
(2004) 10 DEL CK 0102

In the Delhi High Court

Case No : C.A. No. 385 of 1987 in C.P. No. 32 of 1979

Ashoka Auto and General Industries (P.) Ltd.

APPELLANT

Vs

Inder Mohan Puri and Others

RESPONDENT

Date of Decision : 15-10-2004

Acts Referred:

Banking Companies Act, 1949 — Section 450

Companies Act, 1956 — Section 458A, 542, 543, 543(1), 543(2)

Citation : (2005) 124 CompCas 422 : (2008) 3 CompLJ 492 : (2005) 62 SCL 19

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : S.K. Luthra and Manisha Tyagi, for the Appellant; K. Datta and P.C. Khanna and Ruchi Sindhwani, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The official liquidator has filed this application u/s 543(1) of the Companies Act, 1956, with the prayer that the respondents who are ex-directors of M/s. Ashoka Auto and General industries (P.) Ltd. (in liquidation) (hereinafter referred to as "the company") be directed to pay the official liquidator a sum of Rs. 13,86,346.30 along with interest at the rate of 12 per cent, per annum from the date of winding up.

2. The application discloses that after the passing of the winding up orders against the company and appointment of the official liquidator as the provisional liquidator with effect from November 4, 1980 and as the liquidator with effect from May 20, 1981, when final winding up orders were passed, the respondents herein failed to file the statement of affairs which was filed only on July 17, 1986. On going through the statement it was noted by the official liquidator that there were certain trade debtors and certain other debtors to whom company had given the loan and advances. In addition the company has also enormous liability towards various banks being secured creditors who are to be paid, apart from certain preferential creditors and unsecured creditors. However, during the

life time of the company, no action was taken to recover these debts which had become "bad debts". In these circumstances, a prayer is made that the respondents should pay these monies to the official liquidator.

3. Respondents Nos. 1 and 2 entered appearance after notices were issued. Respondents Nos. 3 and 4 have died. On behalf of respondents Nos. 1 and 2 a preliminary objection is taken about the maintainability of this application and the objection is that the same is barred by limitation.

4. Some of the dates which may be relevant for deciding this issue may be noted. The winding up petition was filed on May 26, 1979. The provisional liquidator was appointed on November 4, 1980, and final winding up order was passed on May 20, 1981. The present application was filed on May 18, 1987. Section 543(2) of the Companies Act prescribes a period of 5 years from the date of the order of winding up or of the first appointment of liquidator in the winding up, etc., as the limitation period within which the application under Sub-section (1) of Section 543 is to be made. We may reproduce herein entire Section 543 in its entirety :

"543. Power of Tribunal to assess damages against delinquent directors, etc.--(1) If in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company--

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Tribunal may, on the application of the official liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in Sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal thinks just.

(2) An application under Sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable."

5. As noted above, order of winding up was made on May 20, 1981, and if the 5 years period is to be reckoned from that date, the application should have been

filed by May 19, 1986. However, learned counsel for the official liquidator submits that application is within limitation as provisions of Section 458A are applicable as per which, in computing the period of limitation, a period of one year immediately following the date of winding up order has to be excluded. Therefore, according to the official liquidator, the period of 5 years would start after the expiry of one year from the date of the order of winding up was passed, i.e., May 20, 1982, and thus the 5 years period would expire on May 19, 1987, and as the present application was filed on May 18, 1987, the same would be within limitation. However, it is the contention of learned counsel for the respondents that Section 458A has no application in the present case.

6. It is thus clear that there is no dispute about the dates mentioned above. There is also no dispute that as per the provisions of Section 543(2) of the Companies Act, the application has to be made within 5 years of the date of winding up order. The only aspect which, Therefore, requires consideration is as to whether the benefit of one year as provided u/s 458A would be available in the present case or not. If that benefit is available, the present application is within time. If Section 458A has no application, the present application would be barred by limitation.

7. To appreciate the rival contention, we will have to look into the provisions of Section 458A which is couched in the following language :

"458A. Exclusion of certain time in computing periods of limitation.-- Notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the [Tribunal] the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded."

8. In support of his submission that Section 458A is not applicable, Mr. P. C. Khanna, learned counsel appearing for respondent No. 2 argued that a special period of limitation is provided by Section 543 under which the application has been filed. Therefore, all other periods of limitation provided by the Limitation Act/Companies Act would be inapplicable because the special provision overrides a general provision. Section 543 provides for a period of five years as limitation and it has to be within five years from the date of the order of winding up or of the first appointment of liquidator or of the misapplication, retainer, misfeasance or breach of trust as the case may be whichever is longer. It is also submitted that Section 543 deals only with misfeasance and not with nonfeasance. It deals with acts of commission and not of omission. In the present case there is no such allegation made against any of the directors. There was no fault of the directors and in any case even the official liquidator was guilty of contributory negligence and a guilty person cannot be a complainant.

