

## CIVIL ORIGINAL

Before Bal Raj Tuli, J.

PUNJAB FINANCE PRIVATE LIMITED (IN LIQN.)—*Petitioner.*

*versus*

SHRI MALHARA SINGH, ETC.,—*Respondents.*

C.O. No. 101 of 1971 in

C.P. No. 35 of 1968.

February 7, 1974.

*Companies Act (I of 1956)—Section 446 (2)—Court Fees Act (VII of 1870)—Schedule I Article I and Schedule II Article 1(d)—Application by Official Liquidator under section 446(2)—Whether a suit—Ad valorem Court fee—Whether payable thereon.*

*Held*, that sub-section (2) of section 446 of Companies Act, 1956 contemplates the filing of any suit or proceedings or any claim by or against the company and clearly an application making a claim regarding money due from a debtor is covered by clause (b) of sub-section (2) and for that purpose an application under section 446 of the Act can be filed. It is only if the proceeding is filed in the form of a suit that the court-fee payable will be as provided in Article I of Schedule I of the Court Fees Act, otherwise the application would have to be stamped as an application under the Companies Act as provided in Article 1(d) of Schedule II of the Court Fees Act which prescribes the fee payable on an application presented to the High Court under the Companies Act for taking some judicial action other than the order for winding up. The purpose and object of giving jurisdiction to the High Court to decide such matters as are mentioned in Section 446 (2) of the Act is to provide a speedy and cheap remedy to the Official Liquidator because the Companies (in liquidation) are generally unable to bear the heavy expenditure of litigation. If the Official Liquidator is called upon to pay full court-fee on an application made under Section 446(2) of the Act like a suit, the very purpose of the enactment will be lost.

*Petition under section 446(2) read with section 468 of the Companies Act, 1956, praying that an order be passed in favour of the petitioner company in liquidation and against the respondents for payment of Rs. 20,318.67 plus future interest on Rs. 17,366.45 at the rate of 12 per cent per annum from 1st September, 1971 upto the date of payment.*

K. S. Keer, Advocate, for the petitioner.

D. R. Nanda, Advocate, for respondents 1 and 3.

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 JUDGMENT

TULL, J.—The Punjab Finance Private Limited (in liquidation) through its Official Liquidator filed the present petition under section 446(2) read with section 468 of the Companies Act, 1956, for the recovery of Rs. 20,318.67 Paise from the respondents. The claim is based on a loan raised by the respondents from the petitioner-company on the security of a vehicle on hire-purchase basis. After the issues were framed and the case was fixed for the evidence of the parties, the learned counsel for the respondents 1 and 3 made an application for the framing of an additional issue to the following effect:—

“Whether the claim petition for recovery of the amount from the respondents is in the nature of a suit and as such *ad-valorem* court-fee should be paid ?”

(2) Arguments have been heard on this issue which has been treated as preliminary. The argument of the learned counsel for the respondents is that any action by the Official Liquidator for the recovery of the amount from the debtors of the company amounts to a suit and, therefore, *ad-valorem* Court-fee on the amount claimed should be paid as prescribed in Article 1, Schedule I of the Court Fees Act, 1870. According to the learned counsel, for deciding such claims or suits, the jurisdiction of the High Court as a winding-up Court and all the Subordinate Courts, which have the jurisdiction to try such suits, is concurrent and the nature of the proceedings taken by the Official Liquidator does not change with the form in which they are filed. The learned counsel relies on a judgment of a learned Single Judge of the Calcutta High Court in *In re: Osler Electric Lamp Manufacturing Company Limited (in liquidation)* (1), wherein the following observations occur in paragraphs 24 and 25 of the report:—

“24. The words ‘suit has been instituted’, ‘claim or question has arisen’ in sub-clause (d) of clause 2 (of section 446) refer to suit or application or claim or question pending in a Court other than the winding-up Court. The words ‘is instituted’, ‘arises’ or ‘is made’ in sub-clause (d) of clause 2 again suggest that such a suit or claim or application was made after the date of winding-up of the Company.

25. The words ‘made before or after the order for winding-up of company’ again clearly suggest that it contemplates not

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(1) A.I.R. 1967 Cal. 61.

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only suits, claims or applications made before but also after the winding-up of the Company in a Court other than the winding-up Court. The words 'before or after the commencement of the Companies (Amendment) Act, 1960' make it crystal clear that suits, claims, and applications may be done, even after the amendment in 1960, in Courts other than the winding-up Court."

(3) These observations do not deal with the matter of Court-fee but only lay down that the jurisdiction of the High Court is concurrent with any other competent Court as far as suits are concerned. I respectfully agree with the observations, but it is of no help to the learned counsel on the point in issue.

