

(1967) 01 MAD CK 0015

In the Madras High Court

Case No : Company Application No. 28 of 1966

S.P. Subbiah

APPELLANT

Vs

PR. PR. SP. Periakaruppan Chettiar and Others

RESPONDENT

Date of Decision : 20-01-1967

Acts Referred:

Companies (Court) Rules, 1959 — Rule 239, 240, 241

Companies Act, 1913 — Section 156

Companies Act, 1956 — Section 426

Citation : (1967) 37 CompCas 270 : (1967) 80 LW 263

Hon'ble Judges : Ramaprasada Rao, J

Bench : Single Bench

Advocate : G. Vasantha Pai, for the third party-mortgagee, S.M. Amjad Nainar, for the Appellant;

Judgement

Ramaprasada Rao, J.—This is an application taken out by the members' voluntary liquidator against the respondents for a direction that

they may be asked to pay the amounts respectively due and payable by them and as set out in paragraph 6 of the affidavit in support of the

application, the said amounts being the principal due on the second and final calls over the shares admittedly held by the respondents in

Mahalakshmi Oil Mills and Industries Limited (in members' voluntary liquidation). Only the first respondent has filed a counter-affidavit and

respondents Nos. 2 to 5 do not appear before me. The first respondent, in his counter-affidavit, admits that the claim is not barred by limitation as

it is one arising in the course of liquidation proceedings, but objects to the claim for interest from October 30, 1956, at the rate of 9 per cent, per

annum. He states that under the Companies Act (Act 1 of 1956), interest can be claimed only from the date on which this court directs him to pay

the same, that too at 4 per cent. He also alleges that the company mortgaged its assets including the unpaid call moneys by a mortgage deed dated February 24, 1950, in favour of SP. PR. Ramayee Achi and that, therefore, the said mortgagee is a necessary party before any directions could be given regarding the payment of the unpaid calls. He has also stated that if the mortgagee is made a party to this application, he is willing to deposit the money into court provided this court directs him to do so. In any event, he is ready and willing to deposit the sum of Rs. 1,250 due and payable by him as unpaid call money to this court. On the averment of the first respondent that the mortgagee is a necessary party, the mortgagee was duly impleaded as a third party to this application. The mortgagee filed a counter-affidavit stating that she is not submitting herself to the jurisdiction of this company court and wishes to stand outside the winding up proceedings and exhaust the remedies available to her under the mortgage deed and in O.S. No. 38 of 1958 on the file of the court of the subordinate judge, Chinglepet, which the mortgagee has already filed and has obtained a decree thereon. In the said mortgage suit, the first respondent, who was a party therein along with the other directors of the company in liquidation, undertook that he will pay all the amounts collected towards further calls of the share amount to the credit of the mortgage suit. In the light of this undertaking, the third party mortgagee submits that all the call moneys which are sought to be collected by the voluntary liquidator in this application in any event should be directed to be put into this court with liberty to her to draw out the same after such deposit. To the counter-affidavit filed by the first respondent and the third party mortgagee, the voluntary liquidator filed reply affidavits in which he categorically states that he has no objection to collect the unpaid call moneys and deposit the same in this court and the third-party mortgagee being paid out the same, so that the mortgagee may give credit to the same against the decree amount in O.S. No. 38 of 1958 on the file of the court of the subordinate judge of Chinglepet and enter up part satisfaction. The applicant also states in answer to the counter affidavit of the first respondent, that he is entitled to interest at 9 per cent, per annum on the amounts due from October 30, 1956, that being the date of the original demand. His claim for interest is based on the ground that the company has suffered a decree and has to pay the same with interest at 9 per cent,

to the third party mortgagee.

2. As already stated, respondents Nos. 2 to 5 are ex parte. Only the first respondent contests this application mainly on the ground that he is not

liable, to pay interest as demanded. The principal amount as stated in paragraph 6 of the affidavit in support of the application is admitted by the

first respondent. It is, therefore, clear that all the respondents having defaulted in the payment of the unpaid calls, they are liable to contribute and

pay to the applicant the principal amount of call moneys as set out by the liquidator in paragraph 6.

3. The only remaining question is whether the liquidator is entitled to claim interest at the rate of 9 per cent, from October 30, 1956, or from any

other date. It is now well settled that, though the payment of unpaid call moneys originates under a contract, it has become a statutory liability

under the Indian Companies Act, after the winding up of the company. What was, therefore, a debt ex contractu has become a debt ex legi. It is

also not disputed that the claim of the liquidator is not barred due to the supervening winding up proceedings. This proposition is well supported by

judicial precedents and, as it is not in dispute before me, I do not want to refer to the decisions of courts which support the view that

notwithstanding the bar of limitation under the common law, the liquidator can claim such unpaid call moneys after the winding up of the company

by adopting the prescribed process under the Companies Act.

4. The only issue for determination, therefore, is whether the liquidator is entitled to claim interest. In the view that I intend taking in the matter, the

question as to what should be the rate of interest will not arise.

5. Though the first respondent made a pragmatic assertion that he is not liable to pay interest, no further assistance was given by him. Sri G.

Vasanthia Pai appearing for the third party mortgagee, however, volunteered to render assistance to this court on this subject and I acknowledge

my thanks to him.