9. The submission of Mr. S. K. Luthra, learned counsel for the official liquidator on the other hand was that Section 458A was a non obstinate provision as was clear from the words "notwithstanding anything in the. Indian Limitation Act, 1908, or in any other law for the time being in force" and, Therefore, wherever limitation period was provided for filing any petition/application such period would start only after the expiry of one year from the date on which company is wound up. His submission was that such provision would apply to each and every type of proceedings contemplated under the Companies Act.

10. Both counsel have relied upon various judgments of different High Courts in support of their respective submissions.

11. It was not disputed at the Bar that the provisions of Section 543 read with Section 458A are interpreted differently by different courts. The Andhra Pradesh High Court in the case of Official Liquidator v. T. J. Swamy [1992] 73 C C 583 has taken the view as projected by the official liquidator. On the other hand contrary view is taken by some other High Courts holding that Section 543 being a special provision which contains specifically the period of limitation, the benefit of Section 458A would not be available and the 5 years period will have to be counted with effect from the date of winding up orders. These judgments are :

1. B. Pattnaik Mines (Pvt.) Ltd. v. Bijoyananda Pattnaik [1994] 80 C C 237 (Orissa).

2. Kabini Papers Ltd. v. M. D. Shivananjappa [1999] 98 C C 675.

3. Official Liquidator, Palai Central Bank Ltd. (In liquidation) v. K. Joseph Augusti [1966] KIT 411.

12. As the courts in the two sets of judgments have taken diametrically opposite views, it would be in the fitness of things to find out the reasons for holding the divergent views as given in these judgments. Let me first take up the judgments which lend credence to the contentions advanced by the respondents.

13. In B. Pattnaik Mines (Pvt.) Ltd. v. Bijoyananda Pattnaik [1994] 80 C C 237, the Orissa High Court proceeded to examine the matter by stating the scope and purport behind Section 543 of the Companies Act. It was held in the said judgment that the court is empowered to examine the conduct of the person, director, manager, liquidator, officer of the company and compel him to repay or restore the money or property or any part thereof with interest at such rate as the court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the court thinks just. It was also pointed out that the court is not empowered to proceed suo motu against the aforesaid persons and action could be taken only on the application of the old or the liquidator or of any creditor or contributory. The court also found that as per the provisions of Section 458A of the Act, the additional period of one year would be available for any suit or application in the name and on behalf of the company. Thus, opined

the court, in order that Section 458A applies, both the conditions had to be fulfilled ,i.e., application in the name of the company and on behalf of the company must be satisfied. Then the court proceeded to examine this aspect and came to the conclusion that the application filed u/s 543 of the Act would not be construed as an application in the name and on behalf of the company and in fact this is an application by the old in his own independent right although for the benefit of the company. For coming to this conclusion, the learned judge relied upon the judgment of the Kerala High Court in the case of Official Liquidator, Palai Central Bank Ltd. (In liquidation) v. K. Joseph Augusti [1966] KLT 411. The contention of the old that while dealing with the liquidation proceedings, he represents the company and, Therefore, application u/s 543 filed by the old must be taken to be an application in the name and on behalf of the company was repelled.

14. The Karnataka High Court in *Kabini Papers Ltd. v. M. D. Shivananjappa* [1999] 98 C C 675 also took the view that the five years period of limitation for initiation of proceedings by the old would not be extended by adding periods mentioned in Section 458A of the Companies Act. However, this view was backed by altogether different reasons, namely, application of the principle that where there is a special provision it overrides the general provision of law. In the opinion of the court, Section 458A contained a general provision and provides for certain exclusions. On the other hand Section 543 was a specific provision providing for starting point, i.e., culmination of the winding up proceedings, namely, the date when the winding up order is passed or the date when old was appointed as liquidator as Section 543 specifically provided starting point for the 5 years period in the aforesaid manner, the provisions of Section 458A could not be read into this. The relevant portion where this discussion crops up is as under (page 678) :

"In my considered view, there is absolutely no warrant for this to be done as it is well-settled law as far as the interpretation of statutes is concerned that where the provision is clear and unambiguous it is not permissible to seek to graft on anything from another provision as this would be doing violence to the section. In the instant case, as I have already observed, a more than sufficient period of time stretching as long as five years is provided to the official liquidator, and if there had been any intention on the part of the Legislature to extend this period by even a single minute, then the section would say so and if as contended on behalf of the official liquidator the intention was to give the official liquidator the benefit of one year prescribed u/s 458A of the Act then the section would have specifically mentioned, that this provision is notwithstanding whatever is provided for in Section 458A. That is not the wording of Section 543(2) and this being the position, I have no hesitation in holding that the only correct way in which the section can be applied is to construe it strictly."

