
(1988) 09 KL CK 0015

In the High Court Of Kerala

Case No : M.F.A. No's. 452 and 488 of 1980 and 13 and 263 of 1981

K.P. Ulahannan and Others

APPELLANT

Vs

The Wandoor Jupiter Chits (P) Ltd.

RESPONDENT

Date of Decision : 06-09-1988

Acts Referred:

Companies Act, 1956 — Section 446(2), 458A
Limitation Act, 1963 — Article 137, 27

Citation : AIR 1989 Ker 41 : (1989) 65 CompCas 178 : (1989) 1 ILR (Ker) 32

Hon'ble Judges : P.C. Balakrishna Menon, J; Ku. M. Fathima Beevi, J; K. Sukumaran, J

Bench : Full Bench

Advocate : P. George William, V.N. Achutha Kurup, P.R. Nambiar and C.P.D. Nair, for the Appellant; N. Madhavan, P.V.V. Iyer and T.V. Ramakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Menon, J.—These appeals are against the respective decrees passed by the learned company Judge on the claims instituted by the official Liquidator in Company Petition No. 17/1973 in the matter of the Wandoor Jupiter Chits (P) Ltd. in liquidation. The claims were u/s 446(2)(b) Companies Act, 1956 and related to amounts due from the respective respondents to the company in liquidation on kuries bid and payments received by them. The only plea raised by the respondents-appellants in these appeals is one of limitation. The winding up of the company had commenced on 1-10-1973 and a winding up order was passed on 20-12-1973. The claim in all these cases was filed on 28-12-1978. There is no dispute that the claim was alive on the date of the winding up order. According to the appellants the exclusion of time for the purpose of limitation u/s 458A Companies Act, cannot relate to any period prior to the winding up order.

2. The learned Company Judge following the decision in Official Liquidator v. Kadir 1977 K LT 39 has held that a claim u/s 446(2)(b), Companies Act is an

application falling under Article 137, Limitation Act, and that the starting point of limitation is the date on which the winding up order is passed and the official liquidator is appointed as the liquidator of the company. Adverting to Section 458A, Companies Act the learned Judge held :--

"The claim here is an "application in the name and on behalf of a company which is being wound up" and, therefore, in computing the period of limitation, two periods are to be excluded : --

(i) the period from the date of commencement of winding up to the date on which winding up is ordered;

(ii) a further period of one year immediately following the date of the winding up order."

The two periods thus excluded, it was held that the claim in these cases are within time under Article 137, Limitation Act.

3. Section 458A was inserted and Section 446(2) substituted by the Companies (Amendment) Act, 1960. The Supreme Court in *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, gives the historical evolution of Section 446 in Para. 7 of its judgment :

"Before we advert to the question of construction of Section 446(2)(b), it would be advantageous to notice the historical evolution of the provision as well as its present setting. Section 171, Companies Act, 1913 the predecessor of Section 446(1) did not contain any provision similar or identical to that of Section 446(2). Section 171 only provided for stay of suits and proceeding pending at the commencement of winding up proceeding, and embargo against the commencement of any suit or other legal proceedings against the company except by the leave of the Court. This provision with a little modification is re-enacted in Section 446(1). There was no specific provision conferring jurisdiction on the Court winding up the company analogous to the one conferred by Section 446(2). Sub-section (2) was introduced to enlarge the jurisdiction of the Court winding up the company so as to facilitate the disposal of winding up proceedings. The provision so enacted probably did not meet with the requirement with the result that the committee appointed for examining comprehensive amendment to the Companies Act in its report recommended that a suit by or against a company in winding up should notwithstanding any provision in law for the time being be instituted in the Court in which the winding up proceedings are pending. (See para 207 of the Company Law Committee Report). To give effect to these recommendations, Sub-section (2) was suitably amended to bring it to its present form by Companies (Amendment) Act, 1960. The Committee noticed that on a winding up order being made and the Official Liquidator being appointed a Liquidator of the company, he has to take into his custody company property as required by Section 456. Section 457 confers power on him to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal in the name and on behalf of the company. Power is

