(1988) 09 KL CK 0042

In the High Court Of Kerala

Case No : M. P. A, No''s. 452 and 488 of 1986 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:

Banking Regulation Act, 1949 — Section 45B, 45H
Companies Act, 1956 — Section 171, 446, 446(1), 446(2), 446(2)(b)
Constitution of India, 1950 — Article 137
Limitation Act, 1963 — Section 27, 28, 29(2), 5

Citation : (1988) 2 KLJ 434

Hon'ble Judges : P. C. Balakrishna Menon, J;M. Fatbima Bbbvi, J;K. Sukumaran, J

Bench : Full Bench

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

Final Decision : Dismissed

Judgement

Balakrishna Menon. J.

1. These appeals are against the respective decree 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 under sec, 44,6. (2)''(b) of the Companies Act, 1956 and related to amounts due from the respective respondents to the company id 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 28-2-&7? There is no dispute that the claim was alive on the date of the welding up order. According to the appellants the exclusion of time fdrrflg purpose of limitation under seo. 458A of the Companies act cannot relate to any period prior to the

winding up order. The learned Company Judge: following- the decision in. Official Liquidator v. Kadir and others (1977 K.L.T 39).- has health data claim under sec. 446 (2) (b) of the Companies Act is an application falling under Art. 137 of the 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 sec. 45 the 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 ap 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 claims in these cases are within time under Art.l37 of the Limitation Act

2. Sec. 458A was inserted and sec 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 sec, 446 in paragraph" 7 of its judgment:

Before we advert to the question of construction of Section 446 (2)Hb), it would be advantageous to notice the historical evolution of the provision as well as its present setting. Section 171 of the Indian Companies Act, 1913 the predecessor of Section 446 (I) did not contain any provision simlar or identical to that of S. 446 (2). Section 171 only provided for stay of suits and proceedings pending and 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 Sec. 446 (1). There was no specific provision conferring jurisdiction on the Court winding up the company analogous to the one conferred by S. 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 I 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-sec. (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 movable 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 among 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 S. 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 protix 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 musif; receive such construction at the hands of the court as would advance the object nod at any rate not thwart it.

3. Section 446(1) provides that when a winding up order has been made or an Official Liquidator hat 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-sec. (2) of sec. 446 confers a special jurisdiction on the court winding up the company to do things that are set out in the various sob-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 under sec. 446 (2) (b) of the Act. Sec. 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.

4. The Supreme Court in The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, has held that Article 137 of the Limitation Act, 1963 is not confined to applications contemplated by cr 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, of the Limitation Act. A Full Bench of the Delhi High Court in Faridabad Cold Storage and A flied Industry v. official Liquidator ((1978) 48 Comp. Cas. 432)I-held that Art. 137 applies to claims under sec. 446(2) (b) of the 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:

The right to file a claim petition u/s 446 (2) (b) for a claim enforceable at law on the date of the winding-up 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.

Sec. 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 under sec. 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 Art. 137 of the 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 periods 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 & Others 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 S. 3 of Act 30-of 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 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 Kerala State Electricity Board''s case (1977 SC 282) the learned Judge held that Art. 137 of the print-at on Act applies to applications filed by the Liquidator under sec 446 (2) (be of the 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.

5. A Full Bench of the Delhi High Court in Jatmal Singh Makin v. Official Liquidator { (1978) 48 Comp. Cas. 419) after adverting to the decision of the Supreme Court in Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation), relating to sec. 45B of the Banking Companies Act, 1949, corresponding to sec. 446 of the Companies Act, stated at page 424:

If the object of bringing sub-clauses (b), (c) and (d) to subsection (2) of section 446 of the 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 Inre Official Liquidator V. Pandit Radha Mohan and-others (0979) 49 Comp Cas. 287) (Delhi) S. Ranganffthan J. considering section 446(2) (b) and 458A of the Companies Act held at page 291:

