
(2008) 07 AP CK 0106

In the Andhra Pradesh High Court

Case No : Original Side Appeal No. 14 of 2007

Voltas Ltd.

APPELLANT

Vs

Allwyn Auto Ltd.

RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Companies (Court) Rules, 1959 — Rule 338

Companies Act, 1956 — Section 451(2), 457(3), 476, 529, 529(1)

Citation : AIR 2008 AP 258 : (2008) 5 ALT 570 : (2009) 91 SCL 86

Hon'ble Judges : G. Bhavani Prasad, J;B. Prakash Rao, J

Bench : Division Bench

Advocate : M.S. Ramachandra Rao, for the Appellant; M. Anil Kumar, for the Respondent

Final Decision : Allowed

Judgement

B. Prakash Rao, J.—This appeal is at the instance of the unsuccessful applicant, who seeks to assail the orders rejecting his application purported to have been filed u/s 476 and 457(3) of the Companies Act, 1956 r/w Rule 338 of the Companies (Court) Rules, 1959, by the learned Single Judge as per the orders in C.A. No. 1118 of 2005 in C.P. No. 99 of 2000, dated 14-02-2007.

2. Heard Sri M.S. Ramchandra Rao, learned Counsel appearing for the appellant and Mr. Anil Kumar, learned Counsel appearing on behalf of the Official Liquidator.

3. The facts, which are necessary for disposal of the issue though appears to be an intrigues one but, which however, arises in all most in every liquidation proceedings and revolves around the various expressions used under the provisions of the Companies Act, which falls for consideration at different levels. The appellant is the owner of the land to an extent of Ac.7-14 guntas, which consists of the buildings and structures thereon, situated at Sanathnagar, Hyderabad. The said property was leased out initially to M/s. Hyderabad Allwyn by the then owners namely M/s. Alladin and Family under various registered lease deeds, some time in the year 1963. Later, M/s. Hyderabad Allwyn became

a sick unit and in terms of the scheme of amalgamation approved by the BIFR, M/s. Hyderabad Allwyn amalgamated with Voltas Limited, which is the appellant/applicant. M/s. Allwyn Auto Limited, which is the respondent herein was incorporated on 31-5-1993. Under the said scheme of amalgamation M/s. Hyderabad Allwyn leased out the said property to the respondent along with the said structures for a period of 5 years from 07-04-1993, and a lease agreement was executed on 28-3-1993 between appellant/applicant and M/s. Hyderabad Allwyn on one side and the State of A.P. on the other. According to the terms of the lease monthly rent was fixed at Rs. 1,00,000/-, which has to be paid by the respondent to the applicant in advance every month on or before 10th of each calendar month. The said lease expired on 27-3-1998. On 25-4-1998, a portion of the property to an extent of Ac.3-00 was delivered to the applicant, however, the balance extent of Ac.4-14 cents remained with the respondent along with the structures thereon. Thus, the claim of the appellant was for the damages for the use and occupation of that portion of the property from the respondent herein from March 1996 onwards. In the meanwhile, the respondent company was wound up by the orders of this Court in CP. No. 99 of 2000 on 17-07-2001, and consequently the entire assets and properties of the respondent company vested with the Official Liquidator. Later, this Court namely Company Court directed the Official Liquidator to hand over the said balance extent of Ac.4-14 cents to the appellant/applicant herein as per the orders in C.A. No. 673 of 2002 dated 10-10-2002. In terms of the said orders, the Official Liquidator delivered the possession to the appellant/applicant herein on 12-12-2003. Meanwhile, the Official Liquidator had taken the steps by issuing notice to workmen, secured creditors and other creditors to prove their claims in the matter of M/s. Allwyn Auto Limited (in liquidation) by issuing a publication in Deccan Chronicle on 09-04-2004. In response thereto the appellant had claimed in Form No. 66 along with appropriate affidavit in support thereof and other materials claiming an amount of Rs. 91,27,624/- towards the damages for the period till the delivery of possession i.e., till 12-12-2003. On this, the Official Liquidator passed orders on 16-09-2005 admitting the claim of the applicant for a sum of Rs. 8,41,750/- as unsecured debt against the estate of M/s. Allwyn Auto Limited at Rs. 58,050/- per month towards rent, electricity and water charges, however, as far as the balance claim is concerned he rejected the same. Therefore, the appellant had filed the present application in terms of Section 476 and 457(3) of the Companies Act, 1956 r/w Rule 338 of the Companies (Court) Rules, 1959 for a direction to pay Rs. 16,83,450/- representing the rental, electricity and water charges for a period from 17-7-2001 to 12-12-2003.