6. In Palmer's Company Precedents, sixteenth edition, at page 497, "" Summons for leave to make a call "" appears. On a perusal of the summons,

it is clear that the statutory liability on the part of the defaulting shareholder, notwithstanding the lapse of the erstwhile contractual liability, arises on

an order being made by the company court for making a call to the amount due

by the defaulting shareholder as a contributory. In *In re Welsh Flannel and Tweed Company*, (1875) 20 Eq. 360, Sir R. Malins V. C. makes it very clear that the articles of association do not apply to calls made by the liquidators. Sri S.M. Amjad Nainar appearing for the applicant drew my attention to regulation 16 which is apparently attracted by the articles of the company under which the defaulting shareholder from whom the unpaid call money is demanded shall pay interest thereon from the date appointed for payment to the time of actual payment at 5 per cent, per annum or at such lower rate, if any, as the board may determine. The board also has the liberty under this regulation to waive payment of any such interest wholly or in part. In *Pars Ram Brij Kishore v. Jagraon Trading Syndicate*, [1936] 6 Comp. Cas. 347, Addison and Abdul Rashid JJ. observed as follows:

The liability created by Section 156 is a new liability and no provision is made for interest therein. It may be that when a court makes a payment order under that section it could direct future interest on the amount fixed in the payment order until realisation but we are clear that it cannot include interest prior to that time.

7. Section 156 of the old Act corresponds to Section 426 of the new Act. Regulation 16 cannot, therefore, help the applicant. In *Mahomed Akbar Abdulla Fazalbhoy v. Associated Banking Corporation of India Ltd*, [1950] 20 Comp. Cas. 325 Chagla C. J. and Coyajee J, are of the view that, irrespective of the bar of limitation, a liquidator is at liberty to approach the company judge and, after satisfying him that the call should be enforced by a call made by the court in the winding up proceedings, can obtain a direction for payment from court, which direction compels the defaulting shareholder as a contributory to pay such unpaid calls. The above ruling is an authority for the proposition that what was originally a contractual liability has fruited into a statutory liability, provided, of course, a call has been made in time by the liquidator. It is not disputed in this case that such a call has been made and, in fact, the first respondent admits that the amount is due. I respectfully agree with the dicta laid down by the learned judges in *Mahomed Akbar Abdulla Fazalbhoy v. Associated Banking Corporation of India Ltd*. that, once the liquidator prefers to adopt the statutory procedure to call for the unpaid call money, then the court has

jurisdiction to make such a call and, on such making a call only, the debt becomes enforceable. Reference can also be made to the company rules made by the Supreme Court of India in exercise of the powers conferred by Sub-sections (1) and (2) of Section 643 of the Companies Act, 1956. Rule 239 of the Companies (Court) Rules, 1959, runs as follows :

The order granting leave to make a call shall be in Form No. 103, and shall contain directions as to the time within which such calls shall be paid.

When an order has been made granting leave to make a call, the official liquidator shall file in court a document making the call in Form No. 104 with such variations as circumstances may require.

8. This attracts Form No. 103. This form is in pari materia with the form referred to in Palmer's Company Precedents, already adverted to by me.

On a reading of this Form No. 103, read with rule 239, it is clear that what was originally a contractual liability becomes a statutory liability only after an order to that effect is made by this court. The relevant portion of Form No. 103 runs as follows:

IT IS ORDERED that leave be given to the official liquidator to make a call of Rs..... per share on all the contributories of the said company.....

And it is ordered that each contributory do, on or before the.....day of..... 19..... pay to the official liquidator.....the amount due from such contributory in respect of such call.

9. It is only after such an order is made by the company court that the official liquidator has the power to enforce the call and ask for an order for payment of the call amount due from the contributory. Forms Nos. 106 and 108 appended to the Companies (Court) Rules, 1959, read with rules 240 and 241 make it very clear that the liquidator is not entitled to any interest prior to the order of this court giving leave to him to make a call.

This is the rule of law which has been precisely laid down by the Division Bench of the Lahore High Court in *Pars Ram Brij Kishore v. Jagraon*

Trading Syndicate. No doubt, this was under the Indian Companies Act, 1913 (VII of 1913). But I do not see any reason why this principle of

law as laid down by the learned judges of the Lahore High Court be not made applicable even under the provisions of the (Indian) Companies

Act, 1956 (I of 1956).

10. I am therefore of the view that a direction to pay interest on unpaid calls can arise simultaneously and concurrently only with the order to be

made by this court enabling the official liquidator to call for such unpaid calls. Such a liability being a new one created by statute, it is reasonable

that interest should also be made payable only from such date when the court directs the liquidator to make a call; otherwise it would lead to an

anomaly. In fact, it is because of the statute that a liability which has become barred is resurrected. If interest were to be allowed from any date

earlier than the date of this court, as company court, authorising the official liquidator to make a call, then it would virtually mean that interest would

be payable on a debt which is barred and which is not enforceable in the eye of law ; but the principal alone would be due by virtue of the

supervening winding up proceedings. It will lead to an absurdity if the claim of the liquidator for interest, as in this case, were to be upheld. In order

to harmoniously interpret the intention of the legislature in creating a new statutory liability, it is but proper and indeed compelling that interest

should be allowed only from the date when the order for call is issued to the liquidator.

11. I, therefore, direct that that the liquidator be entitled to make a call for the payment of the unpaid call money from all the respondents to this

application together with interest at 4 per cent, per annum from the date of this order till the date of realisation.

12. In view of the undertaking given in the mortgage suit, O. S. No. 38 of 1958, on the file of the court of the subordinate judge of Chingleput by

the erstwhile directors of the company and in view of the present applicant's averment in the reply affidavit that he has no objection to collect the

money and deposit the same in this court and for the third party mortgagee herein being paid out the same, I also direct that as and when the

moneys are so collected by the liquidator and paid to the credit of this application, the moneys so collected and deposited by the liquidator may be

paid out to the third party mortgagee and in part satisfaction of the mortgage decree obtained by the third party mortgagee in O.S. No. 38 of 1958

on the file of the court of the subordinate judge, Chingleput.