
(1952) 03 MAD CK 0018

In the Madras High Court

Case No : O.S. Appeal No's. 32 of 1951 and 20 of 1952

The Associated Industrial Engineers by their Managing
Partner, P.V. Padmanabha Naidu

APPELLANT

Vs

P.A. Jabbar Sahib and Others

RESPONDENT

Date of Decision : 21-03-1952

Acts Referred:

Companies Act, 1913 — Section 87B, 87C, 87C(1), 87C(3)

Citation : AIR 1953 Mad 197 : (1952) 22 CompCas 217 : (1953) ILR (Mad)
200 : (1952) 65 LW 818 : (1952) 2 MLJ 378

Hon'ble Judges : P.V. Rajamannar, C.J.; Venkatarama Aiyar, J

Bench : Division Bench

Advocate : G. Vasantha Pai and S.G. Rangaramanujam, in O.S.A. 20/52, for the
Appellant; M.G. Kamath and S.G. Rangaramanujam in O.S.A. 32/51, for the
Respondent

Judgement

Rajamannar, C.J.—These two appeals are against an order of Krishnaswami
Nayudu J. passed on an application in the course of liquidation

of a limited company called the South Indian Industrial Engineering Syndicate
Ltd., Gudiyatham. The company was registered on 12th March

1946, with a nominal capital of 30 lakhs divided into three lakhs of ordinary
shares of Rs. 10 each out of which there was an issue of fifty thousand

shares. In and by an agreement dated 10th April 1946 a firm known by the
name of Messrs. Associate Industrial Engineers was appointed as

Managing agents of the company for a period of twenty years on terms and
conditions set out therein. The company obtained a certificate for the

commencement of the business on 30th July. Very soon thereafter
misunderstandings arose between P.V. Padmanabha Naidu, the Managing

partner of the Associate Industrial Engineers, and some of the directors of the

company of whom the most prominent was one P. A. Jabbar Sahib.

He filed two criminal complaints against Padmanabha Naidu. On 1st October 1946, Mr. Gates, one of the partners of the managing agency firm

wrote to the Directors of the Company stating that he had severed his connection with the firm and that the firm had been dissolved. Thereupon the

Board of Directors resolved on 6th October 1946 that in view of the criminal cases pending against Padmanabha Naidu and the non-receipt of the

audit report and the dissolution of the managing agency firm, the business and all monies and other transactions of the company by the managing

agents be suspended till the final decision of the disputes. Subsequently, on 11th November 1946, two of the directors were constituted as a

committee to carry on the business of the company. On 29th November 1946, this committee filed a complaint against Padmanabha Naidu for

wrongfully withholding the delivery of account books and records of the company. On 6th January 1947, two share-holders filed a petition in this

court for winding up of the company but it was dismissed.

On 12th April 1947, the Committee of Directors instituted a suit in the court of the District Munsif, Vellore (O. S. No. 151 of 1947) against the

partners of the managing agency firm for a declaration that the Managing agents were lawfully suspended as per resolution dated 6th October

1946 and for an injunction restraining them from interfering or causing obstruction in the management of the company. This suit was decreed by the

District Munsif on 29th June 1948. But on appeal the learned Subordinate Judge of Vellore held that the resolution of the 6th October 1946 was

ultra vires and invalid but granted a permanent injunction restraining the managing agents from interfering in the affairs of the company. By order of

this court dated 6th December 1949, the company was directed to be wound up.

The two main grounds in the petition for winding up were: (1) That the company defaulted in filing the statutory report and in holding the statutory

meeting u/s 162(2), Companies Act; and (2) That it did not commence business within a year of its incorporation.

2. In May 1950, Padmanabha Naidu on behalf of the Associate Industrial Engineers, the managing agency firm, filed a claim before the Official

Liquidator who had been appointed in the winding-up proceedings. The claim was made up of three items as follows:

1. A sum of Rs. 1705-9-6 alleged to be the amount advanced by the managing agency firm to the Board of Directors of the company;
2. A sum of Rs. 49400-5-0 being the amount of office allowance payable to the managing agency firm from 1st March 1947 to 6th December 1949, as per the terms of the agreement, and,
3. A sum of Rs. 25000 as damages for premature termination of the managing agency agreement.