conferred upon him to sell the properties both moveable and immovable of the company and to realise the assets of the company and this was to be done for the purpose of distributing the assets of the company amongst the claimants. Now, at a stage when a winding up order is made the company may as well have subsisting claims and to realise these claims the liquidator will have to file suits. To avoid this eventuality and to keep all incidental proceedings in winding up before the Court which is winding up the company, its jurisdiction was enlarged to entertain petition amongst others for recovering the claims of the company. In the absence of a provision like Section 446(2) under the repealed Indian Companies Act, 1913, the Official Liquidator in order to realise and recover the claim and subsisting debts owed to the company had the unenviable fate of filing suits. These suits as is not unknown dragged on through the trial Court and Courts of appeal resulting not only in multiplicity of proceedings but would hold up the progress of the winding up proceedings. To save the company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding up proceedings, the Parliament devised a cheap and summary remedy by conferring jurisdiction on the Court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and, therefore, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it."

4. Section 446(1) provides that when a winding up order has been made or an official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose. Sub-section (2) of Section 446 confers a special jurisdiction on the court winding up the company to do things that are set out in the various sub-clauses notwithstanding anything contained in any other law for the time being in force. There is no dispute that money claims on behalf of a company are enforceable u/s 446(2)(b) of the Act. Section 446(2)(b) confers jurisdiction on the company court to entertain and dispose of claims made by or against the company. The claim should however be one enforceable at law.

5. The Supreme Court in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, has held that Article 137, Limitation Act, 1963 is not confined to applications contemplated by or under the Code of Civil Procedure, but is applicable also to applications made to court under any special enactments. It was accordingly held that an application under the Telegraph Act would fall under Article 137, Limitation act. A Full Bench of the Delhi High Court in *Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd.*,) held that Article 137 applies to claims u/s 446(2)(B), Companies Act, and the period of limitation is three years from the date when the right to apply accrues. It is held at page 437 : (of Com Cas) : (at p. 162 of AIR) :

"The right to file a claim petition u/s 446(2)(b) for a claim enforceable at law on the date of the windingup order arises on the date when the winding up order is passed and, therefore, the period of limitation is three years from the date of the winding up order after giving full benefit of Section 458A of the Act."

Section 458A, as adverted to earlier, excludes two periods in computing the period of limitation and a claim, according to the Full Bench of the Delhi High Court referred to above can be filed within three years after the winding up order, excluding also the two periods u/s 458A of the Act. In Kadir's case 1977 KLT 39 G. Viswanatha Iyer J. held that a claim application is not a suit, it would fall under Article 137, Limitation Act and the starting point of limitation is the date on which the winding up order has been passed The learned Judge states at page 42 : --

"3..... The Limitation Act has prescribed period of limitation to file suits and applications. A claim application is not a suit. In Bank of Deccan Ltd. (in liquidation) v. E.K. John (reported in 1977 Com NR 161) this Court had occasion to consider whether a claim is in the nature of a suit or a suit and it was held that it is not. That was in connection with the interpretation of Section 3 of Act 30 of i 1975. The same principle applies to the expression "suit" used in the Limitation Act. In Abdullah Ashgar Ali v. Ganesh Das, AIR (20) 1933 PC 63 their Lordships of the Privy Council had occasion to consider whether the periods of limitation provided for suits in the Limitation Act will apply to the applications made by the Liquidator under the Companies Act and their Lordships held that the Liquidator's application to realise an asset due to the company is not a suit I respectfully agree with the principle laid down therein and applying it I hold that the periods of limitation prescribed by the Limitation Act for suits do not apply to the claim applications filed by the Liquidator."

Following the decision of the Supreme Court in The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, the learned Judge held that Article 137, Limitation Act applies to applications filed by the Liquidator u/s 446(2)(b), Companies Act, and the right to apply accrues to the liquidator when a winding up order is passed or when a provisional liquidator is appointed.