4. Contesting the said application and denying the claim, the Official Liquidator submitted a report mainly on the ground that the claim of the applicant is totally pre-matured one since all other claims are yet to be adjudicated as per the procedure contemplated under the law and as long as such steps are taken finally by settling and disposing the dividend etc., the appellant cannot make any claim. It was submitted that pursuance to the notice issued by the Official

Liquidator on 8-8-2004, inviting claims, he received about thirty claims from unsecured and preferential creditors of the company including the claim of the Commercial Tax Department, however, no claim was made by any secured creditor and, thus, the adjudication of the appellant's claim is under process, and it is only when the same is finalized the list of creditors would be filed before the Court and till then the disbursement of the amount in favour of the applicant required to be deferred and for that the appellant cannot make any preferential claim over others. Learned Single Judge rejected the application holding that the appellant/applicant has to wait till the adjudication of all the claims and also to the effect that the claim of the appellant for preferential payment to the exclusion of all other claims cannot be considered.

5. Sri M.S. Ramachandra Rao, learned Counsel appearing for the appellant mainly contended that having regard to the nature of the claim and especially covering the period during which the property was in custody of the Official Liquidator after the company was wound up, the appellant cannot be asked to standup in the queue along with any such claimants nor his claim would amount to a debt. Further it is pointed out that since there is no dispute with the payment made to the appellant till the company was wound up and vesting of the properties in the Official Liquidator and the present claim being pertaining later thereto, it only form part of the costs, expenses etc., till the date of delivery of possession by the Official Liquidator himself to the appellant which occurred on 12-12-2003 and therefore necessarily his claims squarely fall well within the parameters of Section 476 of the Companies Act, and thus, it was not right to hold that the appellant has to wait till the adjudication of all the claims.

6. Sri M. Anil Kumar, learned Counsel appearing on behalf of the Official Liquidator supporting the orders of the learned Single Judge and the report filed by the Official Liquidator sought to contend that the appellant cannot have any preferential right and the claim of the appellant squarely falls amongst all such debts and claims and the question of any payment to the appellant does not arise nor is it sustainable under the law as rightly held. Hence, he sought for dismissal of the appeal.

7. Having thus considered the rival submissions made from both sides and on perusal of the material, the point which arises for consideration, is whether on the facts and circumstances, the claim of the appellant towards the damages in respect of the property for the period which was in the custody of the Official Liquidator after vesting of all the properties consequent to the orders of winding up of company would constitute as costs and expenses or would amount to a debt to be adjudicated along with other claims.

8. There is not much dispute in regard to the facts. The appellant is the owner of the property, which was let out to the respondent company which was wound up as per the orders of this Court on 17-7-2001 and the entire assets and property of the company vested in the Official Liquidator, and later part of the property was delivered to the appellant on 25-12-1998 and the balance extent was

delivered as per the orders of the Company Court on 12-12-1993. Therefore, the claim now thus is for the period between 17-7-2001 to 12-12-2003, during which the property was in custody of the Official Liquidator after the order of winding up. In the report submitted before the learned Single Judge, the Official Liquidator tried to support his possession for the said period on the ground that he has to take steps in furtherance of winding up order, since the assets of the company had to be removed from the said property before the possession could be delivered. Thus, the Official Liquidator was in control and management and taking care of the said other assets of the company. With this back drop, it now necessitates to refer to the provision Section 476 of the Companies Act, under which the present claim is made, which reads as follows:

Section 476. Power to order costs: The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the Court thinks just.

9. From the above, on a bare reading, it provides that in respect of costs, charges and expenses, which were incurred during the process of winding up can be ordered by the Court in the manner which it thinks just. This provision draws a distinction between the amounts incurred towards such costs, charges and expenses, during the winding up process with the other amounts. These amounts towards the costs, charges and expenses, in the winding up cannot be treated on par with the amounts. Thus, the costs, charges and expenses in the said process, do not fall within the meaning of debts or dues, which has to be dealt in a separate manner. However, the learned Single Judge on a reading of the other provisions namely Section 529A and 530 of the Companies Act and Rule 338 of the Companies (Court) Rules 1959 sought to treat these amounts on par with the other claims of secured, preferential and other creditors and the workmen, which is dealt u/s 529A of the Companies Act, which reads as follows:

Section 529A Overriding preferential payments: (1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company:

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-section (1) of Section 529 pari passu with such dues.

Shall be paid in priority to all other debts.

