

(1998) 03 P&H CK 0165
In the Punjab And Haryana At Chandigarh
Case No : Company Petition No. 110 of 1992

Kainth Finance (P.) Ltd. (in Liquidation)	APPELLANT
Vs	
Shri Karam Singh Kainth and others	RESPONDENT

Date of Decision : 26-03-1998

Acts Referred:

Companies Act, 1956 — Section 168, 175, 175(1), 235, 425

Citation : (1999) 98 CompCas 131 : (1998) 120 PLR 478 : (1999) 1 RCR(Civil) 99

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : G.S. Sandhawalia, for the Appellant; S.K. Hiraji, for the Respondent

Judgement

Swatanter Kumar J.—The official liquidator, as a liquidator of Kainth Finance (P.) Limited, has filed this petition u/s 543(1) of the Companies Act, 1956 (hereinafter called "the Act"), for compelling the respondents to restore the amount to the company.

2. In order to properly appreciate the rival contentions raised by the parties for grant of the relief prayed for on the one hand and the very sustainability of the claim on the other, it would be necessary to refer to the facts giving rise to this petition.

3. Kainth Finance Private Limited was incorporated as a private limited company on July 4, 1975, with its registered office at village and post office Dhunike, District Jalandhar. However, because of some inner mismanagement the company was brought under creditors' voluntary winding up by a special resolution passed on March 24, 1980. Shri Gopal Krishan Monga, advocate, was appointed as its voluntary liquidator. The Registrar of Companies, Jalandhar, informed the official liquidator that certain irregularities in liquidation proceedings under the voluntary liquidator were being committed and a petition u/s 440 read with section 515 of the Companies Act, 1956, for removal of the voluntary liquidator and for winding up of the company should be filed in the

High Court. Consequently, a company petition, being Company Petition No. 24 of 1986, was filed in this regard. The Hon"ble company judge being satisfied with regard to the averments made in the report of the official liquidator, vide order dated September 8, 1988, directed the removal of the voluntary liquidator and directed the winding up of the company with consequential direction. The relevant extract of the order reads as under :

"Consequently, I allow this petition and direct the winding up of the company respondent No. 1 under the supervision of this court and appoint the official liquidator attached to this court as the official liquidator by directing removal of respondent No. 2 as its voluntary liquidator u/s 515(2) of the Act. Respondent No. 2 is directed to hand over complete charge of the books and papers of the respondent-company to the official liquidator after explaining the affairs of the company in detail to him. The official liquidator shall take charge of the assets, books of account and other relevant papers, of the company. Respondent No. 3 is required to furnish all information and render explanation to the official liquidator on the points raised in the petition. In case, however, he fails to do so the official liquidator shall take further proceedings in accordance with law. This order of winding up of the respondent-company shall, within one month, be advertised in the Tribune and the Punjabi Tribune as also in the Punjab Government Gazette in Form No. 53 as required by rule 113 of the Companies (Court) Rules, 1959. In the absence of any representation on behalf of respondents Nos. 1 and 2 there shall, however, be no order as to costs."

4. The official liquidator attached to the company court was appointed as liquidator of the company, vide the same order and was directed to take charge of the assets and accounts books of the company. While examining the state of affairs of the company, it was realised by the official liquidator that the pronotes executed by the debtors in favour of the company during the period 1975-76, have been permitted to become bad debts as they had become barred by time even before the appointment of the voluntary liquidator on March 24, 1980. The official liquidator claims to have taken up the matter with the voluntary liquidator, Mr. Gopal Krishan Monga, who submitted the records to the official liquidator, after he could obtain the records from the respondents as per the letter dated September 30, 1982. An affidavit dated September 10, 1991, was also submitted by the voluntary liquidator, Mr. Monga, that the debts of the company had become barred by time before the records were handed over to him.

5. From the statement of affairs of the company and in view of the above facts, the official liquidator concluded that the debts had become barred by time due to misfeasance, negligence and irresponsible functioning on the part of the managing director and directors of the company prior to the period when the company came into liquidation. The managing director and directors of the company were impleaded as respondents to this petition. As one of the directors, Sardara Singh, died during the pendency of the petition, his name was directed

to be deleted, vide order dated March 18, 1993. In these circumstances, the official liquidator on the strength of the provisions of section 543 of the Companies Act, 1956, prayed for a direction in the form of recovery to restore the amount lost by the company due to the aforestated acts of omission and commission of the respondents-directors.

6. All the respondents were served and a common reply was filed on behalf of respondents Nos. 1, 2, 4 to 6. The liability of the respondents was disputed. It was stated that the respondents cannot be called upon to restore the amount under the aforestated provisions as no misfeasance or negligence was attributable to them. It was stated that the pronotes placed on record were not genuine ones. On the merits, it was stated that Mr. Gopal Krishan Monga, the voluntary liquidator, had informed the official liquidator that the original pronotes had been eaten up by ants and the company had prepared fresh ones mentioning the old dates.. Great emphasis has been placed on the facts that, vide letter dated September 30, 1982, only 14 pronotes were handed over by the voluntary liquidator to the official liquidator and as such the rest of the pronotes are not genuine and have been created to fasten the liability upon the respondents without any basis. In addition to taking up the plea of the present claim made by the official liquidator being barred by time, objection with regard to the maintainability of the present petition for non-joinder of necessary party, namely, Gopal Krishan Monga, has been taken. It is also averred that there is no negligence or misfeasance attributable to the directors.

