(1950) 11 MAD CK 0003

In the Madras High Court

Case No : O.S. Appeal No. 62 of 1950

The Andhra Paper Mills Co., Ltd. APPELLANT

Vs

Anand Bros. RESPONDENT

Date of Decision : 01-11-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 19, Order 8 Rule 6
Companies Act, 1913 — Section 171, 229

Citation : AIR 1951 Mad 783 : (1952) ILR (Mad) 60 : (1952) 65 LW 1243 : (1951) 1 MLJ 340

Hon'ble Judges : Rajamannar, C.J;Viswanatha Sastri, J

Bench : Division Bench

Advocate : K. Narasimha Ayyar, for the Appellant; K.C. Jacob and S.K.L. Retom, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C.J.—The Andhra Paper Mills Co. Ltd., a limited company incorporated under the Indian Companies Act, was directed to be

wound up by an order of this Ct. made on 23-9-1947 & one Mr. Price was appointed Official Liquidator. The Official Liquidator on behalf of the

company in liquidation filed a suit, after obtaining the leave of Ct., for the recovery ef a sum of RS. 2,74,734-15-6 with further interest from the

date of suit from Anand Brothers'' a firm carrying on business in Madras. The suit was instituted under the provisions of Order 7 of the Original

Side Rules. The deft. firm was the sole selling agent of the pltf. from 1942. By a resolution of the Board of Directors of the pltf. company dated 8-

2-1947 this agency of the deft. was terminated. The amount claimed in the suit is made up of Rs. 2,39,354-15-6, the balance alleged to be due

from the deft. to the pltf. company in respect of the value of stocks of paper delivered to the deft. after giving credit to the payments made by the

deft. from time to time & interest at six per cent. per annum from the date of the termination of the agency, namely, 8-2-1947. As the suit had been

filed under 0. 7 of the Original Side Rules, the deft. took out an appln. (No. 3037 of 1949) for the grant of leave to appear & defend the suit. In

the affidavit filed in support of this appln. by a partner of the deft. firm, the proposed defence was set out. The defence is adequately summarised

by the Master before whom the appln. came up in the first instance. It comprised several claims by the deft. against the pltf. company including

claims for damages, the total amount of which was pleaded in reduction and discharge of the claim made by the pltf. The pltf. opposed the appln.

In the counter affidavit filed by the Official Liquidator the merits of the several claims made by the deft. were not traversed, but certain legal

objections were raised. It was stated that the several items of claims made by the deft. fell under one or other of the two categories, namely, legal

set-off or equitable set off & they should be persued, if at all, by the deft. independently & could not form the subject-matter of the defence to the

action. The claims had to be preferred at the first instance before the Official Liquidator & if they were disallowed, they could be taken up before

the Ct. on appeal. In any event it was said that court-fee had to be paid on the amount of these claims. Other legal pleas with reference to

particular claims were also raised, but it is unnecessary to refer to them. The Official Liquidator further submitted that even if the deft. was entitled

to succeed in respect of all or any of the claims, it was not entitled to a set-off against the claim in suit, as the deft. would be entitled only to a

dividend on proof of its claims. As these claims were, therefore, no defence to the action, it was urged that no leave to defend should be granted to

the deft.

2. Another appln. was also filed by the deft. (No. 4188 of 1949) for an order converting the suit brought under the summary provisions of Order 7

of the Original Side Rules into an ordinary suit. The two applns. were heard by the Master who granted the deft. leave to defend unconditionally,

except as regards an amount of Rs. 25,724 5.10 the liability for which was admitted by the deft. In view of this order, he thought it was

unnecessary to pass any separate order on the other appln., though he was apparently not inclined to grant it, Mr. Narasimha Aiyar, the learned counsel for the Official Liquidator who appeared before the Master & who appeared before us contended before him that the various claims made by the deft. were really counter-claims that have to be made with appropriate court-fees & could not be defences to the suit. He also contended that the deft. would only be entitled to a dividend in respect of such claims & cannot have a set-off against the pltf''s. claim. For the deft., it was contended that a set off could be & had to be allowed & that a get off in bankruptcy & winding up was wider in scope than a set off under the C. P. C. The Master did not, however, decide any of these questions which he considered to be matters to be decided by Ct. He was convinced that some at least of the items of claims put forward by the deft. would constitute pleas in defence requiring investigation as they could not be held to be sham or illusory.

