
(1994) 09 MAD CK 0036
In the Madras High Court
Case No : O.S.A. No. 139 of 1985

Best and Crompton Engineering Ltd.	APPELLANT
Vs	
Official Liquidator	RESPONDENT

Date of Decision : 01-09-1994

Acts Referred:

Companies Act, 1956 — Section 391, 44(2), 446, 446(1), 446(2)
Limitation Act, 1963 — Article 1, 137

Citation : (1995) 82 CompCas 77

Hon'ble Judges : M. Srinivasan, J; Doraiswamy Raju, J; A.R. Lakshmanan, J

Bench : Full Bench

Advocate : S.V. Subramaniam, for the Appellant; G. Viswanathan, for the Respondent

Judgement

Srinivasan, J.—Electrical Accessories Private Ltd. (company in liquidation), hereinafter referred to as "the company", had dealings with Best and Crompton Engineering Ltd., the appellant herein. The date of the last transaction was December 16, 1976. The closing of the accounting year for the appellant was December 31, 1976. It is not in dispute that the transactions were covered by a mutual, open and current account. The petition for winding up of the company was filed on January 24, 1977, in C.P. No. 21 of 1977. The order of winding up was passed on March 2, 1978. On March 2, 1982, the official liquidator presented an application u/s 446(2) of the Companies Act, 1956, praying for a direction to the appellant pay a sum of Rs. 39,561.92 plus interest of Rs. 9,428.57 totalling in all Rs. 48,990.49 with subsequent interest at 6 per cent. per annum from the date of application till the date of realisation. The report of the official liquidator filed in support of the application merely stated in

paragraph 7 thereof that the claim was not barred by limitation in view of the provisions contained in section 458A of the Companies Act, 1956, and sections 18 and 19 of the Limitation Act, 1963. Apart from that sentence, the report did not contain any particulars as to how the claim was in time. In the counter filed by the appellant it was contended that the claim was barred by limitation and that the company was bound to give credit to certain payments made by the appellant and also to the value of certain articles returned by the appellant to the company. The learned single judge, who heard the application, passed an order on September 21, 1984, rejecting the plea of limitation. On the other plea, the learned judge found that there was no evidence regarding return of certain items to the company by the appellant; but accepted that the appellant had paid a sum of Rs. 2,603,55 to the company. Deducting the sum, the learned judge passed a decree for Rs. 36,958.37 with interest at 6 per cent. per annum from March 2, 1976, till the date of application and also future interest at the same rate till the date of payment.

2. The appellant preferred this appeal against the said decree. When the matter came up before a Division Bench, it opined that an earlier Bench decision of this court in *Official Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd.* [1988] 63 Comp Cas 749 on the question of limitation required reconsideration and accordingly referred the case to a Full Bench. On the said order of reference, the Chief Justice has constituted this Full Bench to hear the appeal and decide the same.

3. There is no dispute before us on the facts or as to the correctness of the amount for which the decree has been passed against the appellant. The only question canvassed before us relates to limitation.

4. According to the appellant, the application by the official liquidator was clearly barred by limitation, as the cause of action therefore arose on December 31, 1976, and limitation should be computed from that date. It is contended by the appellant that if the periods mentioned in section 458A of the Companies Act are excluded, the total period to be so excluded in this case will be five years, one month and eight days. The last date for filing the application was February 9, 1982, and as the application was filed only on March 2, 1982, the same was barred. On the other hand, learned counsel for the official liquidator has submitted that the starting

point of limitation is the date of the winding up order, viz., March 2, 1978, and the relevant article in the Limitation Act being article 137, the period of limitation is three years as provided in the said article plus one year from the date of the winding up order, as provided in section 458A of the Companies Act. Thus, according to him, the last date of limitation is March 2, 1982, and on that date, the application was filed and, therefore, in time.

5. Before considering the respective contentions of the parties, and advertent to the rulings referred to by them, it is necessary to highlight certain matters in this case. From the order of the learned single judge, it is not very clear whether he accepted the position that the starting point of limitation is the date of the order of winding up. After stating categorically that the period of limitation has to be reckoned from December 31, 1976, the learned judge stated as follows :

It is true that in *Fabrimats (Madras) Pvt. Ltd., In re* [1982] 52 Comp Cas 501 (Mad), I have held that the period of limitation in respect of any suit or application, not only in the name of, but also on behalf of, the company, is the usual period prescribed under the Limitation Act, 1963, plus an aggregate of the two periods mentioned in section 458A of the Companies Act, 1956. But, it is relevant to point out that the decision of the Delhi High Court Full Bench was not brought to my notice. I had an occasion to consider the said decision of the Full Bench of the Delhi High Court in C.A. No. 191 of 1983. On the strength of the Full Bench decision of the Delhi High Court, I have held that at first it has to be ascertained as to whether the debt was alive on the date of the presentation of the winding up order and that if the debt were to be alive then the period from the date of commencement of the winding up proceeding to the date on which the winding up order is made and the period of one year immediately after the winding up order shall be excluded besides the period in the law of limitation. In this case, the period of pendency is one year, one month and eight days. The usual period of limitation is three years. One more year has to be excluded according to section 458A. If the period is so reckoned, the applicant has five years, one month and eight days to present the application and the same was presented on March 2, 1982, and it certainly falls within the said period. Thus I find that the defence regarding the limitation has to be rejected.