7. Replication was filed on behalf of the official liquidator reiterating its case pleaded in the main petition.

8. On the basis of the aforestated pleadings of the parties, the court, vide its order dated October 10, 1996, had framed the following issues :

"(1) Whether the petitioner is entitled to receive a sum of Rs. 3,10,000 from the respondents, the ex-directors of the company ? OPP.

(2) Whether the petitioner is entitled to interest, if so, at what rate and on what amount ? OPP.

(3) Whether the petition is barred by time ? OPR.

(4) Whether the petition is bad for non-joinder of Gopal Krishan Monga, the voluntary liquidator ? OPR.

(5) Relief."

9. Thereafter, the parties led their evidence to discharge the respective onus placed upon them under these issues. The official liquidator examined Mr. M. K. Kappor, official liquidator attached to this court as P.W.-1 as a sole witness who produced and proved on record the various documents including pronotes, letters exchanged between the voluntary liquidator and official liquidator appointed by this court and record from the Registrar of Companies.

10. On the other hand, R.W.-1 Shri Karan Singh, respondent No. 1 was examined by the respondents as their sole witness and other respondents neither stepped into the witness box; nor any other witness was examined on their behalf. Evidence of the respondents was closed on September 4, 1997.

11. At the outset, it needs to be mentioned that earlier all the respondents had refused to accept service and as a result thereof, they were directed to be proceeded against ex parte on March 18, 1993. The official liquidator had examined Mr. H. S. Bawa, as sole witness on April 29, 1993, and vide the judgment of the same date, the Hon"ble company judge had passed an order of payment directing the respondents to restore the amount to the company.

12. However, these proceedings were set aside and as noticed above, the respondents were given opportunity to lead their evidence which they led as afore-indicated.

13. P.W.-1 in his statement stated that after his appointment as official liquidator of the company in furtherance to the order of this court dated September 8, 1988, he had taken into custody the record of the company and the voluntary liquidator had submitted his affidavit dated September 10, 1991, exhibit P.W.-1/36 stating therein that the pronotes delivered by him in court were in the same condition as were handed over to him and also stated that the records were handed over to him by the directors after 2Yz years of his appointment as voluntary liquidator in the year 1980, and the pronotes had got barred by time before the records were received by him. The pronotes which are the subject-matter of the present petition are exhibit P.W.-7 to P.W.-1/33. They are the original pronotes and it needs to be pointed out that all these pronotes had been denied by the respondents. Exhibit P.W.-I/1 is the letter dated July 15, 1989, written by the voluntary liquidator to the official liquidator. He also handed over various documents and records including 27 pronotes. Exhibit P.W.-1/2 is the detail of the deposit. The statement of affairs of the company was submitted by the voluntary liquidator, vide exhibit P.W.-1/5 as on date September 8, 1988. Vide letter dated October 8, 1989, and even by subsequent letter the official liquidator has raised certain queries from the voluntary liquidator including pointing out a doubt on exhibits P.W.-1/29 and P.W.-1/33 that they appear to be new and not as old as if they were executed in the year 1977. The voluntary liquidator, vide letter dated September 9, 1991, exhibited P.W.-1/35 had answered these queries and had given explanation of the doubt of the official liquidator as under :

"2. The pronotes handed over to me by the company were delivered to me through the court and this point raised by you was also taken up with the company. The directors told me that the old pronotes had been eaten up by ants and they were not readable and the company prepared fresh ones mentioning therein the old dates, i.e., the dates when the actual loan was advanced to debtors."

14. It was further stated that the respondents are the directors of the company. With this record of the company produced on record, the official liquidator had claimed to have proved his case making out a case for restoration of the funds of the company.

15. The respondents examined Mr. Karam Singh as R.W.-1 and produced on record two documents, exhibit R.W.-1/1, which was the certified copy of the balance-sheet of the company for the year 1976-77 and R.W.-1/2 which was the letter, vide which the records were given and taken over by the voluntary liquidator on September 30, 1982. In the light of the above evidence produced by the respective parties, it will be appropriate to discuss the issues Nos. 1, 2 and 4 together as in a way they are inter-linked.