3. The Official Liquidator preferred an appeal against the order of the Master. The appeal was heard & dismissed by Rajagopalan J. Before the learned Judge the main, if not the only point, urged on behalf of the company was that as the several claims made by the deft. were in the nature of set off & counter claims leave of the learned Judge dealing with the winding up should have been obtained by the deft. u/s 171, Companies Act, & without such leave the deft. could not be permitted to plead any set off or counter claim. It was argued before him that a set off or counter claim was really a suit which would come within the scope of the language of Section 171. On the other hand the deft. contended that leave was not necessary to raise any plea or set off or counter claim in defence to the suit & even if such leave was necessary it could be obtained later. The learned Judge did not decide any of these questions. He thought that these questions should be tried & decided in the suit itself. All that he had to consider was whether Section 171 was a bar to the grant of leave to defend. He rejected the pltf''s. contention that the appln. itself was not maintainable because leave had not been obtained u/s 171 to file it. He was of the opinion that Section 171 did not bar a defence to a claim already made by the company. As a plea of set off or a counter claim obviously disclosed a triable issue, whatever may be the other factors which ultimately determine the trial of the suit, leave to defend ought to be granted &

unconditionally as there was no proof of bad faith in putting forward

those pleas. The appeal before us is against this order of Rajagopalan J.

4. Mr. Narasimha Aiyar, the learned counsel on behalf of the Official Liquidator, again pressed before us his objection based upon Section 171,

Companies Act. That was his main objection. At first we were inclined to take the same view as Rajagopalan J. took, that it was unnecessary to

consider whether leave u/s 171 was necessary to put forward a plea of set off or counter claim in defence to an action brought by the company.

But on further consideration we think we cannot refrain from deciding the question. Admittedly, the entire defence of the deft. consists of the

several claims whether they be of the nature of set off or counter claims. There is no other plea in defence. The only plea is that the liability of the

deft. to the pltf. must be ascertained after giving due credit to the several claims made by the deft. against the company. If these claims cannot be

allowed to be put forward except with the leave of the Ct. dealing with the winding up, as is contended by the applt. then it is obvious that such

leave not having been obtained, these claims cannot be made. The inevitable result would be that the action would be defenceless. We, therefore,

think that it is necessary to decide whether Section 171 has any application to this case.

5. That section runs thus :

When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceedings shall be proceeded

with or commenced against the company except by leave of the Ct. & subject to such terms as the Court may impose.

Mr. Narasimha Aiyar''s argument briefly is this. A set off or a cross claim is really a suit. Ct. fee has to be paid in respect of it & when the written

statement contains a set off or counter claim it will really amount to a plaint in a cross suit. Therefore Section 171 would apply. In support of this

contention, he invited our attention to a passage in Palmer''s Company Law (19th Edn.) at p. 404,

the object of the winding up provisions of the Companies Act, 1862 said Lindley L. J. in Re Oak Pitts Colliery Co., (1882) 21 Gh. D 322 : 51 L.

J. Ch. 768 "" is to put all unsecured creditors upon an equaility & to pay them pari parsu"". To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into

a scramble for the assets. Accordingly the Act of 1862 gave the Ct. jurisdiction in various cases to restrain proceedings . . . Now by Section 226

of the Act of 1948 the Ct. can, after presentation of the petn. reglrain proceedings & by Sections 227 & 231, on a winding up order being made,

or a provisional liquidator appointed, proceedings are automatically stayed & cannot be proceeded with without leave of the Ct. In this way

creditors & others are compelled to come in & prore their claims in the winding up & a reteable & just distribution of the company'' assets is

affected.

6. We are unable to see what bearing this passage has an a construction of Section 171, Companies Act. The question before us is whether leave

of the Ct. is necessary to a set off or counter-claim by a deft. against whom the company has commenced an action. Un-doubtedly, even in

England & even after the new Ast of 1948, proceedings can go on without leave of the Ct.