In accordance with the directions of the learned Judge sitting in Chambers, Krishnaswami Nayudu J., the Official Liquidator, after notice to the concerned parties, made an enquiry and allowed the claim in its entirety. The members of the Committee of Directors then made an application to the learned Judge in Chambers for setting aside the order of the Official Liquidator allowing the claim preferred on behalf of the Managing agents.

Before the learned Judge there was no dispute as regards the first item of Rs. 1705-9-6. The learned Judge disallowed the second item and allowed only a sum of Rs. 10,000 in respect of the third item. In the result he held that the Managing agents would be entitled to a sum of Rs.

1705-9-6. Against this order of the learned Judge, the Managing Agents have filed O. S. A. No. 32 of 1951. O. S. A. No. 20 of 1952 is by the

Committee of Directors. In this judgment, the managing agency firm will be referred to as the appellant and the Committee of Directors as the respondents.

3. To understand the basis of the claim of the appellant it is necessary to set out the material terms and conditions of the managing agency agreement Ex. P. 2. They are as follows:

Clause (1): The said appointment of the Managing Agents shall be initially for a period of 20 years from the date of these presents notwithstanding

any change in the constitution or in the name and style of the said firm, its successors and assigns;

Clause (3): The managing agents shall be entitled to the following remunerations:

(a) An office allowance for the first six months from the date of these presents a sum of Rs. 800 (Rs. eight hundred) per month; for the next six

months thereafter at the rate of Rs. 1200 (one thousand two hundred) per month; and thereafter at the rate of Rs. 1500 (one thousand five

hundred) p.m.; with a provision to increase this allowance, from time to time as

the business increases, at the discretion of the Directors to a maximum of Rs. five thousand (Rs. 5000) per month, provided however that the salaries of the staff and other expenses for the business of the company shall be borne by the company and shall not be included in the said office allowance.

(b) The managing agents shall also be entitled to a remuneration of 10 per cent (ten per cent) of the annual nett profits of the company as defined

by Section 87 (c) (3), Companies Act, provided however that the managing agents agree to waive such portion or the full amount of their

remuneration of 10 percent on the said annual nett profits, as may be necessary in any year, in which the said annual nett profits of the company are

not sufficient for declaration of at least six percent dividend on the paid-up share capital of the company.

(c) The abovesaid remuneration shall be paid by the company to the managing agents during the period of their appointment, namely 20 years.

Clause 8: Except in the case of the Managing agents being found guilty of fraud or gross negligence or in cases where the law provides, the

managing agents shall not be liable to be discharged from their office or be liable to indemnify the company or any one else, for any acts or

omissions done by them in the discharge of their duties as managing agents of the company. In all such cases, the company shall indemnify the

Managing agents for any loss or damage suffered by them.

Clause 9: The managing agents shall also be entitled to be indemnified for loss or damage that they may suffer by reason of failure or default or

breach of any of the conditions herein on the part of the said company.

4. The second item of claim is made up of two amounts:

(1) Rs. 1560 as office allowance due from 1st March 1947 to 9th April 1947 at the rate of Rs. 1200 per month, and

(2) an amount of Rs. 47840 being such allowance for the period from 10th April 1947 to 6th December 1949 at the rate of Rs. 1500 per month.

This item is expressly founded on clause 3 (a) of the agreement. Prima facie the appellant appears to be entitled to the amount of this item. The

company was wound up only on 6th December 1949 and the amount is claimed in respect of a period anterior to this date. The claim was resisted

by the respondents mainly on the following grounds:

(a) that the suspension of the managing agency by a resolution of the company dated 6th October 1946 was proper and therefore the appellant

was not entitled to any remuneration or office allowance thereafter.