6. If the learned judge had accepted that the period of limitation had to be reckoned from December 31, 1976, by adding a period of five years,

one month and eight days, as stated in the above passage, the application was clearly out of time, as the last date was February 9, 1982. The

learned judge has nowhere said in his order that the starting point of limitation was the date of winding up order. After referring to his earlier

judgment in Fabrimats (Madras) Pvt. Ltd.'s case [1982] 52 Comp Cas 501 (Mad), he referred to the decision of the Delhi High Court Full Bench

in C.A. No. 191 of 1983 which, according to him, was not brought to his notice while deciding the earlier case. One has to assume that the

learned judge chose to differ from the view taken by him in the earlier case and to follow the ruling of the Full Bench of the Delhi High Court.

7. Even before the order of reference was made by the Division Bench in this case on April 24, 1992, the same Division Bench had on December

4, 1991, confirmed the judgment of the learned single judge rendered in Fabrimats (Madras) Pvt. Ltd.'s case [1982] 52 Comp Cas 501 in O.S.A.

No. 34 of 1984. In that judgment, the Division Bench extracted the following passage from the judgment of the learned single judge :

According to the provisions, the period of limitation in respect of any suit or application not only in the name of, but also on behalf of, the

company is the usual period prescribed under the Limitation Act plus the period from the date of commencement of the winding-up of the

company to the date of the winding-up order (both inclusive) and also a period of one year immediately following the date of the winding-up order.

That is the plain meaning of the said section. It is the aggregate of the two periods-(i) the period from the date of commencing of the winding-up

proceedings to the date of the order of the winding-up; and (ii) one year immediately following such date of order of winding-up, that shall be

excluded in reckoning the period of limitation.

8. After extracting the above passage, the Division Bench said :

The above in our view is the correct approach, which will permit addition of the period of the pendency of the proceedings as well as one year

from the date of the winding up order thus making available to any applicant or plaintiff this additional period to be computed along with the period

of limitation prescribed under the Limitation Act. No error has been committed by

the court below in this behalf.

9. When the present matter came up before the same Division Bench their decision in O.S.A. No. 34 of 1984, referred to above, was not brought

to their notice. Without making any reference to the said judgment, the Bench passed the following order :

The sole but a question of far-reaching consequence in the instant appeal is as to what will be the reckoning date of the period of limitation of a

claim u/s 446(2)(b) of the Companies Act. There is no dispute that the period of limitation for the purpose of any such claim shall be as under

article 137 of the Limitation Act, 1963. It appears, however, that quite a few courts have taken the view that the expression "any claim" occurring

in section 446(2)(b) of the Act will have to be interpreted as a claim which is legally enforceable and that such right to file a claim petition u/s

446(2)(b) for a claim enforceable at law will have to be preferred within the period of limitation prescribed under article 137 of the Limitation Act

read with section 458A of the Companies Act and that the reckoning date for this purpose would be the date of the winding-up order. Thus, the

period of limitation of three years from the date of the winding-up order after giving full benefit of section 458A of the Companies Act would be

under article 137 of the Limitation Act (see Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies

Corporation (P.) Ltd., and K.P. Ulahannan and Others Vs. The Wandoor Jupiter Chits (P) Ltd., . A contrary view, however, has been taken by a

Division Bench of this court in Official Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd. [1988] 63 Comp Cas 749, wherein after

giving a restricted meaning to the word "claim" in section 446(2)(b) of the Companies Act, the Bench has said (at page 762) :

The Full Bench decision of the Delhi High Court in Jaimal Singh Makin v. Official Liquidator, Majestic Financiers P. Ltd. [19978] 48 Comp Cas

419, considered the question as to whether the provision of section 446(2) which applies to any claim could be applied to claims which were

already barred by time on the date when the application is so filed u/s 446(2)(b), and held that the expression ""any claim"" in clause (b) of section

446(2) means any claim enforceable at law and, since the right to avail of the remedy provided under clause (b) of section 446(2) arises only after

the passing of the winding up order, the appropriate date to be seen for the purpose of determining whether the claim was enforceable at law or

not, is the date of the winding up order. With great respect to the learned judges of the Delhi High Court, we are unable to agree with this view.

Neither section 446(2) nor section 458A relates to any determination of the enforceability of the claim or the dates on which it shall be

enforceable. Section 446(2)(b) only enables the liquidator to make the claim by way of an application in the company court. The question whether

the claim is enforceable or not, is to be determined with reference to the provisions in the Limitation Act, and that could be decided only with

reference to the cause of action and the date on which the suit or application is filed. As already stated, section 458A is only a computation

provision for the purpose of limitation. Section 446 confers jurisdiction on the company court and enables the liquidator to file a suit or an

application before the company court in respect of a money claim. No claim is wiped out except by payment and discharge. Only the enforceability

of that claim for recovery may be barred. Whether the claim is barred or not, is only a question of limitation."