Issues Nos. 1, 2 and 4 :

16. There is no dispute as to the fact that the respondents were the directors of the company at the relevant time. P.W.-1 has proved the documents, i.e., the original pronotes as P.W.-1/7 to P.W.-1/33. All these pronotes relate to the period 1975-76, and admittedly the company went into voluntary liquidation only on March 24, 1980, when a special resolution to that effect was passed and Mr. Monga was appointed as voluntary liquidator by the company. It is clear that money was due and payable on demand on the basis of these pronotes which had become barred by time due to inaction on the part of the respondents. The records of the company including these pronotes were handed over by the respondents who were the erstwhile directors of the company to the voluntary liquidator in the year 1982. Thereafter, the records were handed over to the official liquidator after he was so appointed by the company court in the year 1989 by the voluntary liquidator. Having looked into these records and the statement of affairs filed by the directors of the company, the official liquidator exchanged some correspondence with the voluntary liquidator to verify facts. Once the facts became clear to the official liquidator the present petition for restoration of the amount of the company u/s 543 of the Companies Act was filed in the month of November, 1992. In the entire reply, there is no justification or explanation rendered by the respondents to show as to why the amount due on these pronotes to the company were not recovered within the period of limitation and even otherwise what efforts or steps were made by them to recover the amounts. Another interesting factor is that all the pronotes including exhibits P.W.-1/7 to P.W.-1/33 have also been denied by the respondents whereas no such stand has been taken by them in their reply and even during the course of arguments. Great emphasis was placed by learned counsel for the respondents that, vide exhibit R.W.-1/2 the company had handed over only 14 pronotes, the details of which have been furnished in that letter, while Mr. Monga, the voluntary liquidator, vide exhibit P.W.-1/ 1 had handed over as many as 27 pronotes to the official liquidator for recovery. On the face of it, the argument appears to be interesting but when one examines it critically, it shows the hollowness of the stand taken by the respondents before this court. When P.W.-1 was examined in

the court, the trend of the cross-examination does not even indicate this version of the respondents. In fact, the answer to this suspicion raised by learned counsel for the respondents has been provided by respondent No. 1 himself in his examination before the court as R.W.-1. The relevant portion of his statement reads as under :

"The interest due from various debtors was got calculated from G. K. Monga who was an employee of the company. Shri Monga, was also an advocate but was mainly working as an accountant. G. K. Monga got a resolution passed for the voluntary liquidation of the company. Since we did not possess enough funds we wanted to close the company. Even at the time of incorporation of the company it was Mr. Monga who prompted us to get it registered. - The records of the company were always in the custody of Shri Monga. It is correct that Shri Monga filed a case against me for recovery of records of the company. I had filed reply in that case. The stand taken by me in that case was that the records were with Shri Monga and not with me. I got some notices issued from Shri Monga to the debtors of the company for recovering money due to it. Shri Monga was carrying on all the activities in the office."

17. The other doubt sought to be created by learned counsel for the respondents is with regard to the handing over of the pronotes by the respondents to the voluntary liquidator and by the voluntary liquidator to liquidator after he was so appointed by the company court in the year 1989 by the voluntary liquidator. Having looked into these records and the statement of affairs filed by the directors of the company, the official liquidator exchanged some correspondence with the voluntary liquidator to verify facts. Once the facts became clear to the official liquidator the present petition for restoration of the amount of the company u/s 543 of the Companies Act was filed in the month of November, 1992. In the entire reply, there is no justification or explanation rendered by the respondents to show as to why the amount due on these pronotes to the company were not recovered within the period of limitation and even otherwise what efforts or steps were made by them to recover the amounts. Another interesting factor is that all the pronotes including exhibits P.W.-1/7 to P.W.-1/33 have also been denied by the respondents whereas no such stand has been taken by them in their reply and even during the course of arguments. Great emphasis was placed by learned counsel for the respondents that, vide exhibit R.W.-1/2 the company had handed over only 14 pronotes, the details of which have been furnished in that letter, while Mr. Monga, the voluntary liquidator, vide exhibit P.W.-1/1 had handed over as many as 27 pronotes to the official liquidator for recovery. On the face of it, the argument appears to be interesting but when one examines it critically, it shows the hollowness of the stand taken by the respondents before this court. When P.W.-1 was examined in the court, the trend of the cross-examination does not even indicate this version of the respondents. In fact, the answer to this suspicion raised by learned counsel for the respondents has been provided by respondent No. 1 himself in his examination before the court as R.W.-1. The relevant portion of his statement reads as under :

