
(1969) 04 RAJ CK 0011

In the Rajasthan High Court

Case No : Company Petition No. 24 of 1963

Jaipur Vastra Vyopar Sangh Ltd. (In liquidation) and Another	APPELLANT
Vs	
Shyam Sunder Lal Patodia	RESPONDENT

Date of Decision : 18-04-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 4 Rule 1, Order 9 Rule 9
Companies Act, 1956 — Section 295, 325, 34, 543

Citation : AIR 1970 Raj 91 : (1969) WLN 223

Hon'ble Judges : P.N. Shinghal, J

Bench : Single Bench

Advocate : D.P. Gupta, for the Appellant; M.D. Bhargava, for the Respondent

Judgement

P.N. Shinghal, J.—This is an application u/s 543 of the Indian Companies Act, 1956, by the Official Liquidator of Messrs. Jaipur Vastra Vyopar Sangh Ltd., in liquidation hereinafter referred to as "the Company", for examination of the conduct of respondent Shyam Sunder Lal Patodia, who is a past director of the Company, and for an order compelling him to restore the money, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the Company by way of compensation in respect of misapplication, retainer or breach of trust as the Court may think proper.

2. The Company was registered under the Jaipur Companies Act of 1942. It is not in controversy that the provisions of that Act were similar to those of the Indian Companies Act, 1913, and that the respondent was the Managing Director of the Company from March 21, 1946 to December 31, 1948.

3. The Company is a public company and it has been alleged that, taking undue advantage of his position as its managing director, the respondent took and utilised Rs. 2,07,832/- for his personal use and thereafter transferred the money in the name of his father Rameshwar Das Patodia on April 29, 1948. It has also been alleged that the respondent took Rs. 19,588/4/6 from the funds of the Company. Both the sums were not repaid, and this is why it has been contended

that the respondent has misapplied, retained and became liable and; accountable for the money of the Company. An order for the winding up of the Company was made on March 9, 1960, and it has therefore been prayed that this Court should examine into the conduct of the respondent and make the aforesaid order u/s 543.

4. The respondent has filed a reply in which he has denied the allegation that he had taken any undue advantage of his position as the managing director of the Company. He has stated that the sum of Rs. 2,07,832/- was treated as a loan and a lien was created under Article 16 of the Articles of Association of the Company which was recognised and confirmed by the District Judge. As regards the sum of Rs. 19,588/4/6, it has been stated that the amount was taken "against the commission of the managing directorship" and only a formal adjustment remained to be made. Further, it has been stated that it was the business of the Company to advance loans to members and create liens on their shares. The respondent has also pointed out that the Company filed two suits for the recovery of these amounts: Civil Original Suit No. 20 of 1953 was filed for the recovery of Rupees 2,37,299/11/6 against Rameshwar Das and others, but it was dismissed in default of the plaintiff's appearance on October 15, 1959. Civil Original Suit No. 21 of 1953 was filed for the recovery of Rs. 24,571/8/- and it was dismissed in default of the plaintiff's appearance on July 15, 1958. It has therefore been urged that these amounts cannot be recovered by the present application u/s 543 and the Company is estopped from making the recovery on account of a resolution of the Company dated April 16, 1948, and also because of the bar under Order 9, Rule 9, C. P. C. as well as the bar of limitation.

5. A rejoinder was filed by the Official Liquidator and the points in controversy between the parties were drawn up in consultation and with the agreement of their learned Counsel as follows,--

1. Has respondent Shyam Sunderlal as managing director of M/s. Jaipur Vastra Vyopar Sangh Limited, Jaipur, misapplied or retained or became liable or accountable for the sums of Rs. 2,07,832/- and Rupees 19,588/4/6 during the period March 21, 1946 to April 29, 1948?

2. If so, at what rate of interest he should be compelled to repay the money?

3. Is the present petition not maintainable on account of the dismissal of civil original suits Nos. 20 of 1953 and 21 of 1953 by the Senior Civil Judge of Jaipur?

4. Is the petition not maintainable as it has been filed after great delay?

The Official Liquidator has recorded his own statement in support of the application, while the respondent has examined himself. There is also some documentary evidence on the record. I shall consider the evidence while dealing with the points ad seriatim.