10. The restricted meaning given by the Bench in which the Full Bench judgment of the Delhi High Court cited above, was referred to, however,

has not been fully endorsed by another Division Bench of this court in the case of Radhakrishnan (V.) v. P. R. Ramakrishnan [1993] 78 Comp

Cas 694. In this case, it is observed as follows (at page 719) :

"Learned counsel for the appellants has taken us through a large number of judgments on the subject. Most of them appear to rest upon the

continuity of the provision in section 171 of the 1913 Act in sub-section (1) of section 46 of the present Act. A Bench of this court in Official

Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd. [1988] 63 Comp Cas 749 has gone into this aspect of the law and clarified in some

detail how the jurisdiction u/s 446(2) is enlarged and how far thus jurisdiction helps the official liquidator to initiate action with respect to the

matters pertaining to one or the other clauses of sub-section (2) of section 446. We are, however, constrained to observe that there is an apparent

mistake in this judgment in understanding the ratio of the judgment of the Supreme Court on section 45B of the Banking Companies Act, 1949, in

Dhirendra Chandra Pal v. Associated Bank of Tripura Ltd. [1955] 25 Comp Cas 19, when this court said (at page 758) :

But what is relevant for our purpose is that section 45B was wide and, therefore, the Supreme Court observed that even with regard to the

recovery of property, movable or immovable, summary proceedings by way of applications could be resorted to by the liquidator. Even there, the

learned judges have definitely stated that the procedure must be taken to be one left to the judgment and discretion of the court having regard to

the nature of the claim and the questions therein involved.

If we have to understand that the Bench pronounced that if it is a claim with respect to shares in a company, although it is a property, suit alone is

the recourse, we are afraid it will be in the teeth of the judgment of the Supreme Court."

11. Since no question of limitation arose for consideration in O.S.A. No. 2120 of 1991 nothing has been said as to whether the view taken with

respect to the limitation also in the case of Official Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd. [1988] 63 Comp Cas 749

(Mad) is not acceptable to the Bench. We are, however, directly faced with the question of limitation in the instant case. The two possible views

are fully expressed in the judgments aforecited. It has, however, to be seen that a limited meaning to the word "claim" in section 446(2)(b) of the

Companies Act will bring it almost in clause (a) thereof and substantially in the same field in which sub-section (4) to section 446 shall operate,

finally restricting the role which section 446(2) has been intended to play. The Bench deciding O.S.A. No. 210 of 1991, has gone in some detail in

to the scheme of section 446(1) and (2) and referred to various judgments on the subject to hold that the scope of an application u/s 446(2) is

different from that of any proceeding under sections 446(1) and 446(2)(b) and other clauses thereof of the legality and the jurisdiction of the

company judge. We, however, are of the opinion that the Bench decision in Official Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd.

[1988] 63 Comp Cas 749 requires reconsideration. Accordingly, we refer the case to a Full Bench.

12. We are told that the statement contained in the order of reference that there is no dispute that the period of limitation for purpose of the claim

shall be as under article 137, Limitation Act, 1963, is erroneous, and that the said matter was very much in dispute. Learned counsel for the official

liquidator agrees that the appellant disputed the applicability of article 137 of the Limitation Act. If there was no such dispute before the Bench,

there would have been no necessity for referring these matter to a Full Bench.

13. We must point out that out that the order of reference is not clear as to why the learned judges of the Division Bench are of the opinion that the

ruling in Official Liquidator, Radel Service P. Ltd. v. Southern Screws P. Ltd. [1988] 63 Comp Cas 749 (Mad) requires reconsideration. No

doubt, the order of reference has referred to the decision of the same bench in Radhakrishnan (V.) v. P. R. Ramakrishnan [1993] 78 Comp Cas

694 (Mad) and the observations made therein expressing a doubt as to the correctness of the pronouncement in Southern Screws P. Ltd.'s cases

[1988] 63 Comp Cas 749. The doubt was expressed only with regard to the maintainability or otherwise of an application and not limitation. In

Southern Screws P. Ltd.'s case [1988] 63 Comp Cas 749 (Mad), two questions were considered by the Division Bench. The first was whether

the official liquidator could file an application for recovery of the amount due to the company in liquidation and whether his remedy was only to file

a suit in the company court. The second question related to limitation. On the first question, the answer of the Division Bench was that the

application was maintainable and it was not necessary for the official liquidator to file a suit. However, in the latter decision in Radhakrishnan (V.)

v. Ramakrishnan (P.R.) [1993] 78 Comp Cas 694 (Mad), the Division Bench said (at page 720) :

If we have to understand that the Bench pronounced that if it is a claim with respect to shares in a company, although it is a property, a suit alone

is the recourse, we are afraid it will be in the teeth of the judgment of the Supreme Court.

14. We are unable to find any warrant for such an observation in the later judgment as in Southern Screws P. Ltd.'s case [1988] 68 Comp Cas

749 (Mad) there was no decision by the Bench that a suit was the only remedy.

15. Apart from that dissent by the later Bench on the question as to the from of the remedy or the procedure to be adopted by the official

liquidator, there is no dissent by any other Bench to the views expressed in the

Southern Screws P. Ltd."s case [1988] 63 Comp Cas 749 (Mad)

on the question of limitation. For the first time, the Bench which referred this matter to the Full Bench has stated that the decision in Southern

Screws P. Ltd."s case [1988] 63 Comp Cas 749 (Mad) requires reconsideration.

16. Now we shall proceed to consider the relevant statutory provisions on the interpretation of which the question of limitation has to be decided.

Section 446 of the Companies Act, 1956, is in the following terms :

(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal

proceeding shall be commenced, or if pending at the date of winding-up order, shall be proceeded with, against the company, except by leave of

the court and subject to such terms as the court may impose.

