

(1930) 09 MAD CK 0011
In the Madras High Court

Sabapathi Rao and Others

APPELLANT

Vs

Sabapathi Press Co. Ltd.

RESPONDENT

Date of Decision : 03-09-1930

Acts Referred:

Companies Act, 1956 — Section 168

Citation : AIR 1930 Mad 1012 : 129 Ind. Cas. 40 : (1930) 32 LW 950 : (1930) 59 MLJ 826

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—I have to deal with this claim in the winding-up proceedings. A creditor, Pola Sankariah by name, applied to the

liquidator for payment of his debt, He failed to comply with the request and I have now to decide whether the creditor's claim is well founded.

2. To make the point at issue clear, I must briefly set forth the course taken by these liquidation proceedings. The petition to wind up this Company

(The Sabapathi Press Co., Ltd.) was filed on the 8th of May, 1922. Mr. Justice Kumara-swami Sastri dismissed the petition on 30th November,

1922, holding that no valid grounds existed for making an order of compulsory winding up. Against this order an appeal was filed and, on 5th

November, 1924, the Appellate Court set it aside and remanded the petition to the Original Side for fresh disposal. The matter then came up

before Mr. Justice Beasley and on the 9th of April, 1927, he made an order referring two questions to the Official Referee. With one of those

questions we are directly concerned. That related to the debt now claimed as due by the creditor. It was then pleaded that that debt was

discharged either by payment or adjustment on 31st of December, 1921. The

Official Referee submitted his report, finding inter alia that the debt due to the applicant was not discharged as alleged. Mr. Justice Beasley (as he then was) accepted the Official Referee's findings, found that the Company's affairs were in a very unsatisfactory state and made an order, dated 16th November, 1927, directing the Company to be compulsorily wound up. Mr. Venkata Rao, by dubious methods (this is the effect of the judgment of Mr. Justice Beasley) acquired a dominant position in the Company and by adopting an aggressive and high-handed attitude, used that position to gain dishonest advantage for himself, his relations and friends. A firm known as "K.V.S.R." which, as the learned Judge observed, was Venkata Rao's own firm, was appointed treasurers of the Company and some of the Company's factories were leased to this firm on terms highly detrimental to the Company. This K.V.S.R. firm in their turn sub-leased the factories making a large profit, to a joint family concern of which the present applicant Pola Sankariah was a member. There were two factories, one at Tadpatri and the other at Adoni. The sub-lessees effected certain repairs to these factories and a large sum became payable to them on this head by the Company. The debt became due before December, 1921. It amounted to about Rs. 25,000. This fact is not disputed. Before proceeding further, I may mention that the winding-up order made by Mr. Justice Beasley was confirmed on the 18th of April, 1929.

3. The question to be decided is, whether the debt due to the creditor was discharged by payment on the 31st of December, 1921. Mr. Venkata

Rao, I have said, raised this incidental question and it was decided in favour of the creditor. As the liquidator raises the point again, I shall deal with it fully.

4. The account books of the Company containing entries of the 31st December, 1921, have been produced. There are some entries to be found

which were made apparently after the accounts were closed and the balance was struck on that date. It is among such entries that those relating to

the alleged payments find a place. The applicant alleges that these entries were fraudulently interpolated. Mr. Venkata Rao, the Chairman of the

Board of Directors, annexes to his affidavit, dated 13th June, 1922, as Ex. B, what he calls an "unaudited balance sheet". It purports to disclose

the state of affairs of the Company as at the end of December, 1921. The amounts due to the applicants are shown in that balance sheet under the heading "Liabilities". There are two amounts shown as due in respect of the two concerns, and the total is given as Rs. 25,546-2-1. This then is an admission by Venkata Rao as representing his Company. According to it, the debt due to the applicants was not discharged by payment on 13th June, 1922. From this the inference must follow that the entries showing payment in the books of the Company are spurious and fraudulent. It will be seen from what I have said that their very position, and the manner in which they were made, render them extremely suspicious. Added to this, there is the further fact that Mr. Venkata Rao admitted on 13th June, 1922, that the debt was subsisting. It is, therefore, fairly clear that these entries of payment were made not on the 31st December, 1921, the date they bear, but some time subsequent to 13th June, 1922. There was an audited balance sheet prepared in September, 1922, as distinguished from the "unaudited balance sheet" to which I have referred. In this balance sheet the debt due to the creditor is shown as having been discharged. I understand that among the numerous charges made in this winding-up petition, there is a complaint against the accuracy of this balance sheet. With that I am not at present concerned, but the fact that emerges is, that the impeached entries must have been made after 13th June, 1922, the date of Venkata Rao's affidavit, and before 27th September, 1922, the date of the "audited balance sheet". It is also noticeable that in the unaudited balance sheet, the amount shown as cash in the hands of the treasurers is Rs. 33,000 odd, whereas in the audited balance sheet it dwindles down to a little over Rs. 12,000. This is of course consistent with the theory of payments having been made between these two dates. Such payments must necessarily diminish the cash in the hands of the Company's treasurers. So much for the payment alleged on the 31st December, 1921.