6. Point No. 1:

As has been stated, it is not disputed that the respondent was the managing director of the Company from March 21, 1946 to December 31, 1948 and the first point for consideration is whether he misapplied, or retained, or became liable or accountable for the sums of Rs. 2,07,832/- and Rupees 19,588/4/6 during that period.

7. So far as the sum of Rs. 2,07,832/- is concerned, a perusal of Article 99 of the Articles of Association of the Company shows that the business of the Company was managed by the managing director or directors subject to the control of the Board of Directors. The respondent was therefore in a position to manage the affairs of the Company. The Official Liquidator has stated that the respondent withdrew a sum of Rs. 1,00,000/- from the funds of the Company as per entry Ex. 1 and debited the amount to the account of Mahaveer Cotton Spinning and Weaving Mills, Delhi, as per Entry Ex. 2. He has also stated that on April 29, 1948, the amount due to the Company from the Mahaveer Cotton Spinning and Weaving Mills, Delhi was Rs. 1,03,180/ 12/- and that it was then transferred to the account of the respondent under Entry Ex. 3.

He has made a reference to "khata" Entry Ex. 5 and has stated that the amount due from the respondent in that account on April 29, 1948, was Rs. 2,07,832/- because some other amounts were also withdrawn by the respondent from the funds of the Company for himself, and also because of accumulation of interest at 6 per cent per annum. The Official Liquidator has produced transfer Entry Ex. 6 in this respect, and has stated that the amount was thereafter transferred from the personal account of the respondent to the account of his firm Messrs. Rameshwar Das Patodia. There is a corresponding Entry (Ex. 7) at page 94 of "khata bahi" No. 6 for 3947-48 in the account of the respondent for Rs. 2,07,832/-. The debit entry of it in the ledger account of Messrs. Rameshwar Das Patodia is in the "khata bahi" and it has been marked Ex. 8.

The Official Liquidator has stated that the balance due on March 31, 1950, was Rupees 2,33,355/8/- which was acknowledged by the respondent in document Ex. 10 on April 15, 1950. It has been stated that this amount has not been paid by the respondent or his firm Messrs. Rameshwar Das Patodia. The liability in the present application has however been confined to Rupees 2,07,832/- because that was the amount which was due up to the period when the respondent functioned as the managing director of the Company. Nothing has been elicited in the cross-examination to shake the testimony of the Official Liquidator. On the other hand, a perusal of the respondent's statement shows that he has clearly admitted that the money was taken by him. He has also admitted that the 61 shares of the Company in the name of his father Rameshwar Das Patodia were owned by him. Further, he has admitted the execution of document Ex. 10 dated April 9, 1950, in which he clearly stated and acknowledged the fact that he was the owner of M/s. Rameshwar Das Patodia and the sum of Rs. 2,32,355/ 8/- on account of principal and interest was due up to the Company upto March 31, 1950. He further stated in that document that the Company's lien on his shares

would remain unaffected by the acknowledgment.

The respondent has admitted in his statement in this Court that he was the managing director of Mahaveer Cotton Spinning and Weaving Mills, Delhi also, that the sum of Rs. 1,00,000/- was remitted to it by the Company and that, inclusive of interest, the amount rose to Rs. 1,03,180/12/- which was transferred to his personal account there- after and a lien was created on his shares for the money when he did not deposit it in spite of notice by the Company. A perusal of entry Ex. 3 also shows that the amount was debited to the respondent under his instructions. The respondent has also admitted that he took more money from the Company from time to time and that Ex. 5 showing the liability for Rs. 1,03,150/12/- is correct, and so also subsequent entry Ex. 7 showing that the liability rose to Rs. 2,07,832/-thereafter. It cannot therefore be doubted that the Official Liquidator has succeeded in proving that the sum of Rs. 2,07,832/- was due from the respondent as he had withdrawn various sums of money from the Company from time to time. It is not at all in dispute that this amount has not been repaid so far.

8. It has however been argued on behalf of the respondent that it was the business of the Company to advance loans to its members and create liens on their shares, and that there is nothing in his conduct to attract Section 543 of the Companies Act. This argument is quite incorrect because a perusal of the Memorandum of Association of the Company shows that it was not the object of the Company to advance loans to its members. Moreover, Section 86D of the Jaipur Companies Act prohibited the Company from making any loan to a director or to a firm of which the director was a partner, so that it is quite obvious that the money was taken by the respondent in contravention of the objects of the Company and the law, It is true that a lien was created on the shares of the respondent, but he has admitted that the Company did so when he did not make the repayment in spite of notice. It cannot therefore be said that the creation of the lien recognised or authorised the withdrawal of the money by the respondent or created a fresh agreement between him and the Company so as to wipe off the earlier liability.