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18. The other doubt sought to be created by learned counsel for the respondents is with regard to the handing over of the pronotes by the respondents to the voluntary liquidator and by the voluntary liquidator to the official liquidator. As already noticed, vide exhibit R.W.-1/2 the voluntary liquidator had received records from the respondents and the voluntary liquidator had handed over to the official liquidator, vide exhibit P.W.-1/1. The discrepancy in regard to the number of pronotes is totally immaterial for two reasons which are apparent from the record. Firstly, 27 pronotes stated in P.W.-1/1, P.W.-1/2 and P.W.-1/3 are traceable in exhibit R.W.-1/2. For example, the names of Buta Singh, Mohinder Singh and Manjit Singh appear in both these documents along with other creditors of the company. Secondly, the 14 pronotes were handed over to the voluntary liquidator and as is clear from the statement of R.W.-1 he was also possessing records of the company and while handing over the complete records of the company he in turn had handed over 27 pronotes in all. For both these reasons, the dent sought to be created by learned counsel for the respondents in the functioning of the official liquidator is not well founded at all. The pronotes have been exhibited in accordance with law because the records were handed over by the respondents them-selves to the voluntary liquidator who, in turn handed over the records to the official liquidator. In addition to this while providing a clarification as aforementioned, the voluntary liquidator had clearly indicated that the new pronotes were got re-executed by the respondents themselves as the original pronotes had been eaten by ants. The official liquidator has been able to discharge his primary onus and the documents in question had been rightly exhibited. In the cross-examination of the official liquidator, the sole witness of the petitioner, not even a suggestion was put to the witness that the pronotes were never executed or the same are fabricated ones. Even in his own statement, R.W.-1 did say that the pronotes exhibited P.W.-1/7 to P.W.-1/33 were forged documents. However, the reason given for such forgery is obviously self-contradictory. The pronotes exhibited P.W.-1/7 to P.W.-1/28, are the original pronotes and it is not stated that these were not one of the 14 pronotes which have been handed over by the respondents to the voluntary liquidator. It is also not stated in the statement that they do not bear the

signatures of the creditors of the company or that the persons who are stated to be the creditors were never the creditors of the company. No explanation has been tendered by the respondents as to how in the certified copy of the balance-sheet (exhibit R.W.-I/1 for the year 1976-77), the unsecured loans of the company have been reflected do not include the creditors shown in these pronotes. Furthermore, in the covering letter, exhibit R.W.-1/1, it is specifically stated that the loans and advances have been increased from Rs. 36,017 to Rs. 40,703.50 for the relevant year.

19. The contention of learned counsel for the respondents that the pronotes have not been proved and the reliance placed for this purpose in the case of Firm Chunni Lal Mansa Ram Vs. Firm Sheo Prasad Banarsi Das, , is totally misplaced. It is not a case where the letter had been received in an ordinary course and sought to be proved by a person who could not state anything with regard to the contents thereof. In the present case, the very person who was the advocate, accountant and representative of the company having in possession of the record had executed the documents to support the version now put forward by the official liquidator.

20. Once the official liquidator has been able to discharge his primary onus then it was for the respondents to prove that the pronotes were without consideration or were totally forged. The respondents could obviously not take that stand because it is for them to prove that the alleged forgery was executed in exhibit P.W.-1/28 in so far as the signatures of Karam Singh were concerned, who was admittedly at the relevant time the managing director of the company and as such was responsible for the conduct of the business of the company.

21. The pronotes relate to 1975-76, and a special resolution for the voluntary winding up of the company was passed on March 24, 1980, the date which would be relevant for such purpose. As such, it is clear beyond doubt that the debts had become barred by time even before the passing of the resolution for voluntary winding up of the company. No explanation has been tendered as to why action was not taken by the directors to recover the amount in time. The respondents have not even stated in their reply nor in evidence that they were not responsible for the conduct of the business of the company. Not even a suggestion was put to the official liquidator in this regard. Once they are responsible for the conduct of the business of the company then they owe an obligation to the company to recover its debts within the prescribed period of limitation. At least they were expected to take all possible steps to recover the amount to avoid loss to the company.

22. The respondents who are closely related to each other were under an implied obligation to look after the interest of the company by taking all possible steps and action which at least a person of common prudence would take. The record of the case establishes the fact that the respondents have acted in a negligent and irresponsible manner. Such conduct on the part of the respondents has not only prejudicially affected the interests of the company, but has caused definite

loss to the company. Keeping in view the fact that the main business of the company was lending and investment of money, the conduct of the respondents cannot be termed as bona fide or even reasonable. On the contrary it amounts to wasting the assets of the company causing a definite loss in terms of money to the company. Thus, it would be covered under the wider scope of the expression "misfeasance" as held in *Canadian Land Reclaiming and Colonizing Co. (Coventry and Dixon's case)*, *In re* [1880] 14 Ch 660 (CA). Where the facts are so clear, the company is not required to plead specific fraud on the company, as any act which would reflect nothing more than a mere negligence coupled with loss to the company would be sufficient to offend the provisions of section 543 of the Companies Act. In this regard reference can be made to the case of *Smart Advertising Co. (P.) Ltd. (In Liquidation) Vs. Ramesh K. Nanchahal and Another*, wherein, while holding the respondents liable in somewhat similar circumstances, a Bench of this court held as under (page 93) :

"From the aforesaid statement, it is clear that the respondents did not institute any proceedings against the debtors for recovery of the amounts due to the company and allowed them to become time-barred. Section 543 of the Companies Act, inter alia, provides that if it appears that any past or present director of the company has been guilty of misfeasance or breach of trust in relation to the company, the court may, on the application of the official liquidator, or the liquidator, examine into the conduct of the director and compel him to contribute such sum to the assets of the company by way of compensation in respect of misfeasance or breach of trust as the court thinks just. The words "misfeasance and breach of trust" have been defined by the Supreme Court in *P.K. Nedungadi Vs. The Malayalee Bank Ltd. (In Liquidation) and Others*, , wherein it was observed that misfeasance and breach of trust include breach of duty to the company resulting directly in misapplication or loss of the company's assets. Allegations or proof of fraud are not essential. It is immaterial that the offender is also criminally liable. Breach of such duty makes him liable to repay or restore the company's loss.