7. It was conceded by Mr. Narasimha Aivar & there can be no doubt that no leave would be necessary for a deft. in a suit brought by a company

being wound up to file a written statement denying all liability for the suit claim. This is because the deft. does not commence arty suit or legal

proceeding & it is only the suit filed by the company which is proceeded with. Lord Davey observed in construing a section of the English

Companies Act of 1862 similar to Section 171 of our Act thus :

When once an action by the company itself has been proceeded with, there is no necessity for the defts. in the action to obtain leave for any

defensive proceeding on their part '' Humber & Co. v. John Griffiths Cycle & Co., (1902) 85 L. T. 141"".

No doubt that case related to an appeal by the defts, to the House of Lords against a decision of the Ct. of Appeal in an action in which the

company was the pltf. but the general principle enunciated by the noble Lord will apply to all defective'' proceeding?. In The Palghat Wariar Bank

Ltd. Vs. Mundan Kandath Purakkal Ramaswamy''s son, Padmanabhan and Another, it was held by a learned Judge of this Ct. (Raghava Rao J.)

that when a company in winding up attaches certain property in execution of a decree in its favour as that of its judgment-debtor, any claim petn.

by a third party cannot be regarded as ""other legal proceeding"" within the meaning of Section 171, Companies Act, & it could be proceeded with

without leave of the Ct. The principle laid down by the House of Lords in Humber & Co. v. John Griffiths Cycle & Co. (1902) 85 L. T. 141 was

followed.

8. The case in Mersey Steel & Iron Co, v. Naglor, (1882) 9 Q B. D. 648 : 51 L. J. Q. B. 576 la very much in point. The pltf. was a company

which had been ordered to be wound up. It commenced an action to recover a sum of money as the price of goods delivered by them to the defts.

The defts. delivered their defence & set up by way of counter claim that the pltfs. had committed a breach of the contract & claimed a Urge

amount as damagfs. The pltfs. by their reply raised the objection that the dtfts. had not obtained leave under the Companies Act to make or

prosecute a set off or counter claim & that under the Act they were not entitled to recover in respect of the counter claim or to extinguish the pltfs.

claim by set off. Lord Coleridge gave judgment for the pltfs on the merits, but did not deal with the objection raised on the ground that leavo had

not been obtained. Before the Ct. of Appeal the objection was again raised. Charles Russel Q. C. for the pltfs. argued thus,

Then, u/s 87, Companies Act 1862, no proceeding can be taken against a company which is being wound up except with the leave of the Ct.

Now a counter chum is a fresh action.

Jossel M. R. repelled this argument with the following observation,

It is in the nature of a defence. A daft, sued by a company must be entitled to raise any defence without leave.

The Ct. of appeal allowed the appeal & revsd. the decision of Lord Coleridge C. J. & it was declared that the defts. were entitled to set off against

the amount admitted to be due to the pltfs., such damages as they, the defts. may have sustained by reason of any breach of the contract by the

pltfs. This decision of the Ct. of Appeal was upheld by the House of Lords in Mersey Steel & Iron Co. v. Naylor Benson & Co. (1S84) 9 A. C.

434 : 53 L. J. Q. B. 497. In Halsbury, Edn. 2 p. 718 (S. 1202 of vol. V) this case is treated as an authority for the position that leave is not

necessary to put forward a counter claim against the company in the nature of a defence.

9. On principle & in the interests of fairness & justice, we think that a party against whom the company has instituted a suit, should not be

prevented from establishing that on a proper taking of the account between the company & the party i. e., after adjusting mutual credits & debits,

no amount is due to the company or that the extent of its liability is more or less reduced. When the company has made a claim, any plea which has

the effect of reducing the claim if successful would be plea in defence. It may ba for certain purposes as for example, for Ct. fees a written

statement containing a plea of set off or counter-claim is treated as a cross suit, but that is not conclusive of the matter. There can be no doubt that

the pleading by the deft. is defensive in character. If it is so, then Section 171 cannot apply.

10. We do not think it necessary to deal fully or finally with the other questions raised by Mr. Narasimha Aiyar, namely, whether the various claims

in the nature of set off & counter claims would be open to the deft. having regard to the general scheme of distribution among unsecured creditors

which does not recognise any preferential rights except in very special cases, & whether the only course open to the deft. is to prove his claim

before the Official Liquidator. These questions really fall to be decided in the suit itself. They would be among the triable issues.

