

(1946) 08 MAD CK 0021
In the Madras High Court

In Re: The Companies Act and S.S.R.S. Nidhi Ltd.

Date of Decision : 16-08-1946

Acts Referred:

Citation : AIR 1948 Mad 51

Hon'ble Judges : Clark, J

Bench : Division Bench

Judgement

Clark, J.—This is a petition by the liquidator u/s 235 of the Act. Respondent 1 was the Managing Director of the Company and respondents 2 to 10 were directors. Respondent 11 was the company's auditor and respondent 12 its head-clerk. Respondent 1 is not appearing in these proceedings. He was adjudicated insolvent and respondent 13, who was the Official Receiver of his estate, was joined, but I am told that the insolvency has been annulled and accordingly respondent 13 has no further interest in the matter.

2. The liquidator claims that large amounts are recoverable from the respondents for misfeasances consisting for the most part in their having granted loans contrary to the byelaws of the company. It is alleged that these loans, which are now, I understand, irrecoverable, were granted at the absolute discretion of respondent 1 without any previous sanction by the Board and, accordingly, that respondent 1 is primarily liable for these losses. It is claimed by the liquidator that the other Directors, the auditor and the head-clerk, i.e., the respondents now before me, were aware of these loans and were negligent in the performance of their duties in that they did not take steps to prevent them, or to recover the amounts so lent. In these circumstances, the case for the liquidator is that they are equally liable along with respondent 1. The winding up order was made on 9th January 1942 and it is common ground that the business of the company was discontinued as from 7th April 1941.

3. Under the order of this Court there have been investigations into the conduct of the Managing Director and Directors of this Company and as it appeared that they had been guilty of offences in relation to the company, I directed the liquidator to refer the matter to the Registrar of Joint Stock Companies u/s 237

of the Act. I understand that respondent 1 is now being prosecuted by the police under the Penal Code and that the question of taking action against him and the other Directors under the Companies Act is still under consideration.

4. In these circumstances it is clearly impossible to proceed with the hearing of this petition on the merits. But as respondents 2 to 12 inclusive contend that the relief now sought by the liquidator is barred by limitation, I have heard arguments on that point as a preliminary issue.

5. u/s 285 (1) the Court may grant relief on an application by the liquidator "made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer." Now the first appointment of a liquidator in this winding up was on 19th November 1941 when provisional liquidators were appointed and this application was presented on 8th November 1944 and filed on 14th November 1944. Accordingly, the application is clearly within time; but it is urged on behalf of the respondents that this does not dispose of their contention. It is said that Section 235 is a procedure Section, which gives no new rights, but merely provides a summary mode of enforcing existing rights [vide *Narasimha Iyengar v. Official Assignee Madras* AIR 1931 Mad. 58 and accordingly that any defence of limitation which would have been open to the respondents if a suit had been filed by the company, or by the Official Liquidator in its name u/s 179 (a) of the Act is open to them in these proceedings. It is said that if a suit had been filed, the limitation applicable to these alleged misfeasances would have been that provided in Article 86, Schedule 1, Limitation Act, and that inasmuch as the business was admittedly discontinued in 1941, the reliefs asked would accordingly have been barred. It is urged that as a suit would have been barred, the present proceedings must be barred also.

5a. Apart from the words of limitation in Section 235 (1), that sub-section is a verbatim reproduction of a provision in the English Companies Act, which first appeared as Section 165 of the Act of 1862.

6. In *In re Merohantile Trading Co., Ex parte Stringer* (1869) 4 Ch. A. 475 the jurisdiction of the Court in summary proceedings under Sections 165 and 101 (which corresponds to Section 186 of our present Act) was considered and Selwyn L.J. at page 484 of the report observed:

That in those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed.