(b) that the Managing Agency firm had ceased to exist when it must be deemed to have been dissolved by one of the partners severing its

connection with the firm;

(c) that the winding up of the company was due to the negligence, default and mismanagement of the managing agents.

5. Before the Official Liquidator, apart from these grounds which were contained in the affidavit filed by the respondents in answer to the claim,

certain other legal objections were also raised. These objections are founded on the provisions of the Companies Act. The learned Judge held that

the resolution of the 6th October 1946 purporting to suspend the managing agency was ultra vires and invalid. He further held that notwithstanding

the retirement of one of the partners, Mr. Gates, the managing agency firm must be deemed to have continued and therefore there had been no

lawful termination by the company of the services of the managing agents. The learned Judge also found that the winding up was brought about by

the negligence and default of the managing agents in carrying out their duties and that therefore the managing agents had not dis-entitled themselves

to any compensation for the termination of the contract. These findings were not challenged by the learned counsel for the respondents before us.

But the learned Judge disallowed this item of claim because in his opinion the amount specified as office allowance was not in the nature of a

minimum remuneration, that the managing agents would be entitled to be paid office allowance only so long as the company functioned and that the

managing agents were prevented from being in charge of the company.

6. Learned counsel for the appellant contended that the amount referred to in clause (3) of the agreement as office allowance is really in the nature

of minimum remuneration. In the alternative he contended that he would be entitled to the amount claimed as office allowance. Both sides relied on

certain provisions of the Indian Companies Act which we shall now set out. Section 87-C of the Act in so far as it is material runs as follows:

""(1) Where any company appoints a Managing Agent after the commencement of the Indian Companies (Amendment) Act, 1936 the

remuneration of the managing agent shall be a sum based on a fixed percentage of the nett annual profits of the company, with prevision for a

minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be denned in the agreement of

management;

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in Sub-section (1) shall not be binding on the

company unless sanctioned by a special resolution of the company.

7. Now it is clear that on the face of it the Managing agency agreement provides both for an office allowance and a remuneration. This is quite in

accordance with the statutory provision. We are unable to agree with the contention of the appellant that the amount expressly stated to be payable

as official allowance is in the nature of a minimum remuneration. I Section 270(1) (Section 87 Clause (1)?) no doubt does con-template a

provision being made for a minimum payment as remuneration in the case of absence of or inadequacy of profits. But on the language of that sub-

section, it is equally clear that this minimum payment is something different from the office allowance. Besides, if it is argued that this provision is in

the nature of a stipulation for additional remuneration in a different form, then it would offend the provision of Section 87 (c) (2) of the Act. It only

remains to be considered whether the appellant is entitled to the amount of the second item as office allowance defined in the agreement for

management. We cannot agree with the learned Counsel for the respondent that the agreement does not define the office allowance. When a

specific sum is mentioned as the office allowance payable, we fail to see why this allowance cannot be held to be defined. The respondent's

counsel, if we understood him aright wanted us to construe the word "defined" to mean "described in detail". This is to say, the agreement should

specify the number of clerks, peons, attenders, stationery etc. Counsel was unable to cite any authority in support of this construction and we have

no hesitation in refusing to adopt what appears to us to be an unreasonable interpretation.

8. The learned Judge, as already mentioned, disallowed the appellant's claim to the second item on the ground that the appellant firm was

prevented from being in charge of the company. With respect to the learned

Judge, who fail to see how this circumstance would deprive the appellant of his rights under the agreement. On 6th October 1946, there was no doubt a resolution of the Board of Directors suspending the functioning of the Managing Agency firm as such. But it is important to notice that this resolution did not purport to terminate the managing agency.

u/s 87-B(f) the removal of a managing agent shall not be valid unless approved by the company by resolution at a general meeting of the company.