11. Nor are we impressed with the fact that applns. are pending before the Official Liquidator in respect of the several claims proposed to be set

up in defence of the suit. It suffices to refer to the following plea set up by the Official Liquidator himself in those applns.

I am advised that the proper course, if any, for the appet. its to have bis right, if any, gone into & determined by filing a counter claim or claiming a

set off in that suit & he cannot, have such right, if any, on his part to be agitated by means of an appln. like the present one.

It was not oven suggested in the course of the argument that the several claims made by the deft. are unsubstantial & unfounded. It was not said by

Mr. Narasimha Aiyar that if there was no legal impediment in the way of the deft. sotting off these claims, there would be no triable issues in the

suit. In fact, two of the claims have been partly allowed by the Official Liquidator.

12. As we have held that Section 1.71 does not apply & therefore leave of the

Judge dealing with the winding up was not necessary for the deft. to

set up any claims in the nature of set off or counter claim, it follows that the Master & the learned Judge were right in granting the deft. leave to

defend. The appeal is accordingly dismissed with costs.

13. By consent the applt. will have two weeks time from today to file the written statement. He will pay Rs. 17-8 0 as costs or"" the deft.

14. Yiswanatha Sastri J.--I entirely agree with the judgment of my Lord & add a few words of mine as the question under debate is not covered

by any direct Indian authority. Mr. Narasimha Aiyar for the Official Liquidator, pltf. in the trial Gt. & here applt. raised two contentions: (i) The

only right of the deft. here resp, was to prove his claim for debts or damages alleged to be due to him from the company before the Official

Liquidator & rank pari pasu with other creditors & take a dividend. He could not indirectly obtain payment of his debt in full from the company by

pleading a set off. (2) The plea of set off is in the nature of a cross suit or croeg claim against the company & cannot be put forward by the resp.

without the leave of the company Judge which in this case, had not been sought or obtained.

15. the argument on the first point overlooks Section 229, Companies Act, which by reference, incorporates Section 47. Presidency Towns

Insolvency Act & Section 46, Provincial Act, The result is that where there have been mutual dealings between a company & a creditor proving or

claiming to prove a debt in the coarse , of the winding up of the company, an account should be taken of what is due from the one party to the

other in respect of such dealings & the sum due from the one party has to be set off against any sum clue from the other party & the balance of the

amount & not more, has to be received or paid by either side respectively. The view of the Legislatuie evidently is that it would be unjust if the

Official Liquidator could demand & recover in full moneys due by a debtor, but that very debtor, if he happens to be a creditor of the company for

an equal sum, must rest content with a dividend representing a fraction of the debt. due to him from the company. The principle is the same

whether this right of the creditor to a set off is assorted before the Official Liquidator or in answer to a claim of the Official Liquidator in a suit filed

by him.

16. The second point relates to the proper-interpretation of Section 171, Indian Companies Act. S, 47, Presidency Towns Insolvency Act &

Section 46, Provincial Act, which are made applicable to proceedings for the winding up of a company & the realisation & distribution of its assets

are wider in scope than Order 8, Rule 6, C. P. C. & would permit, for instance, even a claim for unliquidated damages to be set off against the

claim of the Official Liquidator to recover a debt or other sum of money due to the company : Mersey Steel & Iron Co. v. Naylor Benson & Co.

(1884) 9 A. C. 434 : 53 L. J. Q. B. 497. Peat V. Jones & Co. (1881) 8 Q. B. D. 147 : 51 L. J. Q. B. 128, Jack. V. Kipling, (1882) 9 Q. B. D.