(2) The debts payable under Clause (a) and Clause (b) of subsection (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

10. An overriding provision, with a non-obstinate clause, the amounts mentioned therein viz., under Clause (a) and (b) applies to the debts. Therefore, while dealing with winding up of a company, it contemplates that the workmen dues

and amounts due to secured creditors shall be paid in priority to all other debts. These two claims under Clauses (a) and (b) are given a preference over all such other debts. The expression used is "debts" and therefore this certainly would not include nor can it take in the costs, charges and expenses incurred in the winding up for which the provision is specifically made u/s 476 of the Act. Both the expressions debts vis-a-vis costs, charges and expenses are mutually exclusive and one does not include the other. Therefore it is not right to hold that the overriding provisions would make any difference, hence both cannot be treated on the same lines. It is not well settled that the expression as used in a statutory provision should be given its plain meaning in the context in which they are found. Thus, we are of the view that having regard to the express distinct words used, which stand poles apart both u/s 476 and 529(a) of the Companies Act, the other debts as mentioned to in Section 529 would not take in any amounts towards costs, charges and expenses in the winding up. Even coming to Section 530 of the Companies Act, it has to be seen to what extent it would include such amounts towards costs, charges and expenses incurred in the winding up vis-a-vis the other debts. Section 530 of the Companies Act reads as follows:

Section 530. Preferential Payments. (1) In a winding up, subject to the provisions of Section 529A, there shall be paid in priority to all other debts.

11. Even this provision as mentioned above, the expression used is again "other debts" and therefore the priority as mentioned vis-a-vis the other debts like under Clause (a) to (g) thereof, would not come in any way against the claim in respect of costs, charges and expenses which are incurred in the winding up process. Certainly it goes without saying that the Official Liquidator is entitled to administer and take care of the assets and properties of the company, which has been wound up and necessarily has to meet all such expenses, costs and other charges, which are incidental to running of the show. Therefore such amounts which are incurred towards costs, charges and expenses especially after the orders of winding up of company and vesting of the assets of the company in the Official Liquidator and till the property is delivered to the owner, would not fall within the expression other debts or debt as such. In fact, it would not amount to a debt but only an incidental costs and expenses, when the property remained in the custody of the Official Liquidator. Even Sub-section (6) of Section 530 makes it amply clear that the Official Liquidator is entitled to retain such sums as may be necessary for the costs, charges and expenses of the winding up. Therefore these amounts towards the costs and expenses could not stand on par with any debt or any claims there under. This provision though makes it subject to provision of Section 529(a) mentioned to above, since neither of these provisions would in any way take in any such bar or deal with the costs, charges and expenses during the process of winding up, nothing goes against such claim being made. Now to consider the Rule 338 of the Companies (Court) Rules 1959, which reads as follows:

Rule 338. Cost and expenses payable out of the assets in a winding-up by the Court. (1) The assets of a company in a winding-up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realizing or getting in the assets including, where the company has previously commenced to be wound-up voluntarily, such remuneration, cost and expenses as the Court may allow to the liquidator in such voluntary winding-up, shall, subject to any order of the Court and to the rights of secured creditors if any, be liable to the following payments which shall be made in the following order of priority, namely:

First.- the taxed costs of the petition including the taxed costs of any person appearing on the petition, whose costs are allowed by the Court.

Next.- the costs and expenses of any person who makes, or concurs in making, the Company's statement of affairs;

Next.- the necessary disbursements of the Official Liquidator other than expenses properly incurred in preserving, realizing or getting in the properties of the company;

Next.- the costs of any person properly employed by the Official Liquidator;

Next.- the fees to be credited to Government u/s 451(2),

Next.- the actual out of pocket expenses necessarily incurred by the members of the Committee of inspection, and sanctioned by the Court.

(2) Save as otherwise ordered by the Court no payments in respect of bills of advocates, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer of the Court. The taxing officer shall before passing the Bills of charges of an advocate, satisfy himself that the appointment of an advocate to assist the liquidator in the performance of his duties has been duly sanctioned.

(3) Nothing contained in the Rule shall apply to or affect costs which, in the course of legal proceedings by or against the company which is being wound-up by the Court, are ordered by the Court in which such proceedings are pending, to be paid by the company or the liquidator, or the rights of the persons to whom such costs are payable.