There have been many decisions in the English Courts on these two Sections since *In re Merohantile Trading Co., Ex parte Stringer* (1869) 4 Ch. A. 475 was decided, but so far as I am aware, it has never been doubted that a defence of limitation which would have been available in an action will be equally available in proceedings of that nature. Recently in *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.* AIR 1983 P.C. 63 the Privy Council has laid down that

this defence of limitation is open to a party charged u/s 186 of our Act. But I am here concerned with Section 235 of the Act, which has undergone certain changes since it was first enacted in India.

7. It will be convenient, I think, if I now set out the changes which have been made in this Section. The Section appeared as an exact copy of the English Section in the Act of 1882. In the 1913 Act there was added to it a third sub-section as follows: "The Indian Limitation Act, 1908 shall apply to an application under this Section as if such application were a suit." In 1936 this Sub-section (3) was deleted and the words of limitation now appearing in Sub-section (1) were added.

8. The question I have to decide, therefore, is whether the addition in 1936 of the words of limitation to Section 235 (1) excludes the right of a person charged, which formerly existed, to avail himself of a plea of limitation, which would have been open to him if a suit had been filed.

9. I had to consider this same point last year in the liquidation in *In re Travancore National and Quilon Bank, Ltd.* Appln. No. 2786 of 1941 in O.P. No. 158 of 1938 and I there answered the question in the negative. In that case, like the present, the application was filed within the period specified in Sub-section (1) of Section 235. I arrived at that decision largely on a literal interpretation of the Section as it now stands and on what I considered, to be a line of reasoning similar to that adopted by their Lordships of the Privy Council in *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.* AIR 1983 P.C. 63. But on a further consideration of the point and after hearing a very able argument by Mr. Narasimhachari, who appeared for the liquidator, I am satisfied that my decision in that case was erroneous. I am now satisfied that the question cannot properly be answered by a literal interpretation of Section 285, but that due regard must be paid to the history of that Section. Lindley M.R. observed in *In re Mayfair Property Co.* (1898) 2 Ch. 28 as follows:

In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case (1584) 3 Rep. 7 to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

On this authority I am satisfied that it is not only proper, but necessary for me to consider the history of this Section in our statute book, so that an interpretation may be given which accords with the apparent intention of the Legislature, as it may be gathered from that history.

10. Whilst, as I have already observed, the English Courts have throughout recognised that applications of this nature are subject to the same limitation as would be applied to suits for the same relief, this does not appear to have been the view generally accepted in India. Mr. Narasimhachari has drawn my attention to two authorities one of this Court and one of the Allahabad High Court. In 1895

a bench of the Allahabad High Court (Edge C.J. and Banerji J.) held in *Connell v. The Himalaya Bank, Ltd.* (1996) 18 All. 12 that proceedings under the Section as it then stood were not subject to the periods of limitation prescribed by the Limitation Act. In that case it was suggested that Article 86 of the Schedule 1 would apply, but it was observed as follows at page 15 of the report:

In our opinion Article 36 does not apply to this case. It may well be that the Legislature intended not to provide any limitation in cases in which Courts proceeded to enforce provisions of Section 214 of Act 6 [VI] of 1882 (S. 235 of the present Act). The provisions of that Section could seldom be put in force if Article 36 of Schedule 11 of Act 15 [XV] of 1877 applied. The misapplication or misfeasance of that Section might not be discovered by the Court until after the lapse of two years from the date of the misapplication or misfeasance. It appears to us that there is good reason why directors, managers and officers of companies registered under Act 6 [VI] of 1882 should not be permitted to plead limitation so as to absolve them from making restitution of moneys misapplied or lost to the company through their misfeasance. It may be that this is not exactly the same view of the law as that entertained by the Courts in England in cases under Sections 53 and 54 Vic. Chapter 62, Section 10. However, the Statute of Limitations which Judges in England have to apply to those cases is certainly wider in its wording than the articles of the Limitation Act which we have to apply in this country.

...We hold that the proceedings in this case against the appellant u/s 214 of Act 6 [VI] of 1882 are not barred by limitation.