(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 u/s 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.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding-up of the company is

proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

17. Sub-section (1) relates to proceedings against the company and provides for

stay of proceedings already pending on the date of the winding up order or on the date of appointment of the provisional liquidator. It also bars the commencement of any proceeding after the said dates against the company without the leave of the company court. Sub-section (2) confers jurisdiction on the court which is winding-up the company to deal with suits, proceedings or claims by or against the company as well as applications u/s 391 of the Companies Act and the question of priorities.

Sub-section (3) provides for transfer of any suit or proceeding by or against the company in any other court to the winding up court. Sub-section (4) excludes the applicability of sub-sections (1) and (3) to any proceeding pending in appeal before this court and the Supreme Court. The section as such Does not contain any provision for limitation. Sub-section (2) is a new provision introduced in the Act of 1956 and amended in 1960. The corresponding section 171 of the Indian Companies Act, 1913, did not contain any such provision. The object of sub-section (2) is to save the company in liquidation from long drawn out and expensive litigation and to accelerate the disposal of the winding-up proceedings.

Referring to the provisions of the said sub-section, the Supreme Court observed in *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, :

It specifies the contours of the jurisdiction of the court which is winding up the company. It confers special jurisdiction on the court which is winding up the company to do things that are set out in the various sub-clauses notwithstanding anything contained in any other law for the time being in force. Section 446(2) thus conferred special jurisdiction on the court winding up the company which otherwise it may not have enjoyed...

Sub-section (2) of section 446 confers jurisdiction on the court which is winding up the company to entertain and dispose of proceedings set out in clauses (a) to (d). The expression "court which is winding-up the company" will comprehend the court before which a winding-up petition is pending or which has made an order for winding-up of the company and further winding-up proceedings are continued under its directions.

Undoubtedly, a look at the language of section 446(1) and (2) and its setting in Part VII, which deals with winding-up proceedings, would clearly show that the jurisdiction of the court to entertain and dispose of proceedings set out in sub-clauses (a) to (d) of sub-section (2) can be invoked in

the court which is winding up the company.

18. There is no dispute before us that u/s 446(2), the official liquidator can file an application before the company court for recovery of money due

to the company in liquidation from their parties or in the alternative file a regular suit for recovery of the same either in the company court or in civil

court which has jurisdiction to deal with the matter. As pointed out earlier, the procedure to be followed by the official liquidator was one of the

matters considered by the Division Bench in *Southern Screws P. Ltd.*'s case [1988] 63 Comp Cas 749 (Mad) and it was held that it is open to

the official liquidator to file an application instead of a suit in the company court. In this connection, the Bench said (at page 759) :

It is true that the provisions of section 446(2) have been amended with the object and purpose of avoiding delay and expenses and to enable the

liquidator to file an application in the company court itself and to seek relief in respect of claims by or against the company. But, as we have

already stated, claims in this respect should be treated as claims for money or actionable claims and even here, an option is given to the liquidator

either to resort to the proceeding by filing an application or to file a regular suit.

In a recent decision a learned single judge of this court in *Fabrimats (Madras) P. Ltd., In re* [1982] 52 Comp Cas 501 (Mad), has held that though

the claim on behalf of the company in liquidation, filed by an official liquidator, is in the form of an application, it is really a plaint, and hence such

application should contain, as in the case of a plaint, all the materials necessary to sustain the claim as also the particulars regarding the claim being

in time, particularly when an extended period of limitation is claimed on behalf of the company. We are in entire agreement with this view of the

learned judge.

For the foregoing reasons, we hold that the application filed by the official liquidator is maintainable.

19. The said proposition has not been disputed before us.

20. On the question of limitation, learned counsel for the official liquidator accepted categorically that if a claim was barred by limitation on the date

when the petition for winding-up was filed, it could not be revived by the official liquidator and he was not entitled to institute any proceeding before

the company court or any other court for recovery of any claims. In fact, he

referred to the provisions of section 456 of the Companies Act and pointed out the expression "actionable claims to which the company is or appears to be entitled". He submitted that if the company was not entitled to an actionable claim on the date when the application for winding-up was filed, the official liquidator cannot make any claim thereto. The only question which is argued before us related to the starting point of limitation for a claim which was not barred on the date of the filing of the petition for winding-up.

21. Now, we shall advert to the provisions of section 458A of the Companies Act. The section is in the following terms :

Now withstanding 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 court, 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.

22. It is obvious on a reading of the section that it does not prescribe a period of limitation. It is only a provision for computing the period of

limitation which is prescribed elsewhere. There is no dispute that the Companies Act does not prescribe a period of limitation for a suit or

application for recovery of a debt due to the company from a third party. The only statute that provides for limitation is the Limitation Act. The

Schedule to the said Act contains three divisions, the first relating to suits, the second relating to appeals and the third providing for applications.

