

In Re: Official Liquidator of Various Companies (In Liq.)

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Court : Gujarat

Decided On : May-08-2008

Reported in : [2008]88SCL109(Guj)

Judge : K.A. Puj, J.

Acts : [Companies Act, 1956](#) - Sections 451(2), 527, 529, 529A and 530; Companies (Court) Rules, 1959 - Rules 290, 291, 291(2), 291(3), 291(4), 291(6), 293 and 360

Appeal No. : Official Liquidator Report No. 22 of 2008

Appellant : In Re: Official Liquidator of Various Companies (In Liq.)

Advocate for Def. : Sandeep Singhi,; Shalin N. Mehta,; Nalini S. Lodha a

Advocate for Pet/Ap. : Ameer Yajnik and; Mrugesh Jain, Advs.

Judgement :

K.A. Puj, J.

1. The Official Liquidator has filed this report seeking permission of this Court to deduct an amount of Rs. 3,54,90,803 from the liquidated assets of the 103 Companies (In Liquidation) as per Annexure A to this report, in terms of Rule 291 of the Companies (Court) Rules, 1959 and to pay the said amount to the public account of India by depositing a cheque of the said amount for crediting to the Central Government's account in Reserve Bank of India through designated Bank of Ministry of Corporate Affairs, Punjab National Bank, Ashram Road, Ahmedabad. The Official Liquidator has also sought the permission to encash the fixed deposit receipts for making payment of this amount to the Central Government as per Annexure A to this report.

2. Since the permission sought for by the Official Liquidator in the present report, if granted, will affect large number of Secured Creditors and workers, the Court was of the view that all concerned parties are required to be heard before passing any order on this report. Accordingly, this Court vide order dated 29-1-2008 directed the office to place a notice of hearing on the notice board informing all those learned advocates appearing for the Secured Creditors and Workers about this report and requesting them to collect the copy of the report from the Official Liquidator and to make their submissions before the Court on 5-2-2008. Pursuant to the notice placed on the notice board, inviting objections from the affected parties, Mr. Sandeep Singhi, learned advocate appeared on behalf of one of the Secured Creditors, namely, ICICI Bank Limited. He has raised a preliminary issue to the effect that no details are furnished by the Official Liquidator as to how the amount has been calculated by him. Despite the notice placed on the notice board, only one Secured Creditor has come forward. The Court, therefore, directed the Official Liquidator to issue notice to all Secured Creditors and Workers Union who are on his record so that if they have to say anything about the prayer made in his report, they may remain present before the Court. The Court has also directed the Official Liquidator to send report as well as the calculation of the two test cases, namely, Ambika Mills and Calico Mills along with the notice. The Court has also directed the Official Liquidator to issue notice on Standard

Chartered Bank, Kotak Mahindra Bank Limited and ARCIL, assignees in whose favour debts have been assigned and as per the directions issued by the Division Bench, they are required to be heard in all pending cases where the interest of the assignors is involved.

3. The Court thereafter passed further order on 18-3-2008. After considering the report filed by the Official Liquidator on 29-2-2008, along with which the Official Liquidator has furnished the calculation in two cases (1) Calico Mills and (2) Ambica Mills. The Official Liquidator has bifurcated the amount to be calculated on behalf of Central Government for fees under Rule 291(2), in three different categories. He has given details of the receipt under which inspection charges as well as FDR interest are mentioned. Under the heading 'Dividend payment', the amount paid/disbursed has been mentioned and again under the head 'Sale proceeds' amount of sale proceeds is mentioned. It is the say of the Official Liquidator that Central Government fees are to be collected under Rule 291(2)(i), 291(2)(ii) and 291(4). The grievance of the Secured Creditors, however, was that it was not clear from the details furnished by the Official Liquidator as to what is meant by inspection charges and FDR interest or dividend paid. In absence of the requisite details, it was not possible for the Secured Creditors to make their submissions. Accordingly, the Official Liquidator was directed to furnish the said details.