From the aforesaid definition, it is clear that if the company suffers any loss on account of breach of duty on the part of a director, he is liable to reimburse the company to the extent of such loss. In the present case, the breach of duty on the part of the respondents is apparent from the facts of the case. Therefore, they are liable to reimburse the company to the tune of Rs. 4,056.77. The petitioner has further claimed interest on the said amount from the date of filing of the petition till the date of realisation of the amount at the rate of 12 per cent. per annum. In my view, this claim of the petitioner is justified."

23. The case put forward by the official liquidator, petitioner herein, is well supported by the record which has been proved in accordance with law. The act of misfeasance and wrongful loss to the company has been established. The respondents have utterly failed to discharge their onus of escaping the liability keeping in view the merits of this case. The argument that the petition was bad

for non-joinder of Gopal Krishan Monga in fact has become more or less academic in the present case because Mr. Gopal Krishan Monga has already died probably during the pendency of the petition. Consequently, the liability of all the respondents is not dependent on the liability of the late Gopal Krishan Monga. Further, admittedly the debts have become barred by time even prior to the passing of the special resolution for voluntary winding up of the company. Had the debts become barred by time at the hands of Gopal Krishan Monga voluntary liquidator, probably there could be some meaning in the arguments raised by learned counsel for the respondent that Mr. Monga, was a necessary party. Thus, in the present case, I have no hesitation in holding that Mr. Monga was not a necessary party. At best he could be termed as a proper party in the suit and whose absence would not have vitiated the claim of the official liquidator.

24. The narration of the above facts seen in its correct perspective reflects clear commission or omission, which is a breach of the duty of the respondents which they owe to the company and that has resulted in definite loss to the company. In this regard, reference can also be made to the case of Rao Sahib V. Subbayya and Others Vs. C.T. Machayya and Another, . It can also be not disputed that the respondents were directly in control of the records of the company as well as the affairs of the company. Being managing director and director of the company, the respondents were obliged to protect the property of the company and not permit the debts due to the company barred by time.

25. The petitioner has claimed interest in the main petition. The rate of interest indicated in some pronotes is 18 per cent. per annum (exhibits P.W.-1/7, P.W.-1/21, P.W.-1/23, P.W.-1/39 and P.W.-1/31) while no rate of interest is mentioned in any other pronotes. No other document has been placed on record and no evidence has been led to show that the company would be entitled to the same rate of interest on all pronotes. But still it remains a fact that the petitioner has claimed interest on the amount payable to the company. These are commercial transactions and, therefore, some interest must be paid, may not be the interest at the rate of 18 per cent. on all pronotes. In these circumstances, I am of the view that the interests of justice would be met if the respondents are directed to pay a nominal rate of interest on the entire amount, i.e., interest at the rate of 12 per cent. from the date of institution of the petition till realisation.

26. Accordingly, issues Nos. 1 and 2 are decided in favour of the petitioner against the defendants while issue No. 4 is decided against the respondents in favour of the petitioner.

Issue No. 3 :

27. The submission of learned counsel for the respondent is that the present claim filed by the official liquidator is barred by time. The contention is that admittedly the company had passed a resolution for voluntary winding up on March 24, 1980, while the present claim has been filed on November 25, 1992. Under the provisions of section 543(2) of the Companies Act, the claim could be

filed within three years from March 24, 1980, and as such the claim is barred by time. In order to find the correct precept which could help in solving this legal tangle put forward by learned counsel for the respondent for determining before the court, reference to some provisions of the Companies Act would be necessary. Section 425 of the Companies Act provides for the modes of winding up. A company may be wound up voluntarily or may be wound up subject to the supervision of the court. Every mode of winding up is governed and regulated by different provisions till the company is officially dissolved. Of course, the powers of the official liquidator working under the supervision of the court as well as in a petition where the company is ordered to be wound up by the orders of the court emerge from the same provisions. If a company is wound up voluntarily it has to pass a resolution for that purpose in consonance with the provisions of section 484 of the Act.

28. Various steps are expected to be taken before a company can be finally dissolved in consonance with the mandate of section 515 of the Companies Act. Compliance with such prescribed steps obviously is a condition precedent to the final dissolution of the company as per the provisions of section 497 of the Act. Upon conclusion of the final meeting and winding up of affairs of the company, no further steps are required to be taken by the company except to the extent that the Registrar or the official liquidator has been given the right to move the court in accordance with sub-section (5) to sub-section (7) of section 497 of the Act as the case may be. While on the other hand, a company can be wound up by the orders of the court u/s 433 with the aid of the provisions of sections 433, 434 and 439 of the Companies Act as explained in Chapter 11 of Part VII of the Act. The power of the court to order winding up of a company or voluntary winding up subject to superintendence of the court, both operate in a different realm than the voluntary winding up of a company simpliciter. In a given case the company court while exercising its powers u/s 500 read with section 515 of the Companies Act has also the jurisdiction to appoint a liquidator in a voluntary winding up as well. The scheme of these provisions indicates a clear legislative dissection between the provisions regulating voluntary winding up of the company on the one hand, and winding up of the company by the court. This distinction is unambiguous and is sufficiently indicated in regard to the various stages of proceedings before the court of competent jurisdiction. In other words, the distinction is prescribed in regard to the scope of a petition, limitation of final stage; petition of the official liquidator and the final dissolution of the company and the nature of the directions which could be passed by the company court under the -provisions of this Act.

