

deal with them briefly. Sri M.S. Venkatarama Iyer, learned Counsel appearing for Ganapathisubramania Iyer, 8th respondent, resists the grant of

the certificate in S.C.P. No. 152 of 1964 by contending that so far as his client is concerned, the decree of this Court is one of affirmance of the

decree of Subrahmanyam, J., and that it is not urged by the Official Liquidators that any substantial question of law is involved. It will be seen that

so far as Ganapathisubramania Iyer is concerned, Subrahmanyam, J., fixed a joint and several liability of Rs. 10,000 on respondent 8 and some

others under Clause 27(a) of his decree in respect of advances made subsequent to 7th March, 1947, and a joint and several liability of Rs.

22,000 under Clause 27(b) of the decree for wrongful payment of dividend out of capital. The Bench fixed his liability individually at his request

and confined it to Rs. 25,000, namely, Rs. 10,000 in respect of advances made subsequent to 7th March, 1947 and Rs. 15,000 in respect of

wrongful payment of the dividend. Sri M.S. Venkatarama Iyer urges that the Bench merely gave his client some equitable relief by making him

individually liable for a smaller amount than Rs. 32,000 and that it would only be, a case of affirmance. He relies on the observations of the

Supreme Court in the case above referred to at page 1804 where they say:

Before we part with this appeal we would like to make it clear that if an appellate decree confirms the decision of the trial Court but merely makes

a variation in regard to the order as to costs-, such a variation would not affect the character of the decree which would in law amount to a decree

of affirmance, whether the variation as to costs is made in favour of one party or the other. The-position with regard to interest, however, is

different; for instance, in regard to a claim for interest before the date of the decree which is a part of the dispute between the parties if the

appellate Court makes a variation in respect of the award of interest that would affect the character of the appellate decree. Unlike the order of

costs which is entirely in the discretion of the Court u/s 35 of the CPC an order as to interest which the Court can make u/s 34 of the Code forms

part of a dispute between the parties, and in that sense if a variation is made in regard to it it is an integral part of the decision or the decree. In this connection it may also be necessary to make it clear that if the appeal Court makes a variation in the decision of the trial Court either because a concession has been made in that behalf or the variation has been obtained by parties by consent or a part of the subject-matter covered by the decree has been withdrawn such variation cannot affect the: character of the appellate decree. The principle of affirmance on which the provision rests postulates either affirmance or variation by the appeal Court as an act of adjudication and that necessarily means. the decision of the appeal Court on the merits.

Learned Counsel says that the Official Liquidators practically agreed to the Bench fixing the liability of Ganapathi Subramania Iyer individually at Rs. 25,000.

8. These contentions of the learned Counsel are untenable. For one thing, on the test laid down by the Supreme Court in categorical terms, it is not permissible to take into account only the portion of the decree relating to Ganapathisubramania Iyer. As we have stressed, the decree of Subrahmanyam, J., must be taken as a whole and by comparing one with the other there was clearly no affirmance, Further, even if it is permissible to take into account only the portion of the decree relating to the 8th respondent, there has been a substantial variation in that the liability of the 8th respondent was reduced from Rs. 32,000 to Rs. 25,000. That cannot be compared to a variation in respect of costs. As for the submission that the Official Liquidators practically consented to the reduction of the liability, there is nothing in the judgment of the Bench to show that.

9. In S.C.P. No. 160 of 1964 and likewise in the case of Vanchesan in S.C.P. No. 143 of 1964, Sri S. Swaminathan, learned Counsel for the Official Liquidators, contends that the decree of the Bench of this Court is one of affirmance of the decree of Subramanyam, J., so far as these persons (Ganesa Iyer, Vanchesan and Appaswami Iyer) are concerned and that no substantial question of law is involved. Sri S. Narasinga Rao appearing for V. Ganesa Iyer and Sri K. Sarvabhuman appearing for Vanchesan, however, contend that the decree of the Bench of this Court was not one of affirmance and that even if it should be taken as one of affirmance, a

substantial question of law is involved. The argument of Sri S.