9. An attempt has been made to show that the money was taken by the respondent with the consent of the Board of Directors of the Company, for this is what the respondent has stated in this Court. He had however to admit that there was no such consent in writing. The plea regarding the consent of the directors is quite false because articles 95 and 97 of the Articles of Association of the Company clearly provided that any such resolution had to be in writing signed by a majority of the directors. Article 97 in fact required, inter alia, that all resolutions and proceedings of the directors had to be entered in the book provided for the purpose. The plea of oral consent of the directors must therefore be rejected as incorrect.

10. I have therefore no hesitation in holding that the respondent as managing director of the Company misapplied, or retained, or became liable or accountable

for the sum of Rs. 2,07,832/- which, it is admitted, has not been repaid to the Company so far.

11. I shall now deal with the other sum of Rs. 19,588/4/6. The Official Liquidator has stated that the respondent withdrew a sum of Rs. 20,000/- from the funds of the Company on July 26, 1948 in his personal account as per Entry Ex. 12 in the cash book of the Company. There is a corresponding entry in the respondent's ledger account at page 43 of "khata bahi" No. 7 of the relevant year and it is Ex. 13. The balance due from the respondent on this account was Rs. 20,613/12/- on March 31, 1950 according to Entry Ex. 15 in the "khata bahi". The Official Liquidator has, however confined the liability to Rupees 19,588/4/6 as the respondent ceased to be the managing director of the Company after that amount had become due.

12. The respondent has admitted that he withdrew Rs. 20,000/- from the Company against entry Ex. 12, but has stated that he did so as the money was due on account of his commission as managing director. He claims that he was entitled to a commission at the rate of 10 per cent on the net profits. But he has also admitted that the commission was payable to him after settling the account for the whole of the year. Further, he has admitted that the final account was not settled upto the date when he withdrew the sum of Rs. 20,000/-. It is therefore quite apparent that the respondent was not entitled to take the money as it had not fallen due on the date when it was taken. Section 87C of the Jaipur Companies Act, which admittedly governed the matter, provided that the remuneration of the managing agent was to be the sum based on a fixed percentage of the net annual profits of the Company and that the net profits were to be calculated after allowing for all the usual working charges, interest on loans and advances etc., in each year. The respondent could not therefore calculate the remuneration at his own will and pleasure and withdraw it as he pleased. The balance-sheet (Ex. A. 6) of the Company was not ready until January 11, 1949, and the withdrawal of the sum of Rs. 20,000/- was therefore quite improper, unauthorised and illegal. This was in fact pointed out in portion A to B of the director's report to the share-holders while presenting the balance-sheet (Ex. A.6) and it was specifically stated in it that this was the reason why the respondent was removed from the office of managing director.

13. It has however been argued that the respondent withdrew the sum of Rs. 20,000/- with the consent of the Board of Directors. This contention is incorrect because the respondent has admitted that there was no such written consent and in view of the provisions of Articles 95 and 97 of the Articles of Association of the Company which required the resolution or minutes to be in writing, the plea of oral consent of the Directors is quite unconvincing.

14. The respondent has admitted that in balance-sheet Ex. A-6 the commission of the managing director has been shown as Rupees 2,567/12/3 for the period ended May 31, 1948. This amount was credited to the respondent's account on April 29, 1948, and this is not disputed before me. It is therefore quite clear that

the respondent was not justified in taking the sum of Rs. 20,000/- on that account and in withholding its repayment, He has taken the plea that the profit and loss account was not correctly prepared because a sum of Rupees 70,000/- was paid to the Government although it was not due to it and was wrongly shown as expenses. He has also stated that the directors undervalued the stock of cloth by about Rs. 70,000/-. He had however to admit in the cross-examination that it was simply his own opinion that the sum of Rs. 70,000/- was not due to the Government. Moreover, he admitted that the Government did not refund the money.