(See -- AIR 1950 81 (Privy Council) . Our attention has not been drawn to any such resolution of the company. It is mainly on this ground that the learned Additional Subordinate Judge of Vellore held that the resolution of 6th October 1946 was ultra vires. It is true that the respondents made several attempts to prevent the appellant from acting as managing agents. There were criminal cases and an application for injunction. The criminal cases, however, ended in an acquittal of the managing partner of the appellant firm. From these proceedings, it is apparent that the appellant continued to have the records of the company with it. It may be that there was not much business done by the company, but it cannot be said that this was entirely due to the fault of the appellant. Even assuming the appellant firm was prevented from being in charge of the company it was so prevented by the wrongful action of the respondents. They cannot either in law or in equity rely on their own wrongful conduct as a circumstance disentitling the appellant to the office allowance during the period when the appellant was so prevented. Before us. the argument proceeded on the basis that the managing agency was lawfully terminated only on the date of the winding up of the company, i.e., 6th December 1949. If this be so, the appellant would prima facie be entitled to be paid the office allowance as provided in the agreement. It was not suggested by Counsel for the respondents that the managing agency firm did not have its own office. That office was obviously different from the office of the company as is clear from Clause 3 (a) of the managing agency agreement which refers to the salaries of the staff and other expenses for the business of the company which had to be borne by the company and. were not included in the office allowance payable to the managing agents. In our opinion the appellant was entitled to the office allowance for the period upto the date of winding up, viz., 6th December 1949 at the rates mentioned in clause

(3) of the agreement. The second item of the claim must be allowed in its favour.

9. The third item of claim is by way of special damages payable to the appellant for the premature termination of the managing agency. The

appellant's counsel expressly abandoned the appellant's claim to damages on the basis of the remuneration of ten per cent of the annual nett profits

of the company and confined the basis of his claim to the provision for the payment of the office allowance at a fixed rate. Though according to this

basis he would be entitled to claim at the rate of Rs. 1500 a month for the balance of the term of 20 years, he restricted his claim to Rs. 25000.

Clause 8 of the managing agency agreement provides that except in the case of managing agents being found guilty of fraud or gross negligence or

in cases where the law provides, the managing agents shall not be liable to be discharged from their office, and under Clause 9 the managing agents

shall be entitled to be indemnified for loss or damage suffered by reason of failure or default or breach of any of the conditions on the part of the

company. Learned counsel for the appellant relied on several English decisions in support of his contention that when an agreement provides for

the payment of a salary and other allowances to an employee or agent, the employee or agent is entitled on termination of his employment or

agency to such salary and allowances for the unexpired portion of his contract of employment or agency. In -- "In re English Joint Stock Bank

Yelland's case", 4 Eq. 350, one Mr. Y, was engaged as the sole manager of a branch of a bank for a term of five years from 1st July 1865 at a

stipend of not less than ₹½. 500 a year. It was also provided that whilst he should continue to act as manager of the branch he should have the

right of occupying the bank premises as a dwelling house free of all rent, taxes and other outgoings. Y acted as manager of the branch of the bank

until 11th May 1866 when the bank stopped payment. An order for winding it up was made on 25th May 1866. On 1st August Y received a

notice from the Official Liquidator that his engagement was at an end and that his services would no longer be required. Y sent in a claim for ₹½.

1958 for three years and 11 months" salary at the rate of ₹½. 500 a year and a further sum of ₹½. 360 being equivalent to ₹½. 120 a year for

three years" residence and offices on the bank premises free of rent, rates and taxes calculated from 24th June 1867 when he would have to

vacate the premises. It was held by Sir Page Wood V.C. that the proper course would be to ascertain the present value of an annuity of $\text{£} \frac{1}{2}$. 500

terminating on 1st July 1870 and a proper rent for the bank premises for the rest of the term, regard being had to the risk to health and life and

from that amount deduction should be made for Y being at liberty to obtain a fresh appointment and regard must also be had to the liberty reserved

to him by the agreement of acting as agent for other companies. The matter was sent back to Chambers for calculation upon this principle.