15. The contra view projected by the Andhra Pradesh High Court in *Official Liquidator v. T. J. Swamy* [1992] 73 C C 583 gives the benefit of Section 458A on

the ground that misfeasance proceedings initiated by the old of the company u/s 458A of the Act are in fact the proceedings in the name and on behalf of the company in liquidation and further that as Section 458A of the Act begins with a non obstinate clause, it has the overriding effect. For this proposition that application u/s 543 is also in the name and on behalf of the company the court followed the judgment of the Bombay High Court in the case of B. Mehta and Co. v. Puranmal Bubna [1979] 49 C C 98. It also borrowed the observations of another Division Bench judgment of the Bombay High Court in the case of Gleitlorgor (India) Pvt. Ltd. v. Mazagaon Dock Ltd. [1985] 57 C C 742 wherein reason was given for provision u/s 458A which intended to extend the limitation period for the benefit of the company (in liquidation) and the official liquidator and this reason was to enable the official liquidator to take charge of the company's affairs to examine the records, accounts books, study the statements, decide against whom to proceed and in what manner. He was also supposed to find out resources for initiating and conducting the proceedings. The court also drew parallel with the provisions contained in Section 450 of the Banking Companies Act, 1949, and interpretation of that provision by the Supreme Court in the case of Official Liquidator, Supreme Bank Ltd. v. P. A. Tendolkar [1973] 43 C C 382 was relied upon. In that case also the official liquidator had initiated misfeasance proceedings against the directors and officers of the bank (in liquidation). An objection was raised that Section 450 would apply only to a claim by the banking company and this contention was rejected by the Supreme Court holding that the liquidator really represented the company and that claim made by liquidator, Therefore, a claim "by the banking company". The Andhra Pradesh High Court in this judgment, Therefore, concluded that misfeasance proceedings initiated by the official liquidator u/s 543 of the Act were in the name and on behalf of the company.

16. I may state at the outset that the reasoning given by the Karnataka High Court may not be sound. No doubt Section 543(2) of the Act provides for a 5 years period of limitation to be counted with effect from the date when company is wound up or the official liquidator is appointed. However, Section 458A specifically provides for exclusion of certain time in computing the periods of limitation and is a non obstinate clause as it starts with the expression "notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force". It mandates that the period from the date of commencement of winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded. Therefore, even if Section 543 states that 5 years period is to commence from the date of winding up, in view of Section 458A one year further period is to be provided. When we read this along with the justification for providing this one year period as pointed out by the Bombay High Court in the case of B. Mehta and Co. v. Puranmal Bubna [1979] 49 C C 98, there would not be any difficulty in coming to this conclusion.

17. However, before the provisions of Section 458A are made applicable, what is to be further satisfied is that the proceedings are in the nature of any suit or application in the name and on behalf of the company which is being wound up. It is the satisfaction of this condition, that would make Section 458A applicable. In this conspectus, my task would be as to whether to follow the view of the Orissa and Kerala High Courts or to follow the view taken by the Andhra Pradesh High Court as the two views are divergent in nature.

18. As noted above, the view of the Orissa and Kerala High Courts proceeds on the premise that proceedings u/s 543 of the Act are not on behalf of the company but by the official liquidator in his personal capacity. This view may not be correct in view of the judgment of the Supreme Court in the case of Official Liquidator, Supreme Bank Ltd. v. P. A. Tendolkar [1973] 43 C C 382 which is directly on the point, albeit on consideration of the provisions of the Banking Companies Act. However, two provisions are in pari materia in nature. Section 450 of the Banking Companies Act confers similar powers on the official liquidator to initiate the misfeasance proceedings against the directors and officers of the bank (bank in liquidation). The apex court answered that in such proceedings liquidator really represents the company and, Therefore, the claim made by the liquidator would be a claim by the banking company. This judgment was relied upon by the Andhra Pradesh High Court in concluding that even the proceedings u/s 543 of the Act would be the proceedings on behalf of the company and not by the official liquidator in his personal capacity. Therefore, as the view of the Andhra Pradesh High Court is based on the judgment of the Supreme Court, which is binding on all High Courts under Article 141 of the Constitution of India, I would prefer to adopt the same line of thinking and would respectfully disagree with the view expressed by the Orissa and Kerala High Courts. Therefore, I am inclined to conclude that Section 458A of the Act would be applicable and the benefit of additional one year as provided in the said provision would be available in proceedings u/s 543 of the Act.