5. The liquidator asks me to deal with another suggestion, namely, that the payments were made on the 31st December of the following year. It is not the account books of the Company that are relied on for this purpose, but the liquidator says that he is perplexed by the entries in the account books of K.V.S.R. & Co., the Company's treasurers. In their books, certain adjustment entries were made on the 31st December, 1922. The

applicants are credited with the amounts which the Company owed them, those sums being debited against the Company. In other words, the

applicants' position is changed, K.V.S.R. & Co. being substituted as their debtors in the place of the Company itself. The entries refer to, and

purport to derive their authority from, the Company's audited balance sheet of September, 1921. How can these entries in the account books of

K.V.S.R. & Co. bind the applicants? Before they can be bound, it must be shown that there was an arrangement amounting to a novatio to which

they were also parties.

6. These later entries show that it is not even pretended that actual payments were made to the applicants. K.V.S.R. & Co., instead of holding the

monies due to the applicants as the Company's treasurers, continue to hold them in their individual capacity. This, in short, is the effect of these

dubious entries. This is the kind of evidence that the liquidator places before me in support of his suggestion that the debt has been discharged. I

therefore find that neither on the 31st of December, 1921, nor on the 31st of December, 1922, was the debt due to the creditor discharged by

payment or adjustment.

7. Then there is another question that the liquidator raises. I have already said that the petition for winding up was originally dismissed in 1922. Till

the winding-up order was made in 1927 Mr. Venkata Rao continued to act as the Chairman of the Board of Directors. On the 10th of December,

1926, in that capacity, he entered into a settlement of accounts with the creditor in question. It was found that the debt was reduced to Rs.

19,987-3-9. The creditor wants to abide by this settlement, and the question is, is it binding upon the liquidator? The capital of the Company is

represented by 500 shares. Mr. Somayya appears for persons owning 342 shares and Mr. Venugopala Mudaliar for a gentleman holding 9 shares.

On behalf of these shareholders I am asked to treat the settlement as binding. Then there are three creditors of this Company, two represented by

Mr. Somayya and one by Mr. T. Krishnaswami Aiyangar. On behalf of these creditors also it is stated that the settlement should be treated as

binding. In the view that the settlement is beneficial to the Company the liquidator now concurs. My decision, therefore, is that the settlement,

dated the 10th of December, 1926, must be taken as binding.

8. In regard to this debt there is a further question raised. In the case of a winding up by the Court, the winding up dates from the presentation of the petition. (Section 168 of the Indian Companies Act.) In this case, nearly six years elapsed between the presentation of the petition and the winding-up order. I have already said that the petition was presented on the 8th of May, 1922, and the winding up order was made on the 9th of April, 1927. The question I am asked to decide is, whether interest is to be computed or not subsequent to the winding up. It is not disputed that the debt carries interest. The law on this point is stated thus in Palmer's Company Law, 12th Edn., p. 439:

When a Company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the date of the winding-up order, unless the assets are enough to pay all debts in full

9. The point was first fully considered in *In re Humber Ironworks and Shipbuilding Co.* (1869) L.R. 4 Ch. A 643. The position of the creditors

Selwyn, L.J., observes, must be considered under two aspects --first when there is, and next when there is not, a surplus. Where the estate is

insolvent, nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, that is, where there is a surplus. In the

latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be

taken as between the Company and the creditors in the ordinary way; that is, by applying each dividend in the first place to the payment of the

interest due at the date of such dividend and the surplus, if any, to the reduction of the principal. The rule that interest is payable notwithstanding the

winding up, when there are surplus assets, is also laid down in *In re Duncan & Co.* (1905) L.R. 1 Ch D. 307. This is now treated as settled law.

This question was considered in a Lahore case and this principle was applied. Shadi Lal, J., after stating the rule in the terms I have just mentioned,

proceeds to lay down the test of solvency. The Company's solvency is established if, after payment of the principal and interest up to the date of

winding up, there are some assets sufficient to meet the liability on account of interest accruing after the commencement of the liquidation. *Gansham*

Das v. The Public Banking and Insurance Co. ILR (1919) Lah. 154. The same view was taken in another Lahore case, *Devi Ditta Mal v. The*

Official Liquidator, Amritsar Bank, Ltd. ILR (1920) Lah. 368 in the present case, it is admitted that even after all the creditors are paid in full there

will be a substantial balance available for meeting the claims of the contributories. I, therefore, hold that interest has not ceased to run from the date of the winding-up order.