But for the provisions in section 44(2) of the Companies Act, the only remedy for recovery of the money due to the company was to file a suit,

which will fall within article 1 of the Limitation Act. The period of limitation prescribed therein is "three years" from "the close of the year in which

the last item admitted or proved is entered in the account; such year to be computed as in the account. "Under that article, the starting point of

limitation was December 31, 1976. In the present case, the petition for winding up was filed only on January 24, 1977. Hence, limitation had

already begun to run. But for the winding-up proceedings, a suit ought to have

been filed by the company within three years from December 31, 1976. On account of the proceeding for winding-up and the order of winding-up passed on March 2, 1978, the suit could not be instituted during that period. On the appointment of the official liquidator by the company court, he became entitled to institute a proceeding for recovery of the amount due to the company. It is not a new right or a fresh right of the official liquidator which is sought to be enforced when he institutes a proceeding either in the form of an application before the company court or in the form of a suit before that court or any other court. It is only the same old right of the company which has gone into liquidation that is sought to be enforced.

23. This aspect of the matter was considered and emphasised in *V. Narasimha Aiyangar, Official Liquidator of the City Hygienic Milk Supply Co.*

Ltd. Vs. The Official Assignee of Madras and Others, by a Division Bench of this court. In that case, a joint-stock company was directed to be

wound up and the official liquidator took out an application u/s 235 of the Indian Companies Act, 1913, against some of the directors claiming to

recover compensation in respect of their acts of misfeasance. An objection was taken that the application was barred by limitation. The court held

that the application was time barred as the starting point of limitation for taking out the same was the date of misfeasance and not the date of the

winding up order passed by the company court. In the view, the court held that even under the residuary article 120 of the Limitation Act, 1908,

the application was barred. When the matter came before a single judge, he dismissed the application as barred by limitation. On this aspect of the

matter, the learned judge referred to the various rulings of the English court and said :

This statement, he argued, gives the official liquidator a new right and that the right of action only accrues when he is appointed official liquidator

or at any rate at the winding-up of the company. But, it has been pointed out in the cases to which I have referred that the corresponding section in

the English Companies Act is merely one of procedure and gives no new right to the official liquidator. I think it must be clear that what the official

liquidator has at his disposal is a summary method of enforcing such rights as the company could have enforced or shareholders could have

enforced before winding-up of the company and no more. If proceedings had been taken against the directors before the winding-up by the shareholders or by some others of the directors, the right of action would have accrued to the company or those other persons, when the misfeasance took place, and all that, in my opinion the official liquidator has in those rights, and directors of companies are entitled to claim that the starting point of limitation is the alleged act or acts of misfeasance in the same way that they would be able to set up that contention in an action before the winding-up of the company. I arrive at this conclusion with great reluctance because I am of opinion that in this country, it must necessarily take a very long time before the official liquidator appointed in a winding up is able to bring to light acts of misfeasance on the part of the companies' directors.

24. While affirming the view taken by the learned single judge Ramesam J., one of the members of the Division Bench, said (at page 42 of 1 Comp

Cas) :

Coming now to the second point, the question really turns upon whether entirely new rights with a new cause of action arise on the winding up of a company. That, for certain purposes, new rights may be conferred by the winding-up of a company, there can be no doubt. One such well-known case is the liability to pay calls as a contributory. Both English and Indian authorities are very clear on this matter : but it does not follow from this that the right of a liquidator u/s 235 is a case of a new right accruing by reason of the winding-up.

25. The other learned judge, viz., Cornish J., adopted a slightly different reasoning and said (at page 46 of 1 Comp Cas) :

But with all respect, it may be pointed out that the right of application to the court given by section 235 is not confined to the liquidator : it is given to a creditor and to contributories. And if creditors of a company or the shareholders, who are expected to be alive to their interests, choose to allow remedies which might be open to them in respect of losses attributable to misfeasance by the directors to become time-barred, it seems to me that neither fairness nor justice requires that after the company has been ordered to be wound up the liquidator shall have the right to enforce those remedies against the directors for the benefit of the creditors and

contributories. It is, however, unprofitable to speculate upon the reasonableness of this particular aspect of section 235, because it has been most authoritatively settled that the corresponding provision in section

215 of the English Act, the Companies Consolidation Act, 1908, is a procedure section only and gives no new rights : See City Equitable Fire

Insurance Co. Ltd., In re [1925] 1 Ch 407 . Sir Earnest Pollock M. R. says with reference to this section :

"I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It

provides a summary mode of enforcing existing rights."

To the same effect is the judgment of Sargant L.J., at page 527. This ruling is decisive of the question, and has been regarded as conclusive of it by

a Bench of the Lahore Court in Bhim Singh v. Basheshar Nath Goehla ILR[1926] Lah 167; AIR 1927 Lah 433. In my opinion, therefore, it is

impossible to hold that the liquidator acquired a new right from the winding-up order to enforce against the directors a claim which had already

become time barred whether under article 36 or article 120 of the Limitation Act.

26. The ruling of the Division Bench was followed and the reasoning was adopted with respect to an application u/s 469 of the Companies Act,

1956, by a learned single judge of this court in Malabar Petroleum Co. by Partner K.V. Thomas Vs. Continental Oil Co. Ltd., .

27. In a different context, the Privy Council laid down the same provision in Hansraj Gupta v. Official Liquidators of the Dehra Dun Mussourie

Electric Tramway Co. Ltd. [1933] 3 Comp Cas 207 : [1933] 64 MLJ 403 and said that section 186 of the Indian Companies Act, 1913, did not

create new liabilities or confer new rights on the liquidator, but merely provided a summary procedure in the winding-up court against debtor-

contributories for enforcing existing liabilities and the power of the court, under the section to order payment was discretionary. It was held that if

at the date of the application by the liquidator u/s 186 of the Indian Companies Act to recover certain moneys, a suit by him in the name of the

company for the recovery of the said moneys would have been dismissed as barred by the Limitation Act, the court would have no power u/s 186

to order payment to the liquidators of the moneys so claimed.