19. Be that as it may, on the second aspect the respondent deserves to succeed. The official liquidator in the application has not given any details in support of the allegation in the petition about the so called acts of misfeasance on the part of the respondent/ex-directors. What is stated in para. 5 of the application is that as per the statement of affairs filed, the book value of the assets is Rs. 14,66,438.57 but for all practical purposes the actual realization value is absolutely nil. Rs. 11,11,154.17 out of the aforesaid amount, comprise the trade debtors and Rs. 2,47,917.42 represents the loan and advances. It is alleged that as no action was taken by the directors in time against the said trade debtors to realize the money, the claims have become time barred and, Therefore, "bad debts" and, Therefore, ex-directors are to be squarely blamed for the same. It is also stated that except for a few, no addresses of the persons from whom the trade debts or loan and advances were recoverable were given and, Therefore, no proceedings were initiated against them. In these circumstances the prayer made is as under:

"the respondents are liable to pay to the official liquidator the aforementioned sums of money with interest at 12 per cent. p.a. from the date of winding up to date of payment."

20. Mr. P. C. Khanna, learned senior counsel appearing for one of the ex-directors, namely, respondent No. 2 pleaded that the petition u/s 543 was for misfeasance and not for nonfeasance. He submitted that there were no specific allegations against particular directors to satisfy the conditions contained in Section 543 of the Act. Such a petition, according to him, was not maintainable and in support he relied upon judgments of various High Courts including our own High Court in the case of *Official Liquidator, Milan Chit Fund and Finance P. Ltd. v. Joginder Singh Kohli* [1978] 48 C C 357 and in the case of *Security and Finance Pvt. Ltd. v. B. K. Bedi* [1991] 71 C C 101 . This court speaking through H. L. Anand J. held that where, in an application under Sections 542 and 543, apart from vague allegation made against all the directors in relation to the conduct of the business of the company, there is no specific allegation made against any specific director, the application will be dismissed in so far as that director is concerned. This issue was dealt with more elaborately in the other judgment of this court in the case of *Security and finance Pvt. Ltd. v. B. K. Bedi* [1991] 71 C C 101 and after taking note of many judgments on the issue the court was of the opinion that in order to apply the provisions of this section two conditions must be satisfied, namely, (A) the person against whom an order is made must belong to one of the category specified and (B) he must have either applied or retained any fund or become liable or accountable for any money or property of the company or being guilty of any misfeasance or breach of trust in relation to the company. The court thereafter taking note of the various judgments of different High Courts distilled the principle in the following words (page 122) :

"Under Section 543 of the Act, the court is vested with jurisdiction to examine the conduct of the past or present director, manager, liquidator or any other officer of the company to find out whether he has misapplied or retained or become liable or accountable for any money or property of the company; or he has been guilty of any misfeasance or breach of trust in relation to the company and, where any such conduct is found attributed to any such person, then, to compel him to repay and restore the money or property, or any part thereof to the company. In other words, under this section, the court is to examine the conduct of an individual director or officer and to pass an order against him, if such a person is personally found to be liable for misapplication, etc., of the money or property of the company or, otherwise, is guilty of any misfeasance or breach of trust in relation to the company. It is thus clear that, to enable the court to examine the conduct of an individual director or officer and to pass an effective order to make him personally liable for misapplication, etc., of the money or the property of the company, there has to be positive and specific evidence and pleadings in respect of the individual director of an act of the nature contemplated by the section. In the absence of such specific allegations

and positive evidence, it is not possible or proper for the court to indulge in a fishing or roving enquiry so as to compel the individual director to reimburse and/or compensate the company. The principles with regard to the pleadings and proof are well-settled. There cannot be a general and roving enquiry into the conduct of a person sought to be made liable."

21. Admittedly, there is no allegation of misfeasance or breach of trust against any specific director. There is also no allegation that any director has misapplied or retained any money or property of the company. Whether any of the directors have become liable or accountable for the money which is lost in the process as action was not allegedly taken in time, no particular allegations are made against any particular director. The application is, Therefore, dismissed on this ground.