10. These, I understand are the only three points in regard to which the liquidator wants my direction in respect of this debt. In the light of my

judgment, the parties are directed to bring in a statement showing the amount due to the applicant.

11. The matter will stand adjourned a week for this purpose.

12. The applicants' costs, which I fix at Rs. 400, must be paid out of the assets. I do not propose to allow the liquidator his costs, but, as he does

not press for them, I need not give my reasons.

13. I shall now deal with the question of unpaid dividends. During the pendency of the petition for winding up, dividends were declared for 1921-

25 (both years inclusive). Mr. Venkata Rao, as a part of the general policy he has been pursuing, preferred such of the shareholders as were his

friends and relations and paid them the dividends due and made default in regard to the rest. Some of the shareholders belonging to the latter class

now apply that the liquidator should be directed to pay them also the dividends declared. To place all the shareholders on a footing of equality, I

must comply with this application. The liquidator, after satisfying himself that the dividends claimed are due, shall make the payments. If he feels any

doubt, the matter may be brought up before the Court.

14. Next as regards Hanumanthappa's claim: the liquidator will examine this and state in one week what his view is.

15. I shall now proceed to deal with the claim of Messrs. R.D. Lakshmi Das & Co., represented by Mr. T. Krishnaswami Aiyangar, their counsel.

They claim Rs. 3,381-13-6 in respect of goods supplied to the Company between the commencement of the winding up, that is, the presentation

of the petition and the winding-up order. The effect of a winding-up order u/s 227(2) is to avoid all dispositions of the property of the Company

made between these two dates, unless the Court otherwise orders; that is to say, the winding-up order has a retrospective effect. , What are

avoided under the section are dispositions by the Company of its property. But

even payments by the Company after the commencement of the winding up are avoided unless sanctioned by the Court.

16. Lindley on Companies, 6th Ed., Vol. 11, page 899.

17. Where payments are honestly made and in the ordinary course of business, it is usual for the Court to allow them.

18. Palmer's Company Law, 12th Ed., page 220.

19. In regard to dispositions pending petition, the practice of the Court is to allow them if made honestly and in the ordinary course of business.

20. Palmer, page 426; Lindley, Vol. II, page 900.

21. But what we are here concerned with is neither a disposition of property nor a payment. The Company contracted to purchase goods and

actually took delivery of them. Section 227(2) does not in terms apply to such a transaction, but in *Gosling v. Gaskell* (1897) A.C. 575 (H.L.)

Lord Herschell seems to assume that once the winding-up order is made, the Company becomes as from the date of the petition incapable of

entering into contracts without the sanction of the Court (page 591). In the present case, it is conceded that the goods were purchased by the

Company in the ordinary course of trade. I, therefore, confirm the transactions.

22. As regards the amount, it is admitted that Rs. 50 must go out from the amount claimed. Out of a balance of Rs. 3,331-13-6 I authorise

payment of that sum less Rs. 500 with interest at 9 per cent, per annum from the 1st of January, 1927. As regards the sum of Rs. 500 shown

against the 15th of December, 1926, it is described as a hand loan paid to Mr. Venkata. Rao, who purported to receive it as the Chairman of the

Board of Directors. Whether the liquidator is bound to pay this sum or not, I do not wish to decide at present. Granting that the liquidator is not

bound to pay this sum from the assets of the Company, it may be open to the creditor to ask that it should be paid over to him from any amount to

be found payable by the Company to Mr. Venkata Rao. This point I must reserve for future consideration. The applicant's costs which I fix at Rs.

150 shall come from the assets. The liquidator may pay himself Rs. 50 for his costs. I also direct that Mr. Gopalaswami Mudaliar be paid from the

assets the costs of his application, which I fix at Rs. 50.

23. In pursuance of my judgment, dated 25th August, 1930, a statement has

now been brought in, showing that the amount due up to 31st August, 1930, to Pola Sankariah is Rs. 20,369-4-10 including the costs awarded. By consent, this figure is accepted. The principal amount of Rs. 16,781-0-2 shall carry further interest at 6 per cent, per annum till date of payment.

24. The amount due to Hanumanthappa is by consent declared to be Rs. 2,756-8-6. This amount shall carry interest at 9 per cent, per annum from 28th December, 1926, to the date of payment. The liquidator shall pay Hanumanthappa's costs, which I fix at Rs. 150, from the assets. The liquidator's costs I fix at Rs. 50. This sum he may retain out of the assets.