28. If the said test is applied, there can be no doubt that the period of limitation

for a suit as well as an application by the official liquidator for recovery of money payable to the company by a third party will be the same, whether the proceeding is in the form of a suit or in the form of an application. The provisions of either section 446(2) or section 458A of the Companies Act do not warrant an interpretation by which the period of limitation will be different, if the proceeding is in the form of an application, from that prescribed for a suit. Just because a convenient procedure is prescribed in sub-section (2) of section 446 of the Companies Act to enable the official liquidator to recover moneys due to the company without incurring huge expenditure and without much delay, it is not possible for the official liquidator to contend that he has an option to extend the period of limitation by himself choosing to institute the proceeding in the form of an application instead of a suit. It is this aspect of the matter which has been weighted with the Division Bench of this court in *Southern Screws P. Ltd.*'s case [1988] 63 Comp Cas 749. After referring to the provisions of section 458A of the Companies Act, the Bench said (at page 762) :

It may be seen from this provision that in computing the period of limitation, the time during which the company petition for liquidation was pending, as also a period of one year from the date of the winding-up order will have to be excluded. Therefore, we have to first find out that article of limitation under the Limitation Act applicable to the suit or proceeding and exclude, from the total period provided under that article, the periods contemplated u/s 458A, and find out whether, on the date when the application or suit was filed, it was in time. Having regard to the conclusion, which we have already referred to, that concurrent jurisdiction has been conferred both on the civil court as also on the company court, and the option given to the liquidator to make the claim by way of an application or a suit in respect of money claims, and the need to treat this as a suit, though in the form an application, in view of the special provisions in the Companies Act, that when a claim is made it has to be decided whether it could have formed a claim in a regular suit and, if that is so, the limitation applicable to that proceeding will have to be applied, If such a claim could not be the subject-matter of a suit, but could be claimed by way of an application only, then the corresponding article applicable to such an application should be determined. In either case, in computing the period of

limitation, the two periods referred to in section 458A will have to be excluded. . . The Full Bench decision of the Delhi High Court in *Jaimal Singh Makin v. Official Liquidator* [1978] 48 Comp Cas 419 considered the question as to whether the provision of section 446(2) which applies to any claim could be applied to claims which were already barred by time on the date when the application is so filed u/s 446(2)(b) and held that the expression "any claim" in clause (b) of section 446(2) means any claim enforceable at law and, since the right to avail of the remedy provided under clause (b) of section 446(2) arises only after the passing of the winding up order, the appropriate date to be seen for the purpose of determining whether the claim was enforceable at law or not, is the date of the winding up order. With great respect to the learned judges of the Delhi High Court, we are unable to agree with this view. Neither section 446(2) nor section 458A relates to any determination of the enforceability of the claim or the dates on which it shall be enforceable. Section 446(2)(b) only enables the liquidator to make the claim by way of an application in the company court. The question whether the claim is enforceable or not, is to be determined with reference to the provisions in the Limitation Act, and that could be decided only with reference to the cause of action and the date on which the suit or application is filed. As already stated, section 458A is only a computation provision for the purpose of limitation. Section 446 confers jurisdiction on the company court and enables the liquidator to file a suit or an application before the company court in respect of a money claim. No claim is wiped out except by payment and discharge. Only the enforceability of that claim for recovery may be barred. Whether the claim is barred or not, is only a question of limitation. Therefore, whether the claim was barred or was enforceable has to be determined with reference to the cause of action arising and the date of the filing only and all the other provisions will only enable the computation of the period. We are, therefore, of the view that though the application is filed in exercise of the option provided to the liquidator, if the claim has to be considered as in the nature of a suit, the provisions in the Limitation Act for such suits only would govern the case, and not article 137. Again, we have to make it clear that in each case, the application of the liquidator will have to be considered with reference to the nature of the claim and

not the article applicable in the Limitation Act and then only the computation could be done in order to find out whether the claim was in time or not.

Two other decisions cited at the Bar now be noticed and they are, a decision of the Delhi High Court in Liberty Finance P. Ltd., In re [1979] 49

Comp Cas 287 and a decision of the Karnataka High Court in Unico Trading and Chit Funds (India) P. Ltd., v. S. H. Lohati [1982] 52 Comp

Cas 340. Each of these decisions is by a single judge, and both have followed a Full Bench decision of the Delhi High Court in Faridabad Cold

Storage and Allied Industry v. Ammonia Supplies Corporation P. Ltd. [1978] 48 Comp Cas 432, which decision, in turn, had referred to the Full

Bench decision of the Delhi High Court in Jaimal Singh Makin v. official Liquidator [1978] 48 Comp Cas 419 and, therefore, those two decisions

need not be discussed.

In the result, therefore, we are of the view that article 137 of the Limitation Act is not the article applicable in all cases, but the relevant article will

have to be determined with reference to the nature of the claim made by the official liquidator, the provision of law under which it is claimed and

not with reference to the form of proceeding which he has opted. When an application is filed instead of plaint, the said application which has to be

treated as a suit will have to be governed by the article of the Limitation Act applicable to suits of that nature. If the claim could have formed the

subject-matter of a normal application in a regular court or if the application is filed under any specific provision of the Companies Act, then the

corresponding article in the Limitation Act will have to be applied, and if no other specific article is applicable, the residuary article 137 would have

to be applied.