29. In this background of the, legislative scheme behind these provisions now reference should be made to the provisions of section 543 of the Companies Act with the interpretation of which the court is concerned. Section 543 of the Companies Act reads as under :

"S. 543. Power of court to assess damages against delinquent directors, etc. -

(1) If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company -

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the court may, on the application of the official liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, 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 the mis-application, retainer, misfeasance or breach of trust, as the court thinks just.

(2) An application u/s (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable."

30. The provisions of section 543 of the Act on its composite reading provides the stages and the manner in which the official liquidator would take action and also the period of limitation in which such proceedings could be initiated against the erring directors, secretaries, treasurers, etc. Section 543, thus, is not only a clause enabling the official liquidator to take action on the ground of misapplication, misfeasance or breach of trust, subject to the satisfaction of the court but is the provision which could safely be described as a self-contained section in regard to the cause to approach a court with a petition, the limitation for approaching the court for such purpose and the direction which could be granted in such cases.

31. The official liquidator, during the course of winding up of a company is under a duty to find out that if any person responsible for promotion, formation and running the business of the company, present or past, or any other person who held a status in the company as specified u/s 543(1) of the Companies Act, was responsible for causing any financial loss to the company by his acts of misfeasance and mismanagement. In such event the official liquidator is further under obligation to file an appropriate petition for restoration of the assets of the company before the court of competent jurisdiction. Thereupon if the court is satisfied of such averments in the petition, an order against the erring person within the contemplation of section 543(1) for restoration of assets of the

company could be passed. The acts of misfeasance or mis-management or acts of breach of trust may result from any omission and/or commission as understood in its common parlance. Once it is established that misfeasance was attributable to such person, that would be the foundation for passing such an order. The reading of section 543(2) of the Companies Act makes it evident that the two most important expressions in the said sub-section are "the date of the order for winding up" and "whichever is longer". In other words, an application under sub-section (1) of section 543 can be filed within a period of five years from the date of order of winding up or the first appointment of the official liquidator, in the winding up or the date of misapplication, misfeasance, breach of trust, as the case may be, whichever is longer. In other words, the period of limitation would commence from the last date on which any of the above acts is traceable. The remedies available u/s 543 of the Companies Act are in addition to and not in derogation of the other actions including the criminal liability that may arise against the proceedings specified in this section. The contention of learned counsel for the respondents that the limitation shall have to be reckoned from the date of the resolution for voluntary winding up of the company, is based upon misreading of the provisions aforesaid and a misconception of the principles governing the subject. The resolution passed by the concerned persons seeking voluntary winding up of the company cannot be equated or termed as an order of winding up. Such resolution is subject to subsequent steps as aforesaid and final dissolution of the company and orders in that regard by the court if the liquidator had moved the court u/s 497(5) of the Companies Act. A voluntary winding up of a company can be concluded after the final settlement of affairs of the company and its final dissolution, subject to compliance with the provisions of section 497 of the Companies Act. Even thereafter the matter is not conclusively concluded because the official liquidator has a right to move the court under the provisions of section as has been done in the present case. If thereupon the court passes an order of winding up that will be the point of time which would govern limitation in preference to the other modes of the provisions of section 543 of the Companies Act and it would obviously appear to have no application in the case of a voluntary winding up because the right to move the court is that of the official liquidator. The official liquidator could be appointed either provisionally or when the company is ordered to be wound up finally. In other words where the company is wound up subject to the provisions of the said section still the court may appoint the official liquidator. The two independent modes of winding up operate in different and distinct fields and circumstances. The legislative intention does not permit any meddlesome or transgression of respective jurisdiction provided under the provisions of the Act.