10. In -- "In re: London and Colonial Co., Ex parte Clark", L.R. 7 Eq. 550 by an agreement between a limited trading company and. their agent in

a British Colony it was provided that the salary of the agent was to be $\text{£} \frac{1}{2}$. 750 a year for a period of five years from the day of his arrival in the

colony and in addition he was to be allowed certain commissions on remittances made by him to England. The company also agreed to defray all

expenses for offices, ware-houses and staff of clerks. The agent arrived in the colony in December 1865 and commenced business. In March

1867 the voluntary winding up of the company was ordered to be continued under supervision and in January 1868 the agent's services were put

an end to. The agent claimed salary at $\text{£} \frac{1}{2}$. 750 per annum from 18th January 1868 to 18th December 1870 and commission on certain

remittances made by him and also estimated commission which would have been payable to him during the remainder of his engagement, expenses

of his voyage and legal proceedings. The Vice Chancellor made the following declaration as regards his claims:

Following what was done in "Yalland's case", L. R. 4 Eq. 350 allow to Mr. Clark his full salary to the end of the five years.

Also allow to him a proper sum for rent and office expenses for the same period, having regard to the amount expended whilst the company was a

going concern, also his commission upon all goods handed over by him under the power of attorney at invoice prices; also allow him a proper sum

for the expenses of his return voyage and those of his wife; and in taking such accounts let there be a separate account of all commissions and

salaries due to him after the winding up.

11. In -- "In re English & Scottish Marine Insurance Co., Ex parte Maclure", 5 Ch. Ap. 737 the agreement between an Insurance company and

its agent provided not only for a fixed salary but also for a commission of ten percent, on all business transacted. The agreement was for a period

of five years, but before the five years had expired the company was wound up voluntarily. The agent claimed against the company,

(1) The balance due to him at the time of the commencement of the liquidation for salary, office expenses and commission. This was agreed to by

the liquidators;

(2) The prospective value of $\frac{1}{2}$ 500 a year till the expiry of the period of five years;

(3) The office expenses to the same date; and

(4) The prospective value of the commission to the same date.

The claim was heard by the Master of the Rolls who held that the agent was entitled to the salary for the balance of the period of the agreement,

but disallowed his claim in respect of the value of the commission. As regards office expenses there was a subsequent agreement between the

Official Liquidator and the Agent under which the agent agreed to accept a specified sum. There was an appeal which was disposed of by Sir

W.M. James L.J. He held that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the

term of five years.

12. In -- "In re the Patent Floor Cloth Co., Dean and Gilbert's, claim", 41 L.J. Ch. 476 there was no fixed salary. A company engaged two

persons to act as their commercial travellers for three years in a certain district at a commission upon goods ordered. The company was wound up

before the termination of the three years. It was held that the commercial travellers were entitled to compensation in respect of the commission for

the unexpired portion of the term, and the amount was directed to be ascertained by the Chief Clerk in Chambers. The case in -- "In re, English

and Scottish Marine Insurance Co., Ex parte Maclure", 5 Ch; Ap. 737 in which the claim for commission had been disallowed was distinguished

on the ground that in that case the remuneration was salary and commission whereas the remuneration was only commission in this case.

13. The ruling in -- "Reigale v. Union Manufacturing Co., (Ramsbottom)", 1918 1 K. B. 592 is more or less on similar lines. Here a manufacturing

company employed the plaintiff as agent for a period of seven years for the sale

of their goods. The agent was to obtain orders at agreed prices and he was to get a commission upon the invoice prices of all goods delivered by the company and duly paid for by the purchasers. Before the expiry of the period of seven years, the company passed resolutions for voluntary winding up and eventually sold their business. In an action to recover damages for breach of the agreement it was held that the company was liable to damages. The enquiry as to damages was directed to be made by the Official Referee and the company was allowed to show circumstances which might lead to the conclusion that during the remainder of the period there was very little prospect of any large quantity of business being done.