Swaminathan is based on the assumption that the decree of Subrahmanyam, J., should be split up into three decrees, (1) so far as Ganesa Iyer is

concerned, (2) so far as Vanchesan is concerned, and (3) so far as Appaswami Iyer is concerned, and that similarly the decree of the Bench of this

Court could be construed as three different decrees so far as these persons are concerned. In our opinion, this assumption is untenable in view of

the clear pronouncement of the Supreme Court in *Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty*, . It may be recalled that in

the Supreme Court also-the same argument was advanced that because for the purpose of valuation each appeal would have to be considered

separately, that would result in the splitting; up of the decree. But that argument was rejected and it was pointed out that the criterion of valuation

was a separate criterion which had nothing to do with the decree being only one on the question of affirmance. Sri Swaminathan referred to three

decisions in support of his contention, *Vaithilinga Mudaliar v. Somasundaram Chettiar* ILR 42 Mad. 228 : (1918) 36 M.L.J. 119 *Fateh Kunwar*

Vs. Durbijai Singh, and *Radha Kunwar v. Reoti Singh* ILR 38 All.488.

10. In *Vaithilinga Mudaliar v. Somasundaram Chettir* ILR 42 Mad. 228 : (1918) 36 M.L.J. 119 the suit was brought by the next reversioners on

the death of the widow of the alleged last male holder and the several persons who were in possession of portions of the estate as alienees were

impleaded as defendants. The Subordinate Judge decreed the suit. The alienees filed separate appeals to the High Court. Some of the appeals

were allowed by the High Court. But only one appellate decree was drawn up in respect of all the appeals in accordance with Rule 105 of the then

Civil Rules of Practice corresponding to Rule 93 of the present Rules. The plaintiffs applied for leave to appeal to the Privy Council in respect of

those appeals of the alienees which had been allowed. The valuation of the properties involved in each of the appeals was less than Rs. 10,000, the

limit of appeal ability then. But, if all the appeals were taken together, the valuation exceeded Rs. 10,000. The Bench of this Court refused leave

upholding the contention of the alienees that though in form there was one appellate decree, really it amounted to as many decrees as there had

been appeals of the alienees. It seems to us that this decision must be held to

have been overruled by the decision of the Supreme Court in Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty, where it will be seen the facts were identical except that the suit was brought by the son and not by the reversioners. The Supreme Court definitely rejected the contention that the decree could be split up and treated as several decrees because there were several causes of action or several subject-matters or claims. The decision in Fateh Kunwar Vs. Durbijai Singh, was expressly overruled by the Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty, see page 1804.

11. In Radha Kunwar v. Reoti Singh ILR 38 All. 488 the Privy Council upheld the preliminary objection that the appeal was not maintainable

inasmuch as the value of the subject-matter of the appeal was less than Rs. 10,000 though the High Court had held the contrary. The question

arose thus. There was a mortgage suit in which the mortgagee claimed Rs. 8,000 odd. Radha Kunwar (appellant before the Privy Council) was

impleaded as a defendant as claiming ownership of 4 biswas share through one Hukum Singh, not a mortgagor of the plaintiff. That was a claim of

paramount title and should not have been tried in the mortgage suit at all. However, it was tried. The claim of Radha Kunwar was upheld in respect

of 2 biswas share by the trial Court. On appeal it was held by the High Court that the 4 biswas share was liable to satisfy the mortgage in favour of

the plaintiff. "The appellant applied for leave to appeal to the Privy Council. The value of the 4 biswas share was only Rs. 2,000 (see the judgment

of the High Court at page 490). But it was held that that was not the value of the subject-matter of the appeal to the Privy Council and that the

value of the subject-matter was the sum of Rs. 38,000 odd to satisfy which the 4 biswas share of the appellant was also liable. Their Lordships of

the Privy Council pointed out that that view was wrong and that the value of the subject-matter in appeal was only the market value of the

property claimed by the appellant and since the application for leave was argued before the High Court on the footing that the market value would

be less than Rs. 10,000 the appeal did not lie to the Privy Council. So far no difficulty is created by the judgment of the Privy Council. But at page

493 the judgment of the Privy Council reads as though what was involved was the market value of the two biswas share. This is sought to be read

in conjunction with the judgment of the High Court in granting the leave for appeal where the High Court had said:

The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim and as to one-half there were differing judgments.