4. Pursuant to the order passed by this Court on 18-3-2008, the Official Liquidator has filed his report on 3-4-2008 stating therein that the Rule 291(2)(i) requires the Official Liquidator to pay to the Central Government its fee at the rate prescribed therein. Upon the total assets including produce of calls on contributories, interest on investments and rents on their properties realized or brought to credit by the Official Liquidator (sic). Under this rule, the Central Government fees are required to be paid on all realizations brought to the credit of the Company (In Liquidation) by the Official Liquidator. It is further stated in the said report that as and when assets of a particular Company are put at sale by issuing advertisement in the Newspapers, a date is specified in the advertisement on which the properties of the Company are kept open for inspection of the intending buyers before giving their offer. No fee for such inspection was charged by the Official Liquidator. However, as and when any particular intending buyer makes a specific request to the Official Liquidator, requiring inspection of properties of any Company for any purpose, a fee of Rs. 1,000 is charged if the assets are situated at Ahmedabad and fee of Rs. 2,000 is charged if the assets are situated outside Ahmedabad. Such realizations or collections are debited by the Official Liquidator under the head 'Inspection charges' which are in the nature of realizations and collections on which Central Government fee is required to be deducted in accordance with Rule 291(2)(i).

5. As far as interest on investment is concerned, Rule 293 of the Companies (Court) Rules, 1959 prescribes that all such money for the time being standing to the credit of the Official Liquidator at the Bank as is not mainly required for the purpose of winding up, shall be invested in Government security or in interest bearing deposits in State Bank of India or with the previous sanction of the Court, in interest bearing deposits in any other scheduled Bank in the name of the Official Liquidator as Liquidator of the particular Company to which the funds belong. It is, therefore, stated in the report that the money lying with the Official Liquidator in the various Company's accounts of any nature, whether realizations, collections, sale proceeds or other misc. receipts are invested by the Official Liquidator in FDRs with the Banks as required by Rule 293. The Official Liquidator is earning interest on such FDRs and the interest earned is credited to the respective Bank's account as realization on maturity of the fixed deposit receipts. Out of such realizations, which is in the nature of interest on investments, Central Government fee is required to be deducted as per Rule 291(2)(i) and the amount mentioned in the calculations as FDR interest, is of this nature.

6. So far as 'dividend paid' is concerned, the Official Liquidator has stated in his report that as and when orders are passed by this Court in making payment to Creditors of a particular Company (In Liquidation), the Official Liquidator is required in terms of Rule 290 of Companies (Court) Rules, 1959 to open a separate dividend account for each Company by depositing therein the total amount required to be distributed amongst Creditors as dividend, upon each declaration or order of this Court for payment of Creditors and the Official Liquidator is required to make payment of Creditors out of such separate dividend account opened by

him towards each declaration/distribution as ordered by this Court. The Official Liquidator is, therefore, issues cheques in the name of each individual Creditor including workman and others as required under Rule 290. Clause (ii) of Sub-rule (2) of Rule 291 requires that Central Government's fee at half the rate prescribed in Rule 291(2)(z) is required to be paid to Central Government for all distributions made by him by way of dividend paid to Creditors. He has, therefore, stated in his report that the Central Government at the said rate has been calculated by him which is reflected in the calculation as 'dividend amount'.

7. As far as sale proceeds are concerned, the Official Liquidator has stated in his report that on sale of the assets of a particular Company, the Official Liquidator realizes sale proceeds on which Central Government fee is required to be deducted under Rule 291(2)(i). But the Central Government fee is required to be deducted out of the realizations made by the Official Liquidator by way of sale of assets under Rule 291(4) at the rate prescribed therein. He has, therefore, submitted that the Central Government fee has been calculated by him under Rule 291(4) on all realizations made by him by way of sale of assets of the Company and the same is mentioned as sale proceeds in the calculations already placed on record.

8. Lastly, he has stated in his report with regard to misc. receipts. Sometimes, the Creditors, contributories and others are requiring inspection of files of the Official Liquidator under Rule 360 of the Companies (Court) Rules, 1959. The Official Liquidator is charging inspection fee from them under Rule 360. Sometimes, they are requiring abstracts or copies of files and records also. He is charging fee for providing copies and abstracts as per Rule 360. He is also collecting and realizing tender fee of Rs. 1,000 from each intending buyer and the money so collected is also credited to the respective Company's account which also forms part of the realizations classified as misc. receipts. Central Government fees is required to be deducted out of such misc. receipts also under Rule 291(2)(i).