12. From the above, especially, Sub-clause (1) and Sub-clause (3) which clearly draws a distinction between the fees and expenses incurred in preserving, realizing in getting the assets etc., including the costs. They totally differ from any claim under any other debts. Therefore, even this rule would not bar any claim towards those expenses, which is incidental in the process of wounding up and therefore we are of the view that the claim of the appellant towards the damages for the use and occupation during period under which the company was wound up and till after its delivery by the Official Liquidator the orders of the Court, cannot be put on par with any other debt nor can it be treated as a claim of either preferential or non-preferential, and therefore the question of waiting

till final adjudication of the claim or debts does not arise nor it would necessitate the Court dealing with the matters to make any hesitation to order for payment in respect of such costs, charges and expenses as provided for u/s 476 of the said Act.

13. On behalf of the appellant reliance was placed In Re Sought Kensington Co-operative Stores 1881 Chancery Division 161, In Re National Arms and Ammunition Co. 1885 Chancery Division 474 and Re Blazer Fire Lighter Limited 1891 - 4 All England Report 1174. It necessitates to reiterate the references as made in detail by the learned Single Judge which reads as below:

In the first judgment, according to the matrix of the case, the lease was granted on 12th of November, 1879, to the company and rent was paid up to 24th of June 1880. The rent was payable quarterly and the quarter's rent for the 29th of September, 1880 was never paid. On 27th November 1880 a petition was presented for winding up of the company and on the same day a provisional liquidator was appointed with power to carry on the business of the company. On the 10th of December the winding up order was made and the provisional liquidator was appointed as Official Liquidator. The Official Liquidator continued to carry on the business of the company and for that purpose occupied the leasehold property which had been demised to the company. The landlord prayed to allow distress to be levied on the goods of the company. There was no controversy between the parties inter se that the rent that accrued before the liquidation should be a matter of proof and the subsequent rent a matter of full payment. Under those circumstances, it was held that the rent accrued due is that which ought to be proved for and the rent which cannot be proved for is that which ought to be paid in full.

14. In the second judgment it was a case of payment of rates. A resolution was passed by the company for voluntary winding up on the 20th of December, 1882. The Liquidator appointed remained in the occupation of the business premises of the company for the purpose of carrying out some pending contracts, finishing a quantity of unfinished articles, and storing and keeping in order a quantity of completed articles with a view to selling them. In march, 1883, a rating authority of Corporation of Birmingham under the provisions of the local Acts made a rate for 1883 on all the property within the district. Obviously, the Liquidator was in possession of the property. Under those circumstances, it was held that as the Liquidator had from the commencement of the winding up occupied the property for the purposes of the company and with a view to acquiring gain or avoiding loss to the company, the rate ought to be paid in full. Obviously, this is a case of payment of rate (tax to the corporation).

The third judgment sought to be relied upon by the learned Counsel is also in respect of rates. A test was evolved in the said judgment to the following effect:

The test whether or not a liquidator is liable to pay rates in respect of company premises retained by him after the commencement of the liquidation is whether

there is "beneficial occupation" within the meaning of the rating statutes. Where there is such occupation the liquidator is bound to pay in full the rates becoming due after the commencement of the liquidation, and in default of that payment liberty to distrain ought to be granted.

15. On a reading of these judgments, it spells out that the rent accrued due is that which ought to be proved for and the rent which cannot be proved for is that which ought to be paid in full and further that since the liquidator was in possession of the properties of the company with a view to acquiring gain or avoiding loss to the company, the rate ought to be paid in full and lastly where there is such occupation the liquidator is bound to pay in full the rates becoming due after the commencement of the liquidation. On principle these decisions support the contentions urged on behalf of the appellant.

16. It is a cardinal principle, while looking at a statute, to bear in mind the clear different expressions in different contexts. Therefore, contextually, the meaning has to be attributed with the object behind. Though all the claims pertain to money, yet, there is a distinction amongst them. Thus, having regard to the incidence attached, such claim is not a debt. We are more fortified from the fact that the expressions are different and specific, without creating any doubt nor giving rise to any scope for causa omissions. Further, significantly, the amounts incidental and subsequent to liquidation that too which in the custody of the Official Liquidator, cannot be equated to any monetary claim prior to the date of winding up.

17. We thus hold that on considering the provisions of the Companies Act and the Rules made therein, the claim as now made by the appellant totally stands apart and does not fall under any other claim as debt but it squarely falls within the costs, charges and expenses incurred during the process of winding up and the applicant would be entitled to these amounts, dehors the settlement of debts or other claims.

18. For the foregoing reasons, we allow the appeal setting aside the orders dated 14.2.2007 of the learned Single Judge dismissing the application and consequently the application filed by the appellant in C.A No. 1118 of 2005 in C.P. No. 99 of 2000 is allowed. No costs.