Mr. Swaminathan would read the judgment of the Privy Council as though, by referring to the market value of the 2 biswas, they endorsed the

observations of the High Court that the decree of the High Court should be split up into two portions, that one portion was a judgment of

affirmance and another was not so. But the question in that form did not at all fall to be considered by the Privy Council in that case and, as we

pointed out, even the judgment of the High Court clearly points out that even the market value of the 4 biswas would be only Rs. 2,000. The

judgment of the Privy Council cannot therefore be taken as authority on the question that a decree could be split up. "The direct decision on that

point is the later decision of the Privy Council in Annapurnabai's case L.R. 51 I.A. 319 : ILR 51 Cal. 969 referred to by their Lordships of the

Supreme Court in Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty, . In any case, the decision of the Supreme Court is clear on

this point and holds the field.

12. In view of our conclusion that there was only one decree of this Court and the it was not one of affirmance of the decree of Subrahmanyam, J.,

it is unnecessary to consider the alternative submission of Sri Narasinga Rao and Sri Sarvabhuman that a substantial question of law is involved in

their proposed appeals. But We may say that according to the criterion laid down by the Supreme Court in Sir Chunilal V. Mehta and Sons, Ltd.

Vs. The Century Spinning and Manufacturing Co., Ltd., it will have to be held that a substantial question of law is involved in their appeals, the

question being whether a Secretary or an Assistant Secretary (or an Accountant) would be an officer of the Bank for the purpose of Section 235.

No doubt, Subramanyam, J., and the Bench of this Court had little difficulty in holding that they would be Officers of the Bank. But according to

the criterion laid down by the Supreme Court, still there would be a substantial question of law because there does not seem to be any direct

decision of the Supreme Court or the Federal Court or the Privy Council on this

point and the conclusion was reached by Subrahmanyam, J., and the Bench only after some discussion of the alternative views.

13. We have pointed out that in S.C.P. No. 143 of 1964 the proposed appeal of Appaswami Iyer can be valued only at Rs. 13,450 and therefore

it does not satisfy the test of valuation under Article 133(1)(a) Sri Sarvabhuman, however, invited us to consolidate the appeal of Appaswami Iyer

with the appeal of Vanchesan under the provisions of Order 45, Rule 4 and in that connection he relied on the decision of the Full Bench of this

Court in Molugu Lakshminarasimhacharyulu and Others Vs. Marisetti Ratnam and Others, says:

For the purpose of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may

be consolidated.

But we do not have different suits in this case and that provision cannot directly apply to separate matters in the same misfeasance application. It

seems to us, however, that since the question raised in his (Appaswami Iyer's) appeal, namely, whether he is an officer of the company u/s 235 of

the Companies Act, is the same which Ganesa Iyer and Vanchesan are raising in their appeals, for which leave has been granted, it would be in

consonance with justice to say that under these circumstances the case of Appaswami Iyer is a fit one for appeal in the Supreme Court u/s 133(1)

(c). There is ample precedent for this course. In Mukandi Lal and Others Vs. Hashmat-un-nissa and Others, Sulaiman, C.J., and Bennet, J.,

certified that the case was a fit one for an appeal to the Privy Council u/s 109(c), Civil Procedure Code, even though the requirements of Section

110, Civil Procedure Code, were not fulfilled because the ground of the proposed appeal was common to the other appeals in which leave had

been granted. They referred to the circumstance it had in a previous case where a similar course had been adopted, the Privy Council had taken no

objection. After the Constitution of India came into force, the same principle was applied by this Court in The State of Madras Vs. T.V. Parvathi

Ammal and Others, see in particular the judgment of Krishnaswami Nayudu J. This was followed in Gwalior Sugar Co. Ltd. v. State AIR 1955

M.B. 210. The decision in Erramma v. Veerpanna AIR 1957 Hyd. 24 approved of this principle; but held that this principle was not applicable to

the case before them. Accordingly leave is granted in respect of all the persons.