9. The issue arose before the Court is whether the Official Liquidator is entitled to deduct the amount under Rule 291 of the Companies (Court) Rules and if he is entitled, in that case, whether calculation made by him is just and proper. On this issue, the learned advocates appearing for the respective parties have made their submissions.

10. Mr. Ashok L. Shah, learned advocate appearing for the Official Liquidator has submitted that Section 451(2) lays down that where the Official Liquidator becomes or acts as Liquidator, there shall be paid to the Central Government out of the assets of the Company, such fees as may be prescribed. Sub-section (2) of Section 451 indicates that the fee payable to the Central Government on the assets of the Company under liquidation is when the Official Liquidator becomes or acts as a Liquidator of the Company. The amount sought to be collected as a fee is required to be credited to the Central Government, but the fee is in the context of a winding up proceedings and where the Official Liquidator acts as a Provisional Liquidator or as Liquidator of the Company being wound up. Thus, the fee is in the context of the winding up proceedings and not in the limited context of the services rendered. The liability for payment falls on those persons who actually are benefited from the winding up proceedings and to the extent such persons derive benefit. He has further submitted that the conjoint reading of Section 451(2) and Rule 291 makes it amply clear that the Official Liquidator is entitled to collect fees at the rate prescribed under Rule 291 of the Rules. In support of his submissions, he relied on the decision of this Court in the case of Textile Labour Union v. O.L. of Rajprakash Mills Ltd. Company Application No. 164 of 2001 decided on 13-10-2005 wherein it is held that merely because the secured creditors have remained outside the winding proceedings, is no ground for repudiating or avoiding the liability to pay the fees to the Central Government as required under Rule 291(2)(t) of the Companies (Court) Rules. Since the secured creditors having remained outside the winding up proceedings, the fees may not be chargeable as required under Rule 291(4) but in the matter where the property is realized by the Official Liquidator and when even secured creditors have remained outside the winding up, net effect is the realization of properties of the company in liquidation by Official Liquidator and as the benefit is also to be derived consequently by the secured creditors by remaining outside the winding up proceedings, it cannot be validly contended that no fee whatsoever is required to be paid since the Official Liquidator has not discharged any duty or has not performed any duty for realisation of the property of the

company in liquidation. Further, as observed earlier, even if the quantification is to be made, it should be as provided under Rule 291(2)(i) of the Companies (Court) Rules.

11. Mr. Shah has further relied on the decision of the Karnataka High Court in the case of Titan Springs Ltd. In re [2005] 57 SCL 403 wherein it is held that a perusal of Sub-section (2) to Section 451 indicates that the fee payable to the Central Government out of the assets of the Company under liquidation is when the Official Liquidator becomes or acts as liquidator of the Company. A charge is created under this section. The manner of collection is as prescribed under the rule. A prescribed percentage of payments to secured creditors, promoters from the realization of the assets of the Company is the measure to levy and collect fee from the class of secured creditors who receive payment from the Official Liquidator. Therefore, so long as the Official Liquidator is appointed as a liquidator in charge of winding up proceedings and amount on behalf of such company is coming to the hands of the Liquidator which amount is available for distribution amongst different stake holders, it is inevitable that fee is to be levied and collected and remitted to the account of the Central Government as provided under Sub-section (2) to Section 451 and as prescribed under Rule 291 of the Companies (Court) Rules, 1959. The Court, therefore, held that it is not possible to accept the submission that the Secured Creditors did not receive the service of the Official Liquidator and, therefore, was not liable to pay any fee.

12. Based on the aforesaid statutory provisions contained in the Act as well as the Rules and the decisions of this Court as well as Karnataka High Court, Mr. Shah strongly urged that the prayer made by the Official Liquidator in the present report is required to be granted.