Similarly, he had to admit that his statement regarding undervaluation of the stock was based on memory, To say the least, it has not been supported by any documentary evidence on the record. On the other hand, there is no reason to disbelieve the balance-sheet and I have no hesitation in holding that the respondent was not entitled to take the sum of Rs. 20,000/- from the Company. The Official Liquidator has proved that the sum of Rs, 19,588/4/6 is due from the respondent in this respect and it is quite clear that this amount has been misapplied, or retained or that the respondent has become liable and accountable for it to the Company.

15-16. Point No. 2 :

The next point relates to the question of interest. The Official Liquidator has stated that the liability of the respondent in regard to the initial withdrawal of Rs. 1,00,000/- stood at Rs. 2,07,832/- as per Entry Ex. 7, He has also stated that this "khata" entry included interest at 6 per cent per annum. It is therefore clear that interest at that rate was charged even during the period of the managing directorship of the respondent and there is no reason why it should not be allowed thereafter. So also, when it has been shown that the respondent unjustifiably retained Rs. 19,588/4/6, there is no reason why, in the absence of any evidence to the contrary, he should not be liable to pay interest at 6 per cent per annum on this amount from the date of the application until realisation. It may be mentioned that Section 235 of the Jaipur Companies Act and the Indian Companies Act of 1913, provided for the payment of interest, and so also Section 543 of the Companies Act of 1956 and nothing has been shown why the interest should be disallowed in the present case.

17. Point No. 3:

The third point for consideration is whether the present application is not maintainable on account of the dismissal of civil original suits Nos. 20 and 21 of 1953 by the Senior Civil Judge of Jaipur. In order to appreciate the controversy, it will be necessary to recapitulate the facts.

18. The respondent was the director of the Company from March 21, 1946 to December 31, 1948. The Company thought that he was liable for the two sums of money which he had withdrawn and in respect of which I have recorded the above findings in favour of the Company. It has been admitted before me that

the Company filed two suits against the respondent. Suit No, 20 of 1953 was filed for the recovery of Rupees 2,37,299/11/3 under plaint Ex, A.3 on March 26, 1953, against respondent Shyam Sunderlal Patodia, Messrs. Rameshwar Das Patodia, Seth Rameshwar Das Patodia, Seth Sanwal Ram Patodia and Pandit Bhonre Sahai Sharma. Suit No. 21 of 1953 was filed for the recovery of Rs. 24,571/8/- under plaint Ex. A.S on March 31, 1953, against the respondent. It is also admitted that suit No. 20 of 1953 was dismissed in default of the plaintiffs appearance on October 15, 1959, and no application was made for its restoration under Order 9, Rule 9, C. P. C. Suit No. 21 of 1953 was also dismissed in default of the plaintiff's appearance, on July 15, 1958. An application was filed on August 14, 1958 for its restoration under Order 9, Rule 9, C. P. C., but it was dismissed for default of appearance on January 16, 1959, The question is whether the present application u/s 543 of the Companies Act, 1956, is maintainable in these circumstances in spite of the provisions of Order 9, Rule 9, C. P. C.?

19. It is quite apparent that, on the admitted facts just referred, the two suits were dismissed under Order 9, Rule 8, C. P. C. because the plaintiff did not appear when the suits were called on for hearing. Order 9, Rule 9, C. P. C, provides that on such dismissal "the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action," but that he may apply for an order to set the dismissal aside. It has therefore to be examined whether the present application u/s 543 of the Companies Act is barred under this rule. In other words, the questions for answer are whether: (i) in making the present application the Official Liquidator has acted for or on behalf of the plaintiff in the two suits in question, (ii) the present application is a fresh suit, and (iii) it relates to the same cause of action? For reasons to be stated presently, these questions must be answered in the negative.

20. Now a past director is liable for money owed by him to the Company. He is also liable in action by the Company if he has been negligent or has committed some breach of his duty towards the Company: *Joint Stock Discount Co. v. Brown* (1869) LR 8 Eq 381, and *Nant-Y-Glo and Blaina Ironworks Company v. Grave* (1878) 12 Ch D 738 but, in the normal course, only the company is entitled to sue on any such cause of action, as has been held in *Foss v. Harbottle* (1943) 2 P&H 461 and *Palvies v. Jenson* 1956 Ch 565. Some exceptions have been recognized to this rule but they have not been pleaded or proved in the present case. A perusal of the plaint in the two suits shows that in Civil Suit No. 20 of 1953, the Company took the plea that Shyam Sunder Das Patodia had paid Rupees 1,00,000/- to Mahaveer Cotton Spinning and Weaving Mills, Delhi, from the funds of the Company on June 6, 1947, and that on April 29, 1948 he got the amount of Rs. 1,03,180/12/3 standing to the debit of the Mahaveer Cotton Spinning and Weaving Mills transferred to his own account and took further amounts from the Company during the period from June 9, 1947 to April 29, 1948, and thus owed the sum of Rupees 2,07,832/- to the Company which was transferred to the account of Rameshwar Das Patodia. Mention was also made of