The case in this High Court is *Ramaswami v. Sree Ramulu Chetti* (1996) 19 Mad. 149. That case was heard by a bench of this Court (Collins C. J. and Parker J.) in December 1895. There is no reference to the decision in the Allahabad High Court and doubtless the report of that case was not available when the case in this Court was heard. Further it does not appear that the attention of the Court was drawn to the trend of the English authorities. Shephard J. on the original side had dismissed a claim under the Section apparently on the ground that it was barred under Article 36. His decision was reversed on the ground that Article 36 had reference only to a suit and could not be applied in the case of an application. Accordingly, this decision, like that of the Allahabad High Court was that there was no period of limitation for an application under this Section.

11. It is suggested that it was these decisions which led the Legislature in 1913 to add Sub-section (3). The effect of that sub-section was to constitute an application under the Section a "suit instituted" within the provision of Section 3, Limitation Act, 1908. Thereafter, an application by a liquidator under this Section was to be deemed, for the purpose of limitation, to be a suit and was subject to the law of limitation as such.

12. From 1913 when this sub-section was added until its removal in 1936, there were many and conflicting decisions of the Indian High Courts as to its

application. It is, I think, unnecessary for me to refer to any particular one of those decisions. It will suffice if I say that, broadly speaking, the difference of opinion that emerged was as to the application, on the one hand, of Article 36 with its two year period of limitation and on the other hand, Article 120 with its six year period from the date when the cause of action accrued. As to Article 120 there was a further difference of opinion as to the correct method of fixing the date on which the cause of action could be said to accrue in the case of the liquidator. In 1929 Sir Amberson Marten C. J. observed in *Govind Narajan v. Rangnath Gopal* (1930) 54 Bom. 226 which was a case u/s 235 of the Act, at page 255 of the report as follows:

I would also like to add that in my opinion this appeal shows the desirability of some amendment of the Indian Companies Act, 1913, so as to nullify the existing differences of opinion in various High Courts as to the effect of Section 285 of that Act....

13. Then in 1936 the Legislature removed Sub-section (3) from the Section and added the words of limitation to Sub-section (1). In view of the differences of opinion expressed by the various High Courts, I cannot doubt that this amendment of the law by removing Sub-section (3) must be regarded as displaying an intention on the part of the Legislature to put an end to controversy by removing such proceedings from the provisions of the Limitation Act. It may be said that the law was well settled and would have been the same even if Sub-section (3) had never been added. That may be so, but the sub-section was added in 1913, and what had been only caselaw until then, became statutory thereafter. Is it then to be supposed that when the Legislature removed the sub-section in 1936, its intention was merely to go back to the old state of affairs ? I cannot accept this. I am satisfied that the clear intention was to remove the application of the Limitation Act and, by the additions to Sub-section (1) to impose, instead, a special period of limitation not merely for the application, but for proceedings under the Section in their entirety.

14. Accordingly I hold that the words of limitation in Section 235 (1) of the Act must be regarded as governing all proceedings under the Section and that a defence of limitation, which might have been available to a person charged if a suit had been filed, will no longer be open to him. This finding disposes of the contention raised by the respondents and it is unnecessary for me now to consider the further point, which I had to consider in *In re Travancore National and Quilon Bank, Ltd.* Appln. No. 2786 of 1941 in O.P. No. 158 of 1938 viz., which article of the Limitation Act is to be applied.

15. A recent decision of the Allahabad High Court (*Braund and Wali Ullah JJ.*) in *Benares Bank Ltd. Vs. Shri Sri Prakasha Bhagwan Das and Others*, has been relied on before me for the liquidator and the view which I have arrived at is the same as that arrived at by the Allahabad High Court in that case.

16. Lastly, I think it desirable to state that my decision on this point of limitation

must not be regarded as in any way qualifying the power of the Court in dealing with an application under this Section. The Section is permissive and it cannot necessarily follow that an order must always be passed when a case which is filed within the specified period, is established. It will always be subject to the discretion of the Court when all matters relevant to the exercise of that discretion are before the Court. The case will accordingly be heard on the merits when the records are available. The costs of the hearing of this issue will be costs in the cause.