13. Mr. Sandeep Singhi, learned advocate appearing for the Secured Creditor, on the other hand, has submitted that one has to strictly construe the provisions of the Rule. Under Rule 291(2)(i) the fees to the Central Government are to be paid from the particular year's collection. From the total assets, including produce of calls on contributories, interest on investments and rents from properties, realized or brought to credit by the Official Liquidator. He has further submitted that under this sub-clause, Official Liquidator cannot charge fees on the interest on the investments of sale proceeds made by the Official Liquidator. He has further submitted that under Sub-rule (2) of Rule 291, the Official Liquidator is entitled to collect fees only on the total amount distributed in dividend or paid to contributories, Preferential Creditors and Debenture Holders. Secured Creditors having pari passu charge under Sections 529 and 529A are not covered under this sub-rule. The words 'Preferential Creditors' used here are in relation to the Preferential Creditors within the meaning of Section 530 of the [Companies Act, 1956](#). He has further submitted that under Sub-rule (4) of Rule 291, the Official Liquidator is entitled to collect fees only when he realizes property for Secured Creditors other than debenture holders. Simply because Sale Committee is constituted and the Secured Creditors and the Workers' Union become the members of the said Sale Committee wherein the Official Liquidator is also a Member or Chairman of that Committee, it cannot be said that he realizes the property for Secured Creditors. Hence, he cannot charge any fees under Sub-rule (4) of Rule 291. He has, therefore, submitted that the Official Liquidator cannot charge any fees beyond the scope of Rule 291 of the Rules.

14. Mr. Shalin Mehta and Mr. D.S. Vasavada, learned advocates appearing for the workers Union have also adopted the arguments of Mr. Sandeep Singhi and submitted that the fees charged by the Official Liquidator are not in accordance with the provisions of the Rules and hence, the prayer made by him in this report cannot be granted.

15. The Court has heard at length the learned advocates appearing for the respective parties and has also gone through the relevant statutory provisions contained in the Act as well as the Rules and also the decisions cited before the Court. It is necessary to have a close look at the provisions of Rule 291 of the Rules so as to properly adjudicate the question raised before the Court. Rule 291 reads as under:

291. Fees to be credited to Central Government.- In every winding-up where the Official Liquidator becomes or acts as Liquidator, there shall be paid into the public account of India in the Reserve Bank of India to the

credit of the Central Government, from out of the assets of the company in liquidation [or by the petitioner as provided in Clause (1) below], the fees determined in accordance with the following provisions:

(1) Where the Official Liquidator acts as Provisional Liquidator only,

Such fees as the Court may consider reasonable, to be paid out of the assets of the company or by the petitioner as the Court may direct, in respect of the services of the Official Liquidator as Provisional Liquidator.

(2) Where a winding up order is made and the Official Liquidator acts as liquidator of a company,

(i) Upon the total assets, including produce of calls on contributories, interest on investments and rents from properties, realized or brought to credit by the Official Liquidator, after deducting sums on which fees are chargeable under Clauses (3) and (4) below and the amount spent out of the money received in carrying on the business of the company, upon each year's collections.

On the first Rs. 10,000 or fraction thereof 3%
On the next Rs. 40,000 or fraction thereof 2%
On the next Rs. 50,000 or fraction thereof 1%
Above Rs. 1,00,000 3/4%
(ii) On the total amount distributed in dividend or paid to contributories, preferential creditors, and debenture holders by the Official Liquidator, half the above percentages.

(a) In computing the collections of each year, the year shall be taken as ending with 31st day of March.

(b) The said fees shall include the Official Liquidator's services as Provisional Liquidator and shall be subject to Clauses (8) and (9) hereunder.

(3) Where the Official Liquidator collects, calls or realises property for debenture holders,

The same scale of fees as under Clause (2) to be paid out of the proceeds of such calls or property.

(4) Where the Official Liquidator realizes property for secured creditors other than debenture holders.
On the amount realized for each secured creditor,
On the first Rs. 10,000 or fraction thereof 4%
On the next Rs. 40,000 or fraction thereof 2 1/2%
On the next Rs. 50,000 or fraction thereof 2%
Above Rs. 1,00,000 1 1/2%