the fact that the moneys were taken in violation of Section 86D of the Jaipur Companies Act, and there was a prayer for their, recovery.

The allegation in Civil Suit No. 21 of 1953 was that Shyam Sunder Lal Patodia took away Rs. 20,000/- from the funds of the Company on July 26, 1948 and got the money debited to his personal account on that date. In this case also, reference was made to Section 86D of the Jaipur Companies Act and the suit was raised for the recovery of the money. It is therefore quite clear that both the suits were simple money suits and that, in fact and substance, the liability was not based on any misconduct of Shyam Sunder Lal Patodia as such. So also, there was no question of recovery of compensation or damages for his misconduct. Moreover, it was the Company which brought those actions, and not the Official Liquidator. In all these facts and circumstances it cannot be said that the present application u/s 543 of the Companies Act, 1956, is in the nature of a suit or that it has been brought by the same person who raised the two earlier suits, or that the cause of action is the same.

21. In fact the present application is not at all in the nature of a suit. The word "suit" has not been defined in the CPC or the Companies Act but, as will appear from the provisions of Order 4, Rule], C. P. C., every suit is instituted by "presenting a plaint to the Court or such officer as it appoints in this behalf". It is not in dispute that, in the present case, the application of the Official Liquidator u/s 543 of the Companies Act is not a plaint. The meaning of the word "suit" was considered by their Lordships of Privy Council in Abdullah Ashgar Ali v. Ganesh Das, AIR (20) 1933 PC 63 and their Lordships held as follows :--

"The word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint."

Their Lordships were no doubt considering the question with reference to the provisions of Section 3 of the Limitation Act of 1908. but it is quite apparent from their judgment that they took this view on the basis of the general law, for they held that the explanation to Section 3 of the Limitation Act was not concerned with the question of what is a suit, and their observation cannot be said to be limited to that section. There is therefore high authority for the view that the word "suit" ordinarily means a civil proceeding instituted by the presentation of plaint, unless of course there is any thing repugnant in the subject or the context. In the present case, it cannot be said that there is any such repugnancy so as to exclude the application of the general view of their Lordships. Therefore a proceeding which does not commence with a plaint, and which is not required to be treated as a suit under any other law, is not a "suit": (Delhi) Venkatarama Doss Pantulu Vs. (Delhi) Bheema Rao, So when there is no provision in the Companies Act that an application u/s 543 would be a "suit", it cannot be said that it would be a suit within the meaning of Order 9, Rule 9, C. P. C.

22. An application u/s 543 is, based on the alleged misconduct of a past or present director, managing agent etc., and, by the express wordings of the

section, the right to present it does not vest in the Company, but in the Official Liquidator, liquidator, or any creditor or contributory of the company. This has to be so because the purpose of the application is to ensure that any past or present director, or managing agent etc., having a controlling interest in the company may not be able to evade his liability either by the weight of his influence in the affairs of the company or by pleading that under the law it is only the company which has the right to sue and no one else. As was held in *Official Liquidator Vs. Liaqat Husein*, misfeasance proceedings u/s 235 of the Companies Act of 1913, (which was the counter-part of Section 543 of the Companies Act of 1956) was merely an examination by the Court into the conduct of an officer of the company, and as a result of that examination the Court was entitled to order the officer to restore the money or the property of the company, but that proceeding was not a suit. I have no doubt therefore that the present application is not a "suit".