29. With respect, we are entirely in agreement with the reasoning of the Division Bench. We do not find any justification whatever to take a

different view. It is brought to our notice that a SLP filed against the said judgment was dismissed by the Supreme Court in SLP No. 9243 of

1987 on March 15, 1988, with the following observation :

In view of the fact that the amount involved is too big, we find no reason to interfere.

30. We find that a Full Bench of the Karnataka High Court has concurred with the

view taken by the Division Bench in Karnataka Steel and Wire

Products Ltd. v. Kohinoor Rolling Shutters and Engineering Works (P.) Ltd. [1993] 78 Comp Cas 96. After extracting the above passage from

the judgment of the Division Bench it is said (at page 1119 of 78 Comp Cas) :

As the view expressed by the Division Bench of the High Court of Madras in the aforesaid case accords with our view, we agree with the said

view expressed in the above decision.

31. The Full Bench proceeded to conclude its judgment in the following words (at page 122 of 78 Comp Cas) :

The correct period of limitation for claims made u/s 446(2)(b) of the Companies Act, is the relevant article in the Limitation Act, 1963, as a

applicable to the nature of the claims. Whether the claim is enforceable or not is to be determined with reference to the relevant article in the

Limitation Act, as applicable to the nature of the claim and not with reference to the form by which the claim is enforced or by or through whom it

is enforced. In a given case, if the claim does not fall under any one of the relevant articles in the Schedule to the Limitation Act, the residuary

article 137 will be applicable. The expression "when the right to apply accrues" has to be decided with reference to the right of the company and

the nature of the claim. In other words, as to when the right to recover the claim accrued to the company, and not on the basis that the "right to

apply accrues only on the date the winding up order is passed or the official liquidator is appointed as provisional liquidator" as the liquidator

enforces the claim of the company. In computing the period of limitation, for claims to be made u/s 446(2)(b) of the Act, firstly the applicability of

the relevant article with reference to the nature of the claim has to be decided and then the question as to whether such period of limitation had or

had not expired on the date the petition for winding up was filed or the winding up proceeding commenced has to be determined. In the event it is

found that as per the period of limitation prescribed by the relevant article applicable to the claim, the period of limitation had not expired on the

date the winding up proceeding commenced, to that period of limitation, the two periods described in section 458A of the Act, are to be added

and the question as to whether on the date the application filed u/s 446(2)(b) of the Act was within time or not, has to be determined. In the

words, in the period computed from the date the limitation commenced as per the relevant article in the Schedule to the Limitation Act till the date

of filing of the application u/s 446(2)(b) of the Act, the two periods stated in section 458A of the Act are to be excluded.

32. With respect, we agree, we find that the said Full Bench has referred to the following decisions on which reliance is now placed by counsel for

the official liquidator and differed from them :

Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd., ; R.C. Abrol and Co. (Pvt.)

Ltd. Vs. A.R. Chadha and Co., : Jaimal Singh Makin Vs. The Official Liquidator of Majestic Financiers (P) Ltd., ; Maruti Ltd. v. Parry and Co.

Ltd. [1989] 66 Comp Cas 309 (P &H) ; Maruti Ltd. (In Liquidation) and Another Vs. P.R. Sasidharan and Others, ; K.P. Ulahannan and Others

Vs. The Wandoor Jupiter Chits (P) Ltd., ; New Kerala Roadways Pvt. Ltd. (In liquidation) Vs. K.K. Nanu and Another, ; Syed Patel and Others

Vs. N.H. Doddabasappa and Others, ; Galaxy Trading and Chit Funds (P.) Ltd. (In Liquidation) Vs. S. Bashanudien and Another, and Syndicate

Bank Vs. United Commercial Bank and others, .

33. We are unable to agree with the aforesaid decisions relied on by counsel for the official liquidator.

34. Leaned counsel for the official liquidator contends that in the The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , it has

been held that article 137 of the Limitation Act applies to all applications before a civil court, whether they are under the CPC or any other

enactment. The contention is that under article 137, the starting point of limitation is the date on which the right to apply accrues. According to

learned counsel, the right to apply for the official liquidator can accrue only when the order of winding up is passed and he is appointed as the

liquidator. It is submitted that the application for enforcement of such a right cannot become barred even before it accrues. For this purpose,

reliance is placed on the following observation of a Division Bench of the Punjab and Haryana High Court in Maruti Ltd. v. Parry and Co. Ltd.

[1989] 66 Comp Cas 309 :

It was observed in General Rolling Stock Co., In re [1872] Ch 646 that the effect of a winding up order is to stop the running of the statue of

limitation in the company's favour. On a winding up order having been passed, the company's supervision vests in the court and all proceedings

like a petition u/s 446(2) stem from the winding up order. It has no independent existence. The company court's jurisdiction to determine the claim

arises only on the passing of the winding up order. Thus, the remedy of claim arises only on the passing only on the passing of the winding up

order.

