

(1980) 04 DEL CK 0052

In the Delhi High Court

Case No : Company Appeal No. 21 of 1978

H.K. Dass Sharma

APPELLANT

Vs

Official Liquidator, United India General Finance (P.) Ltd. and
Another

RESPONDENT

Date of Decision : 14-04-1980

Acts Referred:

Companies Act, 1956 — Section 446, 477, 543
Limitation Act, 1963 — Article 137

Citation : (1980) RLR 552

Hon'ble Judges : S.N. Kumar, J;Rajinder Sachar, J

Bench : Division Bench

Advocate : A.K. Jain, for the Appellant; V.V. Sastri, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an appeal against the order of the learned single judge by which he found that an amount of Rs. 10,500 including costs was realisable from the second respondent M/s. Express Financiers Pvt. Ltd., in the first instance and that only in case the entire amount or any portion thereof cannot be realised from that respondent then the balance or the whole amount may be realised from the appellant.

2. M/s. United India General Finance Pvt. Ltd. was ordered to be wound up by this court by an order dated August 12, 1968. The appellant was the managing director of the company. An application was filed by the official liquidator on October 16, 1973, under Sections 446, 477 and 543 of the Companies Act, 1956 (to be called " the Act"), raising a claim concerning vehicle No. MYW-4666. The company had financed this vehicle to one Mr. Satya Pal Bhutani under a hire purchase agreement. This vehicle was repossessed by the company in 1966 in pursuance of the said agreement. The appellant was the managing director of the company at that time. It was alleged in the petition that the appellant on June 12, 1967, had purported to direct the chowkidar of the company to deliver

the vehicle to respondent No. 2 for sale. For that there is no receipt on the records of the company from respondent No. 2 evidencing the receipt of the vehicle ; that neither the vehicle nor the sale proceeds have been handed over to the official liquidator and that the same, Therefore, had been retained wrongfully by the appellant and respondent No. 2 who are liable to return the said vehicle and its sale proceeds. The learned judge on May 17, 1974, held that the appellant cannot be proceeded against u/s 543 of the Companies Act, as such an application had to be moved within five years from the date of order of winding up. Again on September 2, 1975, the learned judge refused the prayer to summon the appellant u/s 477 of the Act. He, however, held that the proceedings could go on u/s 446 of the Act. By that order the learned judge decided one of the preliminary issues, Issue No. 2, to the effect whether on the allegations made in the application it is not maintainable u/s 446 of the Companies Act. The learned judge directed that the case would now proceed u/s 446 on Issues Nos. 4, 5 and 6 on merits which read as under :

3. Issue No. 4: Whether respondent No. 1 has accounted for the vehicle or the value thereof to the company ?

4. Issue No. 5 : Whether the application is barred by time ?

5. Issue No. 6 : To what relief, if any, is the official liquidator entitled ?

6. The appellant admitted that the truck had been repossessed by the company. He also admitted that he had directed the chowkidar to hand over the truck to respondent No. 2. The learned judge has held that the vehicle was handed over, under the instructions of the appellant, to respondent No. 2. He has also held that respondent No. 2 had not given back the vehicle or the sale proceeds to the company. He, Therefore, found that respondent No. 2 was liable to pay an amount which he evaluated to Rs. 10,500. He also held that the appellant as an ex-director of the company was responsible as he did not take proper receipt and as money had been lost he was also liable to produce the truck and accordingly made his liability subject to and in case the amount was not realisable from the respondent.

7. As far as the question of limitation is concerned the learned judge held that it was within time because Section 10 of the Limitation Act which provides for a suit against a person in whom the property has become vested is not barred by any length of time. He also held the claim to be within time under Article 70 of the Limitation Act, which provides a period of three years from the date of refusal after demand in a suit to recover movable property deposited or pawned from a depository or pawnee. The learned judge held that as the truck was with the appellant the same must be held to have been deposited with him for the company for being utilised in a specified manner, and the limitation would run from the date of refusal after demand. This date of refusal was found by the learned judge to be not earlier than May 31, 1972, so far as the appellant was concerned. As regards respondent No. 2 it was for the first time on September

30, 1972, that they informed the official liquidator that the truck was not delivered to them. As both the periods were within three years from the date of the filing of the application by the official liquidator the same was held to be within time.

8. Mr. Jain, the learned counsel for the appellant, challenges the finding of the learned judge as to the applicability of Section 10 of the Limitation Act, the contention being that the property of the company, that is the vehicle, cannot be said to be vested in the director. He has referred to *Bank of Multan Ltd. v. Hukam Chand* AIR 1923 Lah 58(2), which has held that the property is not vested in the company-director and Section 10 of the Limitation Act is not applicable. He also seeks aid from *Brahmayya and Co. Official Liquidators, Hanuman Bank Ltd. (In Liquidation) Vs. V.S. Ramaswami Aiyar and Another*, that the directors are not the trustees. We do not deem it necessary to decide this aspect of the case because as we shall presently show the claim was within time u/s 446 of the Act, as falling within Article 137 of the Limitation Act and it is not necessary to invoke any other provision of the Limitation Act. For similar reasons also we do not intend to decide about the applicability of Article 70 of the Limitation Act which finding was also challenged by Mr. Jain.