16. The above Rule deals with the fees to be paid on account of the work done by the Official Liquidator. The Rule states that if the Official Liquidator becomes the liquidator of a Company, certain amounts as specified in the Rule have to be paid into the public account of India in the Reserve Bank of India to the credit of the Central Government from out of the assets of the Company in liquidation. In case, the Official Liquidator acts as a Provisional Liquidator, then either the Company or the petitioner as the Court may direct, have to pay such fees as the Court may consider reasonable for the service of the Official Liquidator. In case of a winding up order is made and the Official Liquidator acts as a liquidator, then on all realizations made, certain percentage as prescribed in the Rule has to be paid on each year's collection. Similarly, there is a commission to be paid for the realizations of property for debenture holders and other Secured Creditors. If the Official Liquidator acts as a Trustee under a Scheme of arrangement, or performs any special duties, the Court can fix the scale of fees. Similarly, if the Official Liquidator acts as Liquidator in a Creditor's winding up or in case there are additional liquidators under Section 527 of the Act, the fees payable are adjustable by the Court. Finally, if there is reconstruction of the Company in liquidation or a scheme of arrangement, concerning its affairs, or if for any other reason, the Court is of the opinion that the fees prescribed are excessive and reduction should be made, the Court has power to reduce the same. Sub-clause (1) of Rule 291(2) requires charging of fees by the Official Liquidator on each year's collections. The collection is from the total assets of the Company which inter alia, includes produce of calls, on contributories, interest on investments and rents from properties, realized or brought to the credit by the Official Liquidator. If the assets of the Company in liquidation are realized in a particular year, in that year, the Official Liquidator is entitled to charge fees. Similarly, if the Official Liquidator has received certain calls from the contributories or if the investments are

received at the time when he took over the charge of the assets of the Company and from that investment, interest is earned, on that interest amount, the Official Liquidator is entitled to charge fees and the properties of the Company which are let out and from the said properties, rents are collected, on that rent also, he is entitled to charge fees. However, when the assets of the Company are sold, amount is realized and instead of disbursing the said amount amongst the Secured Creditors under Section 529, 529A or 530 of the [Companies Act, 1956](#), such amount is invested and on that investment, if interest is earned, the Official Liquidator cannot charge fees on such interest amount. This amount ultimately belongs to the Creditors and workers and it is to be meant for distribution. Because of the pending litigations, the amount is not distributed immediately and because of delayed distribution, if some interest is earned, the Official Liquidator cannot charge any fees on that interest amount. It is, therefore, directed that if any such fee is charged on the interest amount, earned by the Official Liquidator on the investment of sale proceeds made in fixed deposit, such fees are required to be excluded.

17. So far as Clause (ii) of Rule 291(2) is concerned, the fees are to be charged on the total amount distributed in dividend or paid to contributories, Preferential Creditors and Debenture Holders by the Official Liquidator. Secured Creditors covered under Sections 529 and 529A of the Act do not fall in any of these categories and hence, the Official Liquidator cannot charge any fees on such distribution under Rule 291(2)(ii) of the Rules.

18. Sub-rule (4) of Rule 291 certainly empowers the Official Liquidator to charge fees on the amount realized by him on sale of the property for Secured Creditors, at the rate prescribed therein. The Court does not accept the argument of Mr. Sandeep Singhi that the Official Liquidator has not realized any amount when the property is sold by the Sale Committee through Court auction. When the property is sold after constituting the Sale Committee, under the supervision of the Court, the Official Liquidator renders services to the Secured Creditors. However, it cannot be said that the Official Liquidator performs any special duties and hence, there is no question of fixing any fees under Sub-rule (6) of Rule 291.

19. As far as inspection charges and other miscellaneous receipts are concerned, the Official Liquidator can certainly charge fees at the rate prescribed under Rule 291 of the Rules.

20. A close reading of Rule 291 reveals that Central Government fees are to be charged by the Official Liquidator at the stage of collection or realization. Fees charged at the stage of disbursement under the provisions of Sub-rules (3) and (4) of Rule 291, are required to be deducted from the amount collected or realized. After effecting such deduction of the amount so disbursed and the deduction of expenses incurred by the Official Liquidator, fees can be charged on such balance amount.

21. In the above view of the matter, the Official Liquidator is hereby directed to recalculate the amount of fees to be collected under the respective heads and only on those items which are covered under Rule 291(2)(i) or 291(2)(ii) or 291(4) are to be considered.

22. Subject to the aforesaid directions and observations, this report is accordingly, disposed of in the above terms.