6. A Full Bench of the Delhi High Court in Jaimal Singh Makin Vs. The Official Liquidator of Majestic Financiers (P) Ltd., after adverting to the decision of the Supreme Court in Dharendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation), relating to Section 45B, Banking Companies Act, 1949, corresponding to Section 446 Companies Act, stated at page 424 (of Com Cas) : (at pp. 172-173 of AIR) :

"If the object of bringing Sub-clauses (b), (c) and (d) of Sub-section (2) of Section 446,. Companies Act, was to avoid inevitable delay and expense which would be incidental to the institution and trial of a suit, we do not see any reason why, as a matter of construction, even a money claim by the official liquidator against any person has to be made only by a suit and not by a petition. The fact

that a suit is contemplated by Clause (a) of Sub-section (2) does not go counter to this construction. The right to file a suit by or against the company or a petition making any claim by or against the company is an option conferred by the statute. These options do not militate against each other."

In *Liberty Finance P. Ltd. In re Official Liquidator v. Pandit Radha Mohan* (1979) 49 Comp Cas 287 : (1979 T LR 107) (Delhi) S. Ranganathan J. considering Sections 446(2)(b) and 458A, Companies Act held at page 291 :

"The issue regarding the period of limitation for applications u/s 446(2)(b) has been considered in two Full Bench judgments of this court, *Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd.*, ;and *R.C. Abrol and Co. (Pvt.) Ltd. Vs. A.R. Chadha and Co.*, ; (confirming the decision in *P.T. Gajwani of R.C. Abrol and Company (P) Ltd., (In Liquidation), New Delhi Vs. A.R. Chadha and Co., New Delhi* and Another, and the decision of Anand J. in *Official Liquidator of Security and Finance P. Ltd. Vs. Pushpawati Puri*, The effect of these decisions can be summarised as follows :

(a) The expression "any claim" occurring in Section 446(2)(b) means a claim which is legally enforceable. A claim which had become time barred on the date of presentation of the winding up petition cannot be described as a legally enforceable claim and the provisions of Section 446(2)(b) do not enable the official liquidator to receive claims which had been quietened by the lapse of time.

(b) Where there is an enforceable claim as on the date of the winding up petition, the official liquidator can make an application u/s 446(2). Such an application will attract the provisions of Article 137, Limitation Act, 1963, in view of the decision of the Supreme Court in the case of *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, .

(c) The right of the official liquidator to make an application u/s 446 arises on the date when the windingup order is passed Reading Section 458A of the Act and Article 137, Limitation Act together, such an application by the official liquidator should be filed within a period of four years from the date of the winding up order."

The Punjab and Haryana High Court in *Official Liquidator. Punjab Finance Pvt. Ltd v. Mohan Lal* (1978) 48 Comp Cas 271 has adopted the same view and has held that u/s 458A, Companies Act, the period taken in the winding up proceedings and in addition a further period of one year after the winding up order is passed are to be excluded for the purpose of determination of the period of limitation for a claim u/s 446(2)(b) of the Act.

7. In *Official Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd.* (1988) 63 Comp Cas 749 MAD a Division Bench of the Madras High Court, differing from the view expressed by the Full Bench of the Delhi High Court in *Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies*

Corporation (P.) Ltd., has held that the article of the Limitation Act applicable to claims u/s 446(2)(b) will be the relevant article that would be applicable if the claim had been filed as a suit and the starting point of limitation is not the date on which the winding up order is passed, but the date on which the claim would have been filed as a suit. The said decision has however held that u/s 458A, Companies Act, the time during which the petition for winding up was pending and a further period of one year from the date of winding up are to be excluded in computing the period of limitation for a claim u/s 446(2)(b) of the Act. The Karnataka High Court in *Unico Trading and Chit Funds (India) P. Ltd. v. S. H. Lohati* (1982) 52 Comp Cas 340 DELHI ; 1981 Tax LR 176), following the Full Bench decision of the Delhi High Court in *Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd.*, has held that the expression "any claim" occurring in Section 446(2)(b) of the Act should be interpreted as any claim enforceable at law. This would mean that the claim is alive on the date of the commencement of the winding up proceedings and that the relevant date for computing the period of limitation would be the date of the winding up order made by the Company Court as the liquidator does not acquire any right to enforce such claim u/s 446(2)(b) on any date prior to the date of the winding up order. It is also held that Article 137, Limitation Act, applies to such claims and the claimant is entitled to the full benefits of Section 458A, Companies Act.