9. We shall first deal with the question of limitation on the assumption that an application u/s 446 of the Act was maintainable. We are saying this because Mr. Jain has contended, which contention we shall deal with a little later, that an application u/s 446 of the Act is not maintainable against the appellant.

10. Now, there is no specific article for an application to be moved before the company judge u/s 446 of the Act. Such a claim would, Therefore, be under the residuary Article 137 of the Schedule to the Limitation Act, 1963, which provides for a period of three years for an application for which no period of limitation is provided elsewhere. The time from which the period begins to run is " when the right to apply accrues ". As mentioned already the date of winding-up order is August 12, 1968. The claim-application was filed on October 17, 1973. The learned judge casually observed that even by applying Section 458A of the Companies Act the limitation would have expired apparently on the assumption that the starting period for limitation is at the latest the date of the winding up order, i.e., August 12, 1968. The learned judge obviously did not give any firm finding on this aspect because he was finding that the claims were within time either u/s 10 or Article 70 of the Schedule to the Limitation Act. It seems to us, however, that the claim was within time, as the right to apply laid down in Article 137 of the Schedule to the Limitation Act (which article is applicable) would arise only on September 30, 1972, so far as respondent No. 2 is concerned and May 31, 1972, so far as the appellant is concerned, as there was no refusal by them to return the truck earlier to these dates. The claim application filed in 1973 would thus be well within time. If, for example, the right to apply had accrued even prior to 1967 the result of the winding-up order would have been to exclude the period from the date of commencement of the winding up of the company to

the date on which the winding up order is passed and one year thereafter. But if, as in the present case, the right to apply accrued only in 1972 the resort to Section 458A was not necessary. Of course, Mr. Jain contended that it was not correct to say that the right to apply accrued only in 1972. We cannot agree. In *Mst. Rukhmabai Vs. Lala Laxminarayan and Others*, , it was held that " there can be no " right to sue " until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted ". Applying the ratio of that case when can we say that the right to apply accrued ? According to the facts found, the vehicle was repossessed by the company on April 25, 1965. The vehicle remained with the company till June 12, 1967. According to the appellant he directed the chowkidar to give this vehicle to respondent No, 2 for the purposes of selling it. There is nothing on record to show that at any time between 1967 and August 12, 1968, when the order of winding up was passed there was any denial by respondent No. 2 to return the vehicle or by the appellant disowning that the vehicle had been repossessed by the company or that the same had been given to respondent No. 2. The official liquidator who came on the scene wrote on September 9, 1969, to respondent No. 2 seeking information as to the position of the truck. No reply was received from respondent No. 2 till September 13, 1972, Ex. 3, in which it took the stand that the truck was not delivered to them, rather the stand taken was that the company had itself sold the truck. This letter no doubt indicated that respondent No. 2 was not accepting the liability for the truck and if the official liquidator wanted to proceed against them definitely a right to apply accrued from that date. There is nothing on record to show that earlier to this there is anything in writing from respondent No. 2. As a matter of fact there was a total silence. The right to apply accrued on September 13, 1972, and the claim filed was well within time qua them.

11. As regards the appellant as per letter Ex. P-4 dated May 31, 1972, the official liquidator wrote to the appellant pointing out that the truck was seized by the company and making a reference to letter dated May 22, 1971, written by the appellant to the effect that the vehicle was given to respondent No. 2 against the dues, but pointing out that the amount outstanding against the original hirer is still being shown as due and asking for clarifying the position. In Exs. P-5 to P-7 (June-August, 1972), the letters written by the appellant to the official liquidator, the appellant kept on maintaining that the vehicle was given to respondent No. 2 but that he would make enquiries and give further details. Even if we exclude the subsequent letter Ex. P-5 to P-7 and hold that the right to apply accrued on May 22, 1971 (the date referred to in the letter dated May 31, 1972), wherein the appellant had informed the official liquidator that the vehicle has been given to respondent No. 2 against their dues, the present, claim filed in October, 1973, would be within time. There is no disavowal of liability by the appellant prior to 1971. Official liquidator is making enquiries since 1969 and the right to apply could only arise when disavowal is made and the earliest could be May 22, 1971.

The question, Therefore, of applying against the appellant could not arise earlier than May 1971. Calculating a period of three years from that date, the present claim would be within time against the appellant also.

