

(1959) 05 CAL CK 0017
In the Calcutta High Court
Case No : Original Side Appln.

In Re: Chanbali Steamer Service Co., Ltd. (In Liquidation)

Date of Decision : 11-05-1959

Acts Referred:

Companies (Amendment) Act, 1956 — Section 528, 529
Companies Act, 1913 — Section 228, 229
Limitation Act, 1908 — Article 181, 10, 3

Citation : AIR 1959 Cal 646 : (1960) 30 CompCas 61 : 63 CWN 762

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Judgement

P.B. Mukharji, J.—This is an application on a chamber summons taken out by Lloyds Bank Ltd., against the Liquidator, Chandbali Steamer Service Co. Ltd., (in Liquidation) for an order upon the Official Liquidator of the company to admit the claim of the petitioner as an ordinary creditor for the sum of Rs. 36,954.91 np, and for necessary amendment of the list of creditors already settled by this court.

2. An interesting point of limitation of considerable importance is raised by the Liquidator on this application. It is contended by the Official Liquidator that the claim of the Lloyds Bank is already barred by limitation. If Lloyds Bank Ltd., were to institute a suit to enforce this claim today it will undoubtedly be barred by limitation. In such circumstances, the question is can the court direct the Liquidator to admit the claim. No Indian case has answered the point.

3. The claim of the applicant Bank arises out of the moneys lent and advanced to the company on overdraft account which continued till October-November, 1954. The company went into liquidation in March, 1955. The applicant Lloyds Bank did not put forward its claim before the Liquidator at any stage until 5-11-1958, which was about four years subsequent to the last transaction in the overdraft account and about more than three years after the date of liquidation.

4. The reason which the Lloyds Bank puts forward for this delay is that it was trying to realise this claim from the bills which it was holding as security for this sum. These were the bills supposed to have been payable by the Government to

the company now in liquidation. The Government has claimed a set off for its own claims against the company in liquidation. In fact it has filed a suit against the company now pending against the Liquidator. The Lloyds Bank has failed to realise these Bills from the Government and therefore now wants to come in the winding up.

5. The list of creditors was settled by this court in September 1958. The Lloyds Bank there-after filed its claim before the Liquidator on 8-11-1958. The Liquidator rejected the claim on the 15th November 1958 on the ground of limitation. The Bank therefore now applies to the court for an order upon the Liquidator to admit its claim.

6. It is contended on behalf of the Liquidator that under the explanation of Section 3 of the Limitation Act this claim is barred and should not be allowed. Section 3 of the Limitation Act reads as follows:

"Subject to the provisions contained in Sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation.--A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the Official Liquidator." It is therefore being contended by the Liquidator that the limitation really is accelerated by the provisions contained in the statutory explanation of Section 3 of the Limitation Act because the limitation starts running from the time when the claimant first sends his claim to the Official Liquidator. But I do not see how it accelerates the limitation because the Statute says the starting point is when the claimant first sends his claim to the Liquidator. In tin's case the Bank did not send its claim before 8-11-1958. Therefore the statutory Explanation cannot provide the bar of Limitation to the Bank's claim in this case.

7. It appears to me that this statutory explanation of Section 3 of the Limitation Act does not at all apply to this application for many reasons.

8. In the first place, the proceeding before me is not a suit. The second reason is that it may apply to an application but that application must be one for which a limitation is prescribed by the first schedule of the Limitation Act and there is no limitation prescribed for it as I shall presently show. The third reason is that this section with its explanation is subject to the provision of Sections 4 to 25 of the Limitation Act. Now Section 10 of the Limitation Act provides-

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable

consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

By Sections 228 and 229 of the old Indian Companies Act which govern this application corresponding to Sections 528 and 529 of the new Companies Act of 1956, the Liquidator must be regarded as a person in whom the property of the company has become "vested in trust for the specific purpose" within the meaning of Section 10 of the Limitation Act. The trusts for the specific purpose are those imposed on the Liquidator by the Companies Act and therefore the Liquidator answers the description given in Section 10 of the Limitation Act.

9. There is one Indian decision u/s 3 of the Limitation Act so far as liquidation of companies is concerned. That is the decision of the Judicial Committee of the Privy Council in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63. That decision is an authority for the proposition laid down by Lord Russell that a claim against the company in liquidation not made by a proceeding instituted by the presentation of a plaint cannot be considered to be a "suit instituted" within Section 3 of the Limitation Act.