8. Section 446(2)(b) is a new machinery provided for enforcement of claims for the first time by the Companies (Amendment) Act, 1960. The amendment by way of addition of Clauses (b), (c) and (d) to Sub-section (2) was brought about in the light of the report of the Companies Act Amendment Committee headed by Shri A. V. Viswanatha Sastri. The committee at page 160 of its report made the following recommendation :

"Section 446. Suits and proceedings :

164. A suggestion has been made that the court winding up the company should have full power to decide all claims made by or against any company and all questions of priorities and all other questions whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of the company coming within the cognizance of the court. Such a provision would be on the lines of Section 4, Provincial Towns Insolvency Act, Section 7 of the Presidency Towns Insolvency Act and Section 45B, Banking Companies Act and would speed up the winding up proceedings. There is no danger of the provisions being abused in view of the fact that it is the High Court or the District Court that has jurisdiction under the Act and there is a right of appeal."

It was in pursuance to these recommendations of the Committee that Sub-section (2) of Section 446 was amended. The provision for filing of any suit or proceeding by or against the company was already there before the amendment. The amendment introducing Clauses (b), (c) and (d) to Sub-section (2) of Section 446 was intended to confer a very comprehensive jurisdiction upon the

company court to decide all claims by or against the company so that the winding up proceedings can be expedited. It is for a similar objective that Section 45B had been added to the Banking Companies Act, 1949. The Scope of Section 45B of the Act was considered by the Supreme Court in *Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation)*, The| Supreme Court dealing with Part III-A of the Banking Companies Act came to the conclusion that it was to avoid unnecessary delay and expense that the sections in Part; III-A of the Act were brought in and the claims u/s 45-B are summarily initiated by way of applications.

9. Since the right of the official liquidator to apply u/s 446(2)(b) arises only on the passing of a winding up order or on the appointment of a provisional liquidator, we are of the view that the starting point of limitation for claims under the said sub-section is the date on which the winding up order is passed or a provisional liquidator is appointed. Since the claim is summary and is by way of an application, it should also be held that Article 137, Limitation Act applies to such proceedings.

10. It is clear from Section 458A Companies Act, that in respect any suit or application in the name and on behalf of a company in liquidation, 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 and a further period of one year are to be excluded in computing the period of limitation. It is clear on the terms of the section itself that both the periods referred to above are to be excluded in computing the period of limitation. The decisions in *The Official Liquidator of Liberty Finance Pvt. Ltd. (In Liquidation) Vs. Radha Mohan and Others*, ; *Official Liquidator, Punjab Finance Pvt. Ltd. (In Liquidation) Vs. Mohan Lal and Another*,), *Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd.*, and *Unico Trading and Chit Fund's case 52 Comp Cas 340 : 1981 Tax LR 176 (Kant)* referred to above and also the decisions in *Fabrimate (Madras) P. Ltd In re Official Liquidator v. Best and Crompton Engineering Ltd (1982) 52 Comp Cas 501 (Mad)* and *Arkay Chit and Commercial Trading Co. P. Ltd In Re: Arkay Chit and Commercial Trading Co. P. Ltd. (In Liquidation)*, take the view that the aggregate of the two periods referred to in Section 458A is to be excluded in computing the period of limitation. The decision in *Brahmayya and Co., Official Liquidators of Hanuman Bank (In liqn.) Vs. Mohammedsa Rowther (died) and Others*, relied on by counsel for the appellants does not in any way advance the appellants' case that the period of pendency of the winding up petition cannot be excluded in cases where the period of limitation expires after the date of the winding up order. In *Brahmayya and Co., Official Liquidators of Hanuman Bank (In liqn.) Vs. Mohammedsa Rowther (died) and Others*, the respondent died during the pendency of a claim u/s 45-B Banking Regulation Act, 1949. A petition to implead his legal representatives was filed long after the death of the respondent. The question was whether Section 45-O, Banking Companies Act would apply to extend the period of limitation for impleading the legal

representatives. A Division Bench of the Madras High Court held that Section 45-O will have no application if the starting point of limitation is during the pendency of the claim petition. In these present cases the starting point of limitation was prior to the commencement of the winding up proceedings and the mere fact that the claims were not barred on the date of the winding up order does not exclude the applicability of Section 458A, Companies Act.