32. The expression "whichever is longer" admits of no ambiguity and is clear that the period whichever expires later is the relevant period which is intended to be provided under sub-section (2) of section 543. In this regard reference can be made to a judgment in the case of *Jwala Prasad Vs. Official Liquidator Jwala Bank Ltd.*, , as well as to the case of *Official Liquidator Vs. Mathura Prasad and*

Others, . Another way of examining this matter is to refer to the point of time when the cause of action arises. The cause of action could arise on the basis of any of the classes referred to in sub-section (2) read with sub-section (1) of section 543. The purpose of the Legislature in providing an alternate basis for giving the cause of action is clear by the use of the expression "or" in sub-section (2). In other words, any one of the defined terms could give rise to an independent cause of action from where the limitation would be reckoned and the larger period so computed shall be the limitation for that purpose. In this regard, reference can be made to the judgment of the Delhi High Court in Official Liquidator, Milan Chit Fund and Finance P. Ltd. v. Joginder Singh Kohli [1978] 48 Comp Cas 357. The relevant portion reads as under (headnote) :

"It would be safe to infer from section 543(2) that the right to apply would accrue when the order for winding up is made. The further right to apply would accrue as and when disclosures are made in the course of winding up which may enable the official liquidator or any creditor or contributory to seek relief u/s 542. Such a right would accrue, inter alia, when the statement of affairs is filed because that is how disclosures are made with regard to the affairs of the company."

33. From the various judgments cited by counsel for the parties, I am of the considered view that the view of prescription on limitation has no conflict and there has been a consistent view in this regard. Reference could also be made to the case of Official Liquidator of Security and Finance P. Ltd. Vs. Pushpawati Puri, the relevant portions read as under (at pages 393, 394) :

"It is, therefore, not possible to hold on the language of section 542 of the Act that the right to apply accrues when the person concerned commits the fraudulent act or is guilty of the impugned conduct. Such a right accrues only if a certain state of affairs is disclosed in the course of winding up of a company. An indication as to when the right to apply would accrue may also be gathered from the provision of sub-section. (2) section 543 of the Act where the Legislature made a specific provision with regard to limitation. According to this provision the application could be made within five years of the date of the order of winding up or of the conduct complained of, whichever is "longer". It would be safe to infer from this provision that the right to apply u/s 542 of the Act would accrue when the order for winding up is made. But the further right to apply would accrue as and when disclosures are made in the course of winding up which may enable the official liquidator or any creditor or contributory to seek relief u/s 542 of the Act. Such a right would accrue, inter alia, when the statement of affairs is filed because that is how disclosures are made with regard to the affairs of the company ...

This clearly makes the limitation for the complained acts under the ordinary law of limitation irrelevant. This is so because the provisions of sub-section (2) of section 543 would prevail over the law of limitation, being a provision in a special statute."

34. A Division Bench of the Delhi High Court, while determining the question on limitation provided u/s 458A of the Companies Act in relation to the winding up of a company, held that the appointment of official liquidator would govern the period of limitation prescribed, in the case of Jagdish Parshad Gupta v. Youngmen Benefit Chit Fund (P) Ltd. [1981] 51 Comp Cas 201 (Delhi) which reads as under (at pages 202, 204) :

"Section 526(1) empowers the liquidator, subject to any restriction imposed by the court, to exercise all its powers without the sanction or intervention of the court in the same manner as if the company were to be wound up altogether voluntarily. Sub-section (2) of section 526, however, lays down that except as provided in sub-section (1) any order made by the court for a winding up subject to the supervision of the court shall, for all purposes be deemed to be an order of the court for winding up of the company by the court (emphasis" supplied). It is apparent that sub-section (2) of section 526 creates a legal fiction to the effect that an order passed for winding up subject to the supervision of the court is to be deemed to be an order for the winding up of the company by the court. All the consequences, therefore, which flow from an order of the winding up of the company by the court must necessarily enure to such company which is being wound up subject to the supervision of the court ...

Here, in this case, therefore, though there is no order of the court for winding up the company, yet by virtue of section 526(2), the court's order making the winding up subject to supervision of the court shall for all purposes be deemed to be an order of the court for winding up the company, and that would inevitably and immediately attract section 458A of the Act. In that view the application was filed within limitation. We agree with the reasons given in the judgment of the learned single judge and would dismiss the appeal."

35. The Madras High Court in K. N. Srinivasa Iyer v. Joint Official Liquidators of the Nurani Union Bank Ltd. (In liquidation) [1963] 33 Comp Cas 735, held as under (page 741, 743) :

"Section 175 shows that the liquidator is appointed only for the purpose of conducting the proceedings in winding up the company and that could be only after the order for winding up is made. No doubt such appointment could be made provisionally even before the making of the order for winding up, but that is only provisional and it is not that appointment which is contemplated in section 235, though the use of the word "first" in the relevant portion of the section "from the date of the first appointment of the liquidator" is not happy. It would apply to a case where, even after the winding up order, there happen to be more than one order of appointment of liquidator; for instance, it may happen that first a person A is appointed liquidator (after the winding up) and he is replaced later by another person B or another person C is associated with A as joint liquidator. In such cases the starting point of limitation would be the date of appointment of A in the first instance. Again it is no doubt true that u/s 168 a winding up of a company by the court shall be deemed to commence at the time

of the presentation of the petition for the winding up. But, in our opinion, that legal fiction has no relevancy on the question of limitation for an application u/s 235. The natural meaning of the words "the date of the first appointment of the liquidator in the winding up" is only the date of appointment of the official liquidator u/s 175(1). The reason underlying the provision also suggests the same meaning, for it is only after the official liquidator investigates the affairs of the company, the acts of misfeasance usually come to light and the provisional liquidator may not be able to discover the acts of misfeasance at all in fact it is not his primary duty to discover such acts of misfeasance. To interpret the section as meaning that limitation should start even from the first appointment of the provisional liquidator would really defeat the purpose of the section.