12. The next contention of Mr. Jain is that no proceedings can be held against the appellant u/s 446 of the Act. The learned judge has accepted that the truck was handed over under the orders of the appellant to respondent No. 2 ; this finding has not been disputed before us. Mr. Jain, however, would have it that once it was proved that the truck was handed over even by the appellant's order to respondent No. 2 the liability of the appellant was exhausted. We find that unacceptable. Before the liability of the appellant could be discharged he has to establish that the truck was given rightly to respondent No. 2, and in pursuance of some right of respondent No. 2 to receive the truck. Now, even the appellant in his evidence explained that the truck was given to respondent No. 2 as certain money was owed by the company and respondent No. 2 was in a better position to sell the truck. He admitted that he was never told what had been done by respondent No. 2 about the proceeds of the truck. He also admitted that the legal owner of the truck was the company because the document of the truck had not been given to respondent No. 2. No doubt the respondent No. 2 denied having received the truck. But that finding is against them and Mr, Jain does not dispute that finding. The position is that the truck belonging to the company was given to respondent No. 2 under the orders of the appellant (no doubt the order was countersigned by another director). The appellant was the managing director. Under his orders the property of the company is given to respondent No. 2 who has not returned it or in lieu the proceeds of the truck had been sold. In such circumstances we do not see how the appellant can escape the liability for the return of the truck or its equivalent. The truck was given away under the orders of the appellant. Even if no bad motive is attributed to the appellant, as indeed it should not be, in view of the refusal by the learned judge to proceed against the appellant u/s 543 of the Act, vide his order of May 17, 1974, the fact remains that the assets of the company, namely, the truck was in the possession of the appellant. The mere fact that under orders of the appellant the truck was handed over to respondent No. 2 would not mean that the possession of the appellant in law would not continue. The authority of respondent No. 2 was derived from the appellant and the latter cannot clear himself of this liability by fixing it solely on respondent No. 2. Here the claim is a straightforward one, by the liquidator asking the appellant and respondent No. 2 to return the property of the company, i.e., the truck or its equivalent. The present is a claim like any other claim on a person who is possessed of the assets of a company but has no right to hold it. The Explanation given by the appellant that the truck had been given to respondent No. 2, if accepted, has relevance only to prove that the appellant had not committed any fraudulent conducts as to fall within Section 543 of the Act. But it cannot absolve the appellant of the liability to return the truck or its equivalent to the company. The liability on respondent No. 2 has also been correctly placed because respondent No. 2 did take the truck, though under

orders of the appellant, and having no authority to hold it, is bound to return it. Therefore, the claim against the appellant and respondent No. 2 has been rightly ordered by the learned single judge.

13. Mr. Jain's argument that once the truck had gone out of the hands of the appellant his liability ceases. We cannot agree. To take an illustration if it was found that the truck was still in the possession of the appellant can it be doubted that he would be liable to return it. If in that case the claim can be ordered against the appellant, we see no difference in the present case, where the truck is with respondent No. 2 under authority of the appellant. Passing it on to respondent No. 2 is still an act of the appellant and his liability to account for it would continue.

14. Mr. Jain had also sought to contend that proceedings u/s 446 cannot be maintained against a director. No precedent was cited for such a position nor is it supported on any principle of law. No doubt Sections 477, 542 and 543 of the Companies Act empower the court to proceed against the director and assess his liability for fraudulent conduct of the business, and no doubt benefit of Section 543 for extended limitation is also available for proceeding against a director if he has misapplied any property of the company, it does not mean that if there is a claim for which limitation is still available by applying u/s 446, this remedy is prohibited. Section 543 of the Act does not exclude moving against the director u/s 446 of the Act. Both of them are not mutually exclusive. As to what provision would apply would depend on the facts of each case. To take an illustration, if an amount had been taken on loan from the company or some funds had been openly drawn by the ex-director before the passing of an order of winding up not for wrongful purposes but for legitimate purposes of the business of the company, but had not been returned out of sheer forgetfulness or inadvertence and with no intention to misapply it or retain it wrongfully, there is no logic or rationality which prohibits the official liquidator, in the event of the refusal by the ex-director to return the amount, to proceed against him u/s 446 of the Companies Act. He does not have to, nor indeed it may be possible to, proceed against the ex-director u/s 543 of the Act, if no fraudulent conduct was alleged. Section 446 in terms applies to claims against every one. It is impossible to cut down the width of the section by excluding the directors from its ambit. This would be adding to the language of the statute, which is not permissible, unless the result was to lead to absurdity or anomaly, for which, we find no basis. We, Therefore, would hold that the learned judge was right in directing the payment of the amount by the appellant and by respondent No. 2, though we have arrived at this conclusion by a different process of reasoning.

15. There is thus no merit in the appeal and the same is dismissed with costs.