(4) To the similar effect are the observations of the Division Bench of the Calcutta High Court in *Narendra Nath Saha and another v. Official Receiver, High Court, Calcutta and another* (2) in paragraph 9 of the report. These observations are:—

"It is true that, in Item No. 16, reference is made to a suit triable by this Court under any special law other than the Letters Patent. Granting that the Companies Act, 1956, would be a special law for the purpose and granting also that the suit, by virtue of section 446(2) of the said Act, would be triable by this Court, the jurisdiction, conferred under the said section on this Court, being, as held by the learned trial Judge himself, a concurrent jurisdiction. Item No. 16 of the First Schedule should not be read to have the effect of ousting the jurisdiction of the City Civil Court which has otherwise primary jurisdiction in this matter."

(5) Again the observations in this judgment are of no use to the respondents. The counsel has then relied on a judgment of a learned Single Judge of the Mysore High Court in *The Official Liquidator, High Court of Mysore, Bangalore v. T. Muniswamy Achary and others* (3), wherein it was held:—

"The result is that although section 446(2) of the Companies Act empowers this Court as the winding-up Court to

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(2) A.I.R. 1968 Cal. 394.

(3) A.I.R. 1967 Mysore 190.

entertain a suit, Court-fee payable in respect of it has necessarily to be calculated under the Mysore Court-Fees and Suit Valuation Act, 1958.”

(6) In that case, the Liquidator under the directions of the Court took out notices to the debtors of the Company (in liquidation) under section 477 of the Companies Act which were dealt with under a single application. Majority of the debtors appeared in Court and admitted the claims made against them by the Liquidator on behalf of the company. In some cases, the matters in dispute were settled by agreement and decrees by consent were passed. In regard to cases where there was some dispute to be gone into and in cases where parties served with notices did not appear, the learned Judge made a general direction that the Liquidator may take out applications in the nature of suits separately against such parties. In pursuance of that direction, the Liquidator filed application against the debtors in the High Court. The question then arose about the payment of the court-fee on such applications, that is, whether it was to be paid *ad-valorem* as on a suit or fixed court-fee as on an application under section 446 of the Companies Act. The learned Judge held that—

“The nature of the suit, as a suit does not get changed or transformed into a mere application or a proceeding other than a suit.”

and that the application was to be treated as a regular suit for the purpose of Court-fee and Court-fee had to be paid thereon under the Mysore Court fees and Suits Valuation Act, 1958. With great respect to the learned Judge, I am unable to agree with that conclusion. The same learned Judge dealt with this matter in *Bank of Maharashtra Limited, Poona v. Official Liquidator, High Court Buildings* (4), wherein he held as per head-note (A):—

“All property and assets of the company which has been ordered to be wound up, immediately come under the custody of the winding up Court and are, in the eye of law, property in *custodia legis*. The Official Liquidator is in the position of a Receiver appointed by the Court for the purpose of acquiring and retaining the possession of all property and assets of the Company, acting subject to and in accordance with the directions from time to time given

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(4) A.I.R. 1969 Mysore 280.

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by the winding-up Court. Even in the case of properties of a company which are mortgaged or charged in favour of any of its creditors, the creditor does not acquire rights which are exhaustive of the entire title of the Company in respect of the properties. The properties continue to be the properties of the company, although by reason of a transfer of some interest therein by way of security, the creditor is enabled by law to enforce his security in the manner provided by law for the purpose of recovering moneys due to him. Hence, even when a secured creditor wants to exercise the option given to him by law to stand outside the insolvency and work out his rights, it cannot be said that the winding-up Court is totally powerless or has no jurisdiction whatever in respect of him or in respect of the property over which he claims a certain right by way of security. In regard to such properties, questions may and do often arise either in respect of priorities or in respect of any other matter whatsoever, which may relate to the winding-up of the company's affairs. In trying to reduce to his possession properties of the company, whether mortgaged to third parties or not, the Liquidator is not trying to recover any property from any body, he is acting on behalf of the Court into whose custody the properties have already come by virtue of the winding-up order. In the event of any third party resisting or opposing or questioning his attempts to reduce the property to his possession in the name of the Court, if the Liquidator considers it necessary to approach the Court for directions, he is merely acting under sub-section (4) of section 460 of the Act and invoking the powers of the Court under section 446(2)(d) of the Act and Rule 233 of the Companies (Court) Rules, 1959. The clearest position, therefore, is that the Liquidator, in such circumstances, is not obliged to file a suit, nor is the filing of a suit or an application in the nature of a suit before the winding-up court the only or the necessary way of invoking the jurisdiction of the Company Court. The proper proceeding is undoubtedly an application made to the winding-up Court, and the Court-fee payable thereon is as for an application and not as for a suit. The proper article applicable is Article 11(U) of Schedule II of the Mysore Court Fees and Suits Valuation Act (1958)."