11. The appellants rely also on the decision of Raman Nayar J. in the Official Liquidator v. Dr. K. Ramakrishna Pillai 1969 K LJ 748. The question in that case was as to whether Section 5 of the Limitation Act would apply to proceedings u/s 543, Companies Act readwith Section 45-H Banking Regulation Act. It was held that Section 5 applies by virtue of the provisions of Section 29(2), Limitation Act. The learned Judge held that proceedings u/s 543 read with Section 45-H, Companies Act cannot be said to be "any suit or application in the name and on behalf of a company which is being wound up by the court" within the meaning of Section 458A Companies Act. The question as to whether the period of pendency of a winding up petition can be added on to the period of limitation in a case where the claim is alive on the date of the winding up order did not arise for decision in that case.

12. The statute of limitation only bars the remedy, but does not extinguish the right except in regard to matters specified u/s 27 Limitation Act, 1963. The Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, stated at page 335 :

"Now it is the settled law of this country that the statute of Limitation only bars the remedy but does not extinguish the debt. Section 28, Limitation Act, provides that when the period limited to a person for instituting a suit for possession of any property has expired, his right to such property is extinguished. And the authorities have held and rightly that when the property is incapable of possession, as for example, a debt, the section has no application, and lapse of time does not extinguish the right of a person thereto. u/s 25(3), Contract Act, a barred debt is good consideration for a fresh promise to pay the amount. When a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt. (Vide Section 60 of the Contract Act. It has also been held that a creditor is entitled to recover the debt from the surety, even though a suit on it is barred against the principal debtor. Vide AIR 1939 110 (Privy Council) ; Subramania Aiyar v. Gopala Aiyar ILR (1910) Mad 30 and Dil Muhammad v. Sain Das AIR 1927 Lah 396. And when a creditor has a lien over goods by way of security for a loan, he can enforce the lien for obtaining satisfaction of the debt, even though an action thereon would be time-barred. Vide Narhndrala Lal Khan Vs. Tarubala Dasi, at p. 823 That is also the law in England. Vide Halsbury's Laws of England (Hailshams Edition), Vol. 20, page 602, para 756 and the observations of Lindley L.J. in Carter v. White (1883) 25 Ch D 666 and of Cotton L J. in Curwen v. Milburn (1889) 42 Ch D 424 . In American Jurisprudence, Vol. 34, page 314, the law is thus stated.

"A Majority of the Courts adhere to the view that a statute of limitations as distinguished from a statute which prescribes conditions precedent to a right of action does not go to the substance of a right, but only to the remedy. It does not extinguish the debt or preclude its enforcement, unless the debtor chooses to avail himself of the defence and specially pleads it. An indebtedness does not lose its character as such merely because it is barred; it still affords sufficient consideration to support a promise to pay, and gives a creditor an insurable interest."

In *Corpus Juris Secundum*, Vol. 53, page 922, we have the following statement of the law :

"The general rule, at least with respect to debts or money demands, is that a statute of limitation bars, or runs "against, the remedy and does not discharge the debt or extinguish or impair the right obligation, or cause of action."

Section 458A in substance and effect provides for an extension of period of limitation prescribed under the Limitation Act for suits and claims falling under the said section. The Supreme Court in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, observed :

"When a question arises as to the interpretation to be put on an enactment, what the court has to do is to ascertain "the intent of them that make it", and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. The literal construction then has, in general, but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider (1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason of the remedy."

There is nothing in Section 458A to restrict its application to the one year period after the winding up order has been passed in cases where the claim does not get barred during the pendency of the winding up application. The section, to a limited extent mentioned therein, has only extended the period of limitation and to that extent has revived the remedy which would have been otherwise lost under the law of limitation.

13. For the aforesaid reasons we see no merit in the contention that the respective claims involved in these appeals are barred by limitation.

The appeals fail and are accordingly dismissed No costs.