14. Before applying the principles laid down in the above decisions to the facts of the present case we think we should also refer to a decision not

cited before us, namely, -- "Rhodes v. Forwood", 1 A. C. 256. A and B agreed that for seven years A should be the sole agent for the sale of B's

coals and that B should not employ any other agent for that purpose. A was to be paid a fixed commission of three per cent. At the end of four

years. B sold the colliery itself. In an action by A for damages for breach of the agreement it was held by the House of Lords that the action was

not maintainable. The "ratio decidendi" was that where two parties agree for a fixed period the one to employ the other as his sole agent for

certain business, there is no implied condition that the business itself shall continue to be carried on during the period named. Lord Hatherley

observed:

The parties seem to me to have entered into a simple contract of agency, which necessarily determines when the subject-matter of the agency is

gone. The subject-matter of the agency has disappeared without mala fides on either side. Therefore the contract is brought to an end by the

course of events--by that happening which might necessarily have been expected to happen and which would have the effect of putting an end to

the contract.....

My Lords, it appears to me that all that has happened is this: The parties meet together, and they assume as between themselves the probability of

a certain state of things existing, but they do not enter into a guarantee that that state of things shall continue to exist.

Lord Penzance pointed that the natural reading of such a contract as that before the House was that as long as the principal chooses to carry on his business he shall be bound to employ the person with whom he has agreed as his agent, but that he shall be at liberty when he likes to put an end to that business to do so. The rule of law enunciated by the House of Lords in this case has been referred to in several of the decisions cited by the appellant's counsel.

In -- "In re, the Patent Floor Cloth Co., Dean and Gilbert's claim", 41 L. J. Ch. 476 though the ruling itself is not referred to as the case was

decided earlier the same principle is stated. Distinguishing -- "In re, English and Scottish-Marine Insurance Co., ex parte Maclure", 5 Ch. Ap. 737

Bacon V.C. said:

But that was a case in which the man had stipulated for two things, salary and commission, and if the man who had agreed to pay him the salary

chose to leave off business the servant could not prescribe to his master that he must carry on business whether he liked it or not.

(Vide also -- "Reigate v. Union Manufacturing. Co., (Ramsbottom)", 1918 1 K. B. 592). Buckley in his Commentary on the Companies Act, 12th

Edn. sums up the legal position on a review of all the authorities thus:

Where two parties mutually agree for a fixed period the one to employ the other as his sole agent in a certain business at a certain place, the other

that he will act in that business for no other principal at that place, a condition that the business itself shall continue to be carried on during the

period named is not to be implied in the absence of special circumstance, e.g., if under the terms of the agreement the principal is bound to accept

orders obtained by the agent""(pp. 619-620).

In our opinion this principle must be applied with greater force to the case of a managing agency such as that with which we are concerned in the

present case. We have excluded altogether out of consideration cases in which though the company may continue to carry on business the

managing agents' services have been wrongfully dispensed with. Such cases would stand on quite a different footing.

Here we have a case where the company has been compelled to close down its business and it is only by this event that the managing agency has

come to an end. Can we infer as an implied term of the agreement that the

company is bound to carry on business for a period of 20 years? We think not. If that be so and if the company has been forced to come to an end the managing agent cannot be heard to say that he must be paid what he might have earned if the company had continued to carry on business for the full term of 20 years. This of course would obviously apply to any claim which may be put forward by the appellant for an estimated amount of profits which might have been earned by the company if it had continued. We think that the same consideration must also apply to the claim for office allowance. The appellant cannot compel the company to continue to carry on business for 20 years or pay him office allowance for the full period of 20 years though the company itself may cease to carry on business long before the expiry of the period. We further think that the position of a managing agent materially differs from that of an ordinary employee of the company, employed at a fixed salary. In this view the third item of claim must be entirely disallowed.

15. O. S. A. No. 32 of 1951 is allowed in part. The appellant will get proportionate costs but the respondents 1 and 2 will bear their own costs.

Respondent 3, the Official Liquidator will take the costs from the company's funds. O. S. A. No. 20 of 1952 is allowed with costs.