(7) From these observations it is clear that it is open to the Official Liquidator to file an application or a suit and each one of them will have to be stamped in accordance with the provisions in the Court Fees Act.

(8) Section 446 (2) of the Companies Act reads as under :—

“446(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of :—

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the Company including claims by or against any of its branches in India;
- (c) any application made under section 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding-up of the company;

Whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding-up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.”

(9) This sub-section contemplates the filing of any suit or proceeding or any claim by or against the company and clearly an application making a claim regarding money due from a debtor is covered by clause (b) of sub-section (2) and for that purpose an application under section 446 of the Act can be filed. It is only if the proceeding is filed in the form of a suit that the court-fee payable will be as provided in Article I of Schedule I of the Court Fees Act, otherwise the application would have to be stamped as an application under the Companies Act as provided in Article 1(d) of Schedule II of the Court Fees Act which prescribes the fee payable on an application presented to the High Court under the Companies

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Act for taking some judicial action other than the order for winding-up as Rs. 13. This application filed by the Official Liquidator is directly covered by that clause of Article 1 in Schedule II and, therefore, the payment of Rs. 13 as Court-fee is correct. It has also to be remembered that the purpose and object of giving jurisdiction to the High Court to decide such matters as are mentioned in section 446(2) of the Act is to provide a speedy and cheap remedy to the Official Liquidator because the Companies (in liquidation) are generally unable to bear the heavy expenditure of litigation. If the Official Liquidator is called upon to pay full-court-fee on an application made under section 446(2) of the Act like a suit, the very purpose of the enactment will be lost.

(10) While construing the provisions of the Court Fees Act, we have to determine under which provision of the Court Fees Act does a document requiring the payment of Court-fee fall. If it falls or can fall under more than one provisions, then it is open to the person liable to pay the lowest fee prescribed. It is for the legislature to make the provisions clear. It may be noted here that all such claims are filed in the High Court under the Banking Regulations Act and a separate provision has been made for the payment of Court-fee on claims made or the appeals arising out of the decisions of those claim petitions under section 45-B of that Act. If the Legislature is so minded, such a provision can also be made in the Court Fees Act in respect of applications for claims under section 446(2) of the Act. In the absence of such a provision, the present petition is fully covered by clause (d) of Article 1 in Schedule II of the Court Fees Act.

(11) The learned counsel for the respondents has then relied on rule 11(a) of the Companies (Court) Rules, 1959, wherein it is stated that the applications mentioned therein have to be made by petitions and these applications do not include an application under section 446(2) of the Companies Act. It is, therefore, inferred that the applications under section 446(2) of the Companies Act have to be filed as suits and not as petitions. I regret I cannot agree with this submission. Section 446(2) does not only talk of suits, but all other proceedings or claims by or against the company and the adjudication of any question of priorities or any other question whatsoever; whether of law or of fact, which may relate to or arise in the course of the winding-up of the companies. The question of priority etc., has to be raised by way of an application and not by way of a suit.

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I agree with the learned counsel for the Official Liquidator that an application under section 446(2) of the Companies Act is covered by clause (b) of rule 11 which is a residuary provision. Some applications have to be made in the form of petitions while others are made by Judges' summonses. Rule 12 enumerates the various matters which have to be heard in open Court, but with a proviso that:—

“\* \* \* the Court may, if it thinks fit, direct that the hearing or any part of the hearing of any of the said matters, shall be held in Chambers.”

Clause (b) of this rule provides:—

“Every other matter or application may be heard and determined in Chambers provided that the Judge may adjourn any such matter into Court.”

(12) Under these provisions, an application under section 446(2) can be heard in Chambers as well as in Court if the Judge so directs. It cannot, therefore, be said that the applications or matters specifically enumerated in rules 11(a) and 12(a) are exhaustive. They make special mention of certain applications and matters to be heard in the manner provided therein and prescribe a general procedure for the other applications and matters in clause (b) of each rule. An application under section 446(2) of the Act falls squarely under clause (b) of rule 11 and clause (b) of rule 12. It cannot be said that the non-mention of such an application in rule 11(a) necessarily leads to the conclusion that an application claiming recovery of amount from a debtor necessarily amounts to a suit. In my opinion, in view of the provisions in clause (b) of sub-section (2) of section 446, a claim by a company can be made by an application and the present claim made by the Official Liquidator is covered by that provision. The application for the adjudication and recovery of that claim, therefore, falls under Article 1(d) in Schedule II of the Court Fees Act and the Court-fee of Rs. 13 has been correctly paid. The issue is decided against the respondents with no order as to costs.

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K.S.K.