23. So also, it cannot be said that the cause of action for an application u/s 543 is the same as for a suit by the Company against a delinquent director or past director, By virtue of the winding up proceedings, the section gives new rights which did not exist before, and I consider it sufficient to refer here to the following passage from "*Buckley on the Companies Acts*", thirteenth edition, page 672,--

"As regards applications by the liquidator, the Act gives after winding up new rights which did not exist before winding up, and which can be enforced only in the winding up, so that it is not in this sense correct to say that the liquidator can recover only what the company could have recovered. But it is a correct statement that this Section is a procedure section only. It merely provides a summary method for enforce-ing such liabilities as might have been enforced by the company itself or by its liquidator by means of an ordinary action, including new rights created by the winding up."

This is what has been held in *Re National Funds Assurance Company*, (1878) 10 Ch. D. 118 at p. 125. In that case it has further been held that the new rights created by the winding up did not exist before the winding up and could be enforced only under the winding up proceedings. The same view has been taken in *Re Whitehouse and Co.* (1878) 9 Ch. D. 595, *Burgess's case*, (1880) 15 Ch. D. 507 and *Flitcroft's case*, (1882) 21 Ch. D. 519 at p. 530.

24. In fact Section 543 cannot be said to enable the company to recover from a director or past director a mere monetary claim owed to the Company. This is the view taken of the provisions of Section 333 of the Companies Act, 1948, in force in England (which is substantially similar to Section 543 of our Act), and I may only refer to *Re Etic, Ltd*, 1928 Ch. 861 in this connection. For this reason also, it cannot be said that an application u/s 543 is based on the same cause of action.

25. Then there is one other feature which distinguishes the two proceedings. It has been stated regarding the court's discretion u/s 333 of the Companies Act,

1948, of England in "Palmer's Company Law", twentieth edition, page 575,--

"The court is given a discretion, both as to whether or not it will grant the relief sought, and as to the amount of relief which it gives. This is in contrast to an action by the company against a director, where the court would be bound to give judgment in accordance with the legal rights established."

It would be supererogation on my part to add to this observation, for it is sufficient to establish that an application u/s 543 is not based on the same cause of action as a simple suit for the recovery of money.

26. The provisions of Section 543 do not prevent a company from filing a suit against a delinquent director or past director etc. for the recovery of money or damages but, by its very nature, an action by way of such a suit has to be brought by the liquidator on behalf of the company, while an application u/s 543 has to be made by him in his own name, for it cannot, in terms, be brought in the name of the Company.

27. For all these reasons, it cannot be said that in presenting the application u/s 543 of the Companies Act, the Official Liquidator has acted in the capacity of a plaintiff, or that the application is by way of a suit, or that it relates to the same cause of action as the two suits of 1953. It follows therefore that the bar of Order 9 Rule 9 C. P. C. cannot be raised against the application.

28. There is one more reason for this view. As has been stated, the orders of dismissal of the two suits were passed on October 15, 1959 (in respect of suit No. 20 of 1953) and July 15, 1958 (in respect of suit No. 21 of 1953). The winding up order was made on March 9, 1960, and by virtue of Section 441 of the Companies Act, 1956, it took effect from October 26, 1957 when the petition for the winding up of the Company was presented. Then Section 458A of that Act provides that notwithstanding anything in the Indian Limitation Act, 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. It was therefore open to the Official Liquidator to make an application under Order 9, Rule 9 C. P. C. within this extended period of limitation, and it cannot be said that the application would have been barred by limitation on account of the expiry of the normal period of thirty days prescribed for it. Two alternative courses were therefore open to the Official Liquidator: (1) he could make an application u/s 543 of the Companies Act for recovery of damages from the delinquent past director, or he could apply under Order 9, Rule 9 C. P. C. for orders to set the dismissals of the suits aside. It cannot however be doubted that the former was the speedier remedy and the Official Liquidator cannot be blamed if he chose it in preference to the remedy under Order 9, Rule 9 C. P. C. It is not disputed, and is

in fact admitted at the Bar, that the suits had not made any progress worth the name in the trial court and their restoration would have led to lengthy trials. That, in turn, would have delayed the winding up proceedings. If therefore the Official Liquidator preferred the remedy by way of an application under Section 543 of the Companies Act, which had the added advantage of providing a longer period of limitation it cannot justifiably be argued that his application should be rejected simply because he did not choose to adopt the remedy under Order 9, Rule 9 C. P. C.