If the construction to the cause of action is put as the last date of the transaction and the limitation is to commence from the said date, the remedy

might become barred before it is available to the claimant resulting in the provisions of section 446(2) becoming redundant. The said interpretation

would deprive the company of its right to prefer a claim before the company court. It would be destroying the right before it has arisen. No such

interpretation is envisaged nor can it be put. The right to move the company court accrues only on the winding up order. Thus, the cause of action

cannot be taken back earlier to the date of the winding up order.

35. We have earlier referred to the fact that the Karnataka Full Bench has considered the judgment of the Punjab and Haryana High Court in the

above case and expressed its dissent. We find that the Punjab and Haryana High Court had only followed the ruling of the Delhi high Court in

Faridabad Cold Storage's case [1978] 48 Comp Cas 432. We do not agree with the reasoning of the Punjab and haryana High Court. We have

already pointed out that the right of the official liquidator is not a new right and it is only the right of the company which went into liquidation that

was being enforced. Even if article 137 is applied, the starting point of limitation under the third column is the date on which the right accrued in the

first instance to the company and the same has to be decided with reference to the right of the company and the nature of the claim.

36. The judgment of the Supreme Court in The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , was not concerned with this

question and the court only decided in that case that the article would apply to all applications whether they are filed under the CPC or under

another enactment, provided the applications were made to a civil court. No reliance can be placed on that ruling to contended that the view taken

in Southern Screws Pvt. Ltd.'s case [1988] 63 Comp Cas 749 (Mad) is erroneous.

37. The next question urged by learned counsel for the official liquidator is that the company had only a right to file a suit before proceedings for winding up commenced. The period which elapsed between December 31, 1976, when the right of the company accrued or when the limitation began to run and March 2, 1978, the date on which the order of winding up was passed, has to be excluded only if a suit is instituted. On the passing of the winding up order, the right of the official liquidator is to file an application and, therefore, it will be governed only by article 137 and not by article 1, which relates to a suit. There is no merit in this contention. The reasons which we have given earlier are sufficient to reject this contention. Further, though the proceeding instituted by the official liquidator is in the form of an application, it can be said that in substance it is a suit and the provisions of the Limitation Act relating to suits will apply. The question has been considered by a learned single judge of the Calcutta High Court in *Indian Iron and Steel Co. Ltd. Vs. Shish Ram*, a case under the Workmen's Compensation Act. While holding that a claim petition under the Act would tantamount to a "suit" within the meaning of the Limitation Act, the learned judge said (at page 20 of 57 FJR) :

The word "suit" has not been defined in the CPC but in legal parlance it means any legal proceeding of a civil kind brought by one person against another. Under the code a suit is instituted when the plaint, which is nothing other than a statement of the claim, or recital of the cause of action, is presented in a court. In the case of a claim for workmen's compensation before the Commissioner, the claim has also to be presented before him.

The form of lodging the claim, instead of being by a plaint, is to be made by an application in a statutory form. Since the proceeding commences on the lodging of the claim, it has little difference from a plaint and it is not merely an application in a proceeding but an original claim required by laws of procedure to be filed by way of an application. Such proceeding arising out of a claim application has no difference from a suit in legal phraseology.

The Limitation Act does not also define a suit, except stating that it does not include an application or an appeal and the application here does not include what is in substance a plaint or a claim under the Compensation Act. In section 3(2)(a), it is said that a suit is instituted, in an ordinary case

when the plaint is presented to the proper officer. In case of workmen's compensation, the institution of the case will be on the date when the claim

application is filed before the Commissioner. The word "suit", since the Limitation Act applies to all claims and applications to the court under any

Act, must be given a wider meaning, so as to include a claim, in whatever form it is presented to the court either by plaint or otherwise, whereon a

proceeding before the court commences as was held in Hayatkhan and Others Vs. Mangilal and Others, , in respect of the Motor Vehicles Act.

Accordingly, on the application in the statutory form being filed, the suit on the claim is to be deemed to be instituted by the aggrieved party.

38. It should also be pointed out that if reliance is placed only on article 137, the official liquidator can claim only a period of three years from the

date of winding up order and not the benefit of exclusion u/s 458A of the Companies Act.

39. At one stage of the case, learned counsel for the official liquidator contended that the period of limitation is three years under article 137 of the

Limitation Act, even if the benefit of exclusion u/s 458A of the Companies Act is not available to the official liquidator. If that argument is accepted,

the present proceeding filed on March 2, 1982, is clearly barred by limitation. We cannot, however, accept the argument that article 137 of the

Limitation Act applies and the limitation starts from the date of winding up order.

40. It is finally argued that the right of the company which went into liquidation was different from the right which had vested in the body of

creditors after the winding up order, whom the official liquidator represents and, therefore, limitation would start afresh under article 137 of the

Limitation Act. This contention is fallacious and for reasons we have already given.

41. In the result, we are of the opinion that the judgment of the Division Bench in Official Liquidator, Radel Services P. Ltd. v. Southern Screws

Pvt. Ltd. [1988] 63 Comp Cas 749 (Mad) is correctly decided. Hence, the present application filed by the official liquidator before the learned

single judge was barred by limitation and deserves to be dismissed.

42. Consequently, the judgment of the learned single judge in application C.A. No. 178 of 1982, dated September 21, 1984, is set aside and the

said application is dismissed. The appeal is allowed. In the circumstances of the

case, there will be no order as to costs.