The object underlying this change could be subserved and promoted only by the construction we are placing on the section, viz., that the commencement of the period of limitation is the date of the appointment of the regular liquidator u/s 175(1) and not of the provisional liquidator u/s 175(2)."

36. This view was also followed by the Andhra Pradesh High Court in *Official Liquidator, High Court of Andhra Pradesh v. Chepur Ratnakar Rao* [1992] 9 Corpt. L. A. 67 (AP).

37. It may also be mentioned here that the judgment of the Madras High Court in *K. N. Srinivasa Iyer v. Joint Official Liquidators of the Nurani Union Bank Ltd. (In liquidation)* [1963] 33 Comp Cas 735 also took the view that the appointment of the liquidator in winding up means the date of the appointment of the official liquidator and not the provisional liquidator. Learned counsel while making a reference to the provisions of section 441 of the Companies Act argued that the winding up of the company shall be deemed to have commenced at the time of passing of the resolution and as such that would be the deemed date of winding up of the company. This contention raised does not possess merit. The provisions of section 441 of the Companies Act are founded on the principle of relating back an action taken on a subsequent period, by fiction of law can be permitted to relate back to an earlier date but obviously for the purpose and intent indicated in the concerned and relevant provisions of section 441 are intended to provide validity to the proceedings taken from the course of the voluntary winding up. It serves no other purpose except that the proceedings taken in the case of a voluntary winding up from the date of the voluntary winding up till the winding up order passed by the court, if passed, would for all purposes and intents be valid proceedings. The exception moved in this provision itself is found by the court concerned. Similarly, sub-section (2) of section 441 of the Companies Act refers to the winding up of a company by court would relate back to the presentation of the petition for winding up. The purpose of the provisions of section 441 is limited and has no effect on the provisions of limitation specifically provided in the Act. It is a plain rule of interpretation of statutes that provision of no section would ever be read or interpreted to defeat or destroy the object of any section. Firstly, I find no conflict between the two sets of provisions, i.e.,

sections 441 and 543 of the Companies Act and secondly, in any case they operate in two different and independent fields, with a different purpose and object sought to be achieved under each of these provisions. In other words, a resolution for voluntary winding up of a company cannot be construed and equated to the order of the winding up passed by the court of competent jurisdiction. If the argument of learned counsel for the petitioner is to be accepted, it would amount to frustrating the very object of Various provisions of the Companies Act and would result in disarray of legislative intent behind the enactment of these provisions and would be violative of the settled principles of interpretation of statutes.

38. By applying the above well enunciated principles to the facts of the present case, the order of winding up on the report of the official liquidator is in regard to the provisions of section 484 of the Companies Act and the petition filed u/s 440 of the Companies Act read with section 515 of the Act. The court vide its order dated September 8, 1988, had ordered the winding up of the company and appointed the official liquidator attached to this court as the official liquidator of the company. Thus, the period of limitation of five years as postulated u/s 543(1) of the Companies Act shall commence from September 8, 1988, and as such the petition has been filed in time, i.e., on November 25, 1992. This, however, would be in addition to the plea of learned counsel appearing for the official liquidator at a subsequent date that the act of misfeasance and omission and commission or breach of trust of the respondent, came to the notice of the official liquidator only in the year 1991, i.e., after entering into the prolonged correspondence. The voluntary liquidator had given the complete information including the affidavit exhibit P.W.-1/36. As such the period of five years would have to be computed from that date. As I have already held that the petition has been filed within the period of limitation, I find no necessity to discuss this issue any further. Without intending to accept it as a proposition of law, another argument which could be noticed at this juncture in favour of the petitioner is that the petition would, in any case, be within the period of limitation with the aid of the provisions of section 458A of the Companies Act. Thus, it may be appropriate to at least mention that another possible view in addition to the above, is that, the period of five years as specified in section 542 of the Companies Act, available to the official liquidator would be in addition to the period of one year indicated in the provision of section 458A of the Companies Act would also be available to the official liquidator. This view was expressed by the Andhra Pradesh High Court in Arkay Chit and Commercial Trading Co. P. Ltd. (In liquidation), In re [1982] 52 Comp Cas 174.

39. For the reasons aforesaid, I decide this issue as well in favour of the petitioner and against the respondent. In view of the findings of all the aforesaid issues in favour of the petitioner and against the respondent, I have no hesitation in coming to the conclusion that as a result of commission and omission and breach of duty on the part of the respondent in intentionally not recovering the dues of the company based on exhibits P.W.-1/7 and 1/35 are the

acts of misfeasance which render them liable to restore the money of the company. Consequently, the respondents are hereby directed to pay a sum of Rs. 3,10,000 with 12 per cent. interest from the date of the institution of the petition till realisation. The petition is accordingly allowed.