10. Two English decisions are relevant on the point and it will be necessary to notice them. The first one is in *Re. General Rolling Stock Company*, (1872) 7 Ch. A. 646. The Appeal Court held in that case that under the English Companies Act, 1862 the assets were made applicable to the payment of all liabilities of the company subsisting at the date of the winding up order. The particular English provisions considered there are the same as those contained in sections of the Companies Act in India which I have already mentioned. The English Court of Appeal held in that case that the statute of limitation did not run against the creditor from the date of the winding-up order and therefore the claimants were entitled to prove their claims without of course disturbing any former dividends.

11. The principle that the Liquidator acts as a trustee in this respect can also be supported by the English decision in *Re. Fleetwood and District Electric Light and Power Syndicate*, 1915-1 Ch. 486. Astbury, J., at pages 490-491 of that report refers to the case of *General Rolling Stock* which I have already quoted and comes to the conclusion that the assets are to be applied in payment of the liabilities subsisting at the time of the winding-up order and that after the order is made the Statute of Limitations does not run but of course a debt barred at the date of the order cannot be proved.

12. In both these decisions as well as in the decision of (1872) 7 Ch. A. 646, the point is established that specific duties and trusts are imposed upon the Liquidator and the Court to take care that the assets of the company shall be applied to the discharge of its liabilities in the specific manner laid down by the company statutes. Those liabilities mean all the liabilities of the company existing at the date when the winding-up order is made which gives that right. In that context it was rightly pointed out that it would be most unjust if any other

construction was adopted, for, after all when a winding-up order is made no action can be brought by a creditor except by a special leave of the court. Naturally the court would never grant such leave if the claim is already barred by limitation before the date of the winding-up order. But the court should not defeat the claim on the same ground if the claim was alive at the date of the winding up order.

13. The true principle that I enunciate and deduce from these authorities is then this that a claim already barred by limitation at the date of winding-up order will not be entertained by the Liquidator and the court but a claim not so barred at that date but barred by limitation after the date of winding-up order can nevertheless be entertained and admitted by the Liquidator and the Court even after the settlement of the list of creditors has been made by the court without disturbing previous dividends and commitments of the liquidator and unless there are special reasons in a particular case for excluding such claim. In doing so the court which supervises the liquidation may impose any terms and conditions that it thinks proper in the best interests of a fair liquidation including such conditions that previous dividends should not be disturbed or even in a proper case postponing such delayed or barred claim after these claims proved within time. In this case no question of such terms and conditions arises because I understand no dividend has been declared, although for the sake of greater safety, I shall provide for it in the order I propose to make herein.

14. It was then contended on behalf of the applicant that no period of limitation was really prescribed for this kind of an application so that it could not come within the mischief of Section 3 of the Limitation Act. If it were a suit, Article 57 of the Limitation Act would have been applicable to this case and that Article provides a period of three years. But then it is argued that it comes under the residuary Article 181, because this is an application for which no particular period of limitation is prescribed. The difficulty of attracting that residuary Article 181 is that the better opinion appears to confine that Article only to applications under the Civil Procedure Code. This is not an application under the CPC but one under the Companies Act. The Privy Council decision which I have quoted did not decide this point although it came very near it. There the application was not by a claimant but by the Liquidator himself and it was contended that the application made by the Liquidator was an application which could be said to be governed by Article 181. Lord Russell in delivering the advice of the Judicial Committee of the Privy Council in *Hansraj Gupta's case* at p. 64 of *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63, avoided a decision on this point by saying that even if Article 181 applied the particular application before his Lordship was within three years.

15. The problem here can be approached from yet another point of view. Even if Article 181 applied to this application, although I am not inclined to think that it does, the right to make this application arose when the Liquidator rejected the claim of Lloyds Bank. This rejection by the Liquidator took place on 15-11-1958.

Right to apply thereafter for an order from this court to direct the Liquidator to admit the claim would not therefore be barred even under Article 181 of the Limitation Act.

16. Following these principles which I have discussed I shall therefore direct and order the Liquidator to admit the claim of the applicant Lloyds Bank as an ordinary creditor for the amount which the Lloyds Bank should satisfactorily prove before the Liquidator. To this extent the list of creditors settled by this court already will be modified by including the claim of the Lloyds Bank herein for the amount to be proved satisfactorily before the Liquidator, This order, however, will not disturb any dividend paid or declared or any commitment made by the Liquidator in respect of the list of creditors already settled by the court.

17. The applicant will pay the costs of and incidental to this application to the Liquidator as between attorney and client. In this case I grant a Certificate under Rule 251 to the Liquidators attorney who appeared on this application.