29. What is barred under Order 9, Rule 9 C. P. C. is another suit, but the bar cannot be raised where any other provision of the law intervenes. Thus it is well settled that the provisions of Order 9, Rule 9 cannot override the provisions of Section 60 of the Transfer of Property Act and a fresh suit is permissible: *Shridhar Sadba Powar Vs. Ganu Mahadu Kavade*, A fortiori, the bar of Order 9, Rule 9 cannot debar the making of an application u/s 543 of the Companies Act to make a delinquent past director liable for misconduct.

30. It may be said to be quite well settled that even if action by way of a suit is found to be barred by the law of limitation in any particular case, the remedy by an application u/s 543 of the Companies Act is still available to the Official Liquidator (and others entitled to it) if the extended period of limitation prescribed by the section happens to be available to him. Reference may in this connection be made to the decisions in *Benares Bank Ltd. Vs. Shri Sri Prakasha Bhagwan Das and Others*, *In Re: The Companies Act and S.S.R.S. Nidhi Ltd.*, which made a reference to that case, and *Official Liquidator, Palai Central Bank Ltd., Official Liquidator, Palai Central Bank Ltd. (in liquidation), Ernakulam Vs. K. Joseph Augusti, Kayalackakam House, Palai and Others*, in which both the cases were followed. There is no reason why any stricter view should be taken of the bar of Order 9, Rule 9, C. P. C. than of the bar under the Limitation Act.

31. For the foregoing reasons, I have no hesitation in deciding that the present application cannot be held to be barred because of the dismissal of the Civil original suits Nos. 20 and 21 of 1953, and the point is decided against the respondent.

32. Point No. 4: The last question for consideration is whether the petition could not be maintained as it was filed after great delay. Learned counsel for the respondent realised, however, during the course of the arguments that he could not sustain the objection to the maintainability of the present application on any such ground, and he did not therefore, press it for consideration. It will be sufficient to say however that subsection (2) of Section 543 of the Companies Act provides, inter alia, that an application under Sub-section (1) shall be made within five years from the date of the order for the winding up of the Company. As has been stated, it is not disputed that that order was made on March 9, 1960, and as the present application was filed on November 5, 1963, it is undoubtedly within the prescribed period of limitation and the objection to the contrary is quite futile.

33. Finding that the odds were against him, Mr. Bhargava, learned counsel for the respondent, tried to raise the argument that because the Jaipur Companies Act of 1942 and Indian Companies Act of 1913 were repealed on the coming into force of the Indian Companies Act, 1956, the applicant lost any right he had to make an application u/s 235 of the repealed Acts or Section 543 of the Companies Act, 1956. The learned counsel made repeated reference to Section 6 of the General Clauses Act to support his argument. It is however quite unsustainable. No such objection was taken in the reply, and the point was not pressed for consideration when the points for determination were drawn up. Section 3(1)(i) of the Indian Companies Act, 1956, defines "company" to mean a company formed and registered under that Act, or an "existing company" as defined in Clause (ii). That clause defines an existing company to mean, inter alia, a company formed and registered under any of the previous laws relating to companies mentioned in the clause. It cannot be doubted, and has not been disputed, that the Company was a company within the meaning of that definition, It would therefore undoubtedly fall within the purview of Section 543 of the Companies Act of 1956. So, if in the course of its winding up, it appears that any past director has misapplied, or retained, or became liable or accountable for, any money of the Company, there is no reason why the official liquidator should not move the Court for action u/s 543 of the Companies Act, the more so when it has been admitted by Mr. Bhargava that the order for the winding up of the Company was made on March 9, 1960 under the provisions of the Companies Act of 1956. There is therefore no force in the argument of Mr. Bhargava and I have no doubt that it cannot save the respondent from his liability u/s 543.

34. In the result it is declared that respondent Shyam Sunder Lal Patodia has misapplied, or retained, or became liable or accountable for the sums of Rs. 2,07,832 and Rs. 19,588/4/6, making a total of Rs. 2,27,420/4/6. It is ordered that he shall repay to the Official Liquidator the said sum of Rs. 2,27,420/4/6. He shall pay interest at 6 per cent per annum on the sum of Rs. 2,07,832 from April 29, 1948 down to the date of payment. Similarly he shall pay interest at the same rate on the sum of Rs. 19,588/4/6 from November 5, 1963, which is the date of presentation of the present application down to the date of payment. The respondent shall also pay the costs of and incidental to this application to the Official Liquidator.