113 : 51 L. J. Q B. 463, Re City Equitable Fire Insurance Co. (No. 2), (1930) 2 ch. 293 : (99 L. J. ch. 536). Where such a set. off is claimed &

established, there is in substance a deduction from one demand for money of another cross demand between the same parties with the result that

the claim o! the Official Liquidator stands liquidated in whole or in part as the case might be. The right of set off is a ground of defence & is

required by Order 8, Rule 6, C. P. C., to be pleaded as part of the written statement of the deft. If established it is an answer to the pltf.''s claim

wholly or pro tanto a3 the case might be. The deft. if entitled to a sot off, is not liable to make satisfaction of the claim made against him or so much

of it as equals the amount which he is entitled to set off. If a set off equal to the pltf.''s claim is established, it is an absolute defence entitling the deft.

to a decree of dismissal of (the suit. The processual law provides that the written statement containing a set off has the same effect as a plaint in a

cross suit so as to enable the Cb. to pronounce a final judgment & pass a single decree in respect of both the original claim & the set off; see 0. 8,

B. G (2) & Order 20, Rule 19, C. P. C. This, however, does not mean that a written statement containing a plea of set off is to be treated as a

plaint in all respects & for all purposes. The set off allowed by Section 229, Companies Act, is a weapon of defence A a written statement

pleading a set off filed in answer to a suit by the Official Liquidator, is a defensive proceeding. The Official Liquidator hiving brought the deft.

before Ct. the latter must in common justice, have a right to contest the suit by raising all defenses allowed to him by law including a defence of set

off.

17. Thery is high authority in England for the view that leave of the company Judge is not necessary for raising a plea of set off in defence to a suit

by the Official Liquidator or for taking other defensive proceedings in such suit. With reference to a counter claim by the deft. for damages for

breach of contract in a suit by the liquidator of a company for recovery of the price of goods sold & delivered by the company, Jessel M. R.

remarked :

It is in the nature of a defence. A deft. sued by a company must be entitled to raise any defence without leave"" Mersey Steel & Iron Co. v. Naylor

Benson & Co. (1882) 9 Q.B.D. 648 : 51 L.J.Q B. 576 .

The objection on the ground of want of leave which was overruled by Jessel M. R. in the Ct. of Appeal was apparently given up when the cise

reached the House of Lords in Mersey Steel & Iron Co. v. Naylor Benson & Co., (1884) 9 A. C. 434 : 53 L. J. Q. B. 497. In Humber v. John

Griffith Cycle Co., (1902) 85 L. t. 141, a limited company whose suit had been dismissed preferred an appeal. The company was wound up

during the pendency of the appeal. The appeal was thereafter allowed. The deft. appealed to the House of Lords against the decision of the Ct. of

Appeal without leave of the Company Judge. Lord Davey observed :

When once an action by the company itself has been proceeded with, there is no necessity for the defts. in the action to obtain leave for any

defensive proceeding on their part. The liquidator was either party or privy to the proceedings in the Ct. of Appeal & the reap, having been

successful in that appeal cannot now object to the applts. defending themselves against tho consequences of the judgment by the ordinary means of

an appeal to this House.

The House of Lords held that an appeal from a decision in which the company was originally the pltf. was not a proceeding against the company

within the meaning of Section 87, English Companies Act of 1862.

18. The principle of the case last mentioned has been followed by the Lahore H. C. in Jiwandas v. Peoples Bank of Northern India, A. I. R.1937

Lah. 926 : 176 I. C. 203 & Benares Bank Ltd. Vs. Sashibhushan Misra, & by Eaghava Eao J. in this Ot. in The Palghat Wariar Bank Ltd. Vs.

Mundan Kandath Purakkal Ramaswamy''s son, Padmanabhan and Another, , the only dissenting note being struck by Braund J. in Chhakauri

Singh Vs. Sri Krishna Pande and Others, .

19. A deft. pleading a set off in defence is not commencing or proceeding with a suit or other legal proceeding against the company within the

meaning of Section 171, Companies Act, & tho leave of the company Judge is not required to entitle him to resist or defend a suit filed by the

Official Liquidator by pleading a set off in his written statement. Here the claims advanced by the Official Liquidator & the deft. against each other

are money claims which fall within the purview of Section 229, Companies Act, the set off claimed by the deft. is really a defence to the pltf.''s

claim for recovery of money & Section 171 does not apply. Where in a suit for recovery of money by the Official Liquidator the deft. counter

claims with a prayer for injunction or cancellation or specific performance or declaratory relief, different considerations might possibly arise, for

there the counter claim is an independent claim affording no defence to the pltf.''s claim though the processual law might allow the counter claim to

be tried in the suit itself as effectually as in an independent suit, if that can conveniently be done.