The issue regarding the period of limitation for applications under s. 446(2) (b) has been considered in two Full Bench judgments of this court, Faridabad Cold Storage and Allied Industry, v. Official Liquidator, Ammonia Supplies Corporation P. Ltd. (1978) 48 Comp. Cas. 432; Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd., and R. C. Abroi & Co.(P) Ltd v. A. R. Chadha Co. (1979)49 Comp Cas 77; R.C. Abrol and Co. (Pvt.) Ltd. Vs. A.R. Chadha and Co., (confirming the decision in of Liq. of RC Afcroland Co-PJ-td. v. A; R. Chadhaand Co. reported in (1973) 43 Compi Cas 3)6 (Delhi) and the decision of Anand J. in Official Liquidator,''Security & Finance P. Ltd. v. Poshpa Wati Puri (1978) 48 Coflrp 385 Delhi). The effect of these decision can be summarised as follows:

(a) The expression "any claim" occurring in s. 446 (2) (b) meaps 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 tiff s. 446(2) (b) do not enable the official liquidator to recnive clairts -which had been quiotened by the lape. 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 under s.446 (2). Such an application will attract the provisions of art. 137 of the 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 under s. 446 arises on the date when the winding-up order is passed. Reading s. 458A of the Act and art. 137 of the 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 Lai and another (1978) 48 Com Cas 271) has adopted the same view and has held that under sec. 458A of the 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 under sec. 446 (2) (b) of the Act..

6. In official Liquidator, Radel Services P. Ltd. v. Southern Screws P Ltd. ((1988)63 Comp. Cas. 749) a Division Bench of (he Madras High Court, differing

from the view expressed by the Full Bench of the Delhi High Court in Faridabad Cold Storage''s case (0978)48 Comp. Cas. 432) has held that the article of the Limitation Act applicable to claims under sec.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 under sec. 458A of the 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 under sec. 446 (2) (b) of the Act. The Karnataka High Court, in Unicog Trading & Chit Funds {India) l\\ Ltd. v. S. H. gohati (1982) 52 Comp, Cas. 340), following the Full Bench decision of the Delhi High Court in Faridabad Cold Storage''s case, has held that the expression "any claim" occurring in sec. 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 tip proceedings j 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 under sec, 446 (2)(b) on any date prior to the date of tile winding up order. It is also held that Art. 137 of the Limitation Act applies to such claims and the claimant is entitled to the full benefits of sec. 458A of the Companies Act 8. Sec. 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-sec. (2) was brought about in the light of the report of the Companies Act Amendment Committee headed by Shrig A. V. Viswanatha sastri, The committee it page 160 of its report made the following recommendation;

SECTION 446i 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 of the Provincial Towns Insolvency Act, section 7 of the Presidency Towns Insolvency Act and section 45B of the Banking Companies Act and would speed up the winding-up proceedings. There is no danger of tile 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 recommendation of the committee that sub-sec. (2) of sec. 446 was amended. The provision for Filling of any suit or proceeding by or against the company was already there before the amendment. The amend to en t introducing clauses (b), (d) to sub-sec. (2) of sec.446 was Intended to Conifer a, very comprehensive jurisdiction upon the company court to decide all claims by or against the company so that the winding up proceeding an be expedited. It is for a similar objective that Sec. 45B had been added to the Banking Companies Act, 1949.'' The scope of Sec. 45B of the Act was considered by the Supreme Court in Dhirendra Chandra Pal v. Associated Bank of Tripura Ltd. ((1955)25 Camp Cas. 19t= AIR 1953 803) The Supreme Court dealing with Part III-A of the Banking Companies act tame-to the conclusion that ft was to avoid unnecessary delay an expend that the sections in Part III-A of the Act were brought in and the claims under sec. 446(2)(b) we summary justified, by way of applications.

8. Since (he right of the official liquidator to apply under sec 446(2)(b) arises only on the passing of 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, ft should also be held that Art. 137 of the Limitation Act applies to such proceedings.

9. It is clear from sec.458A of the Companies Act that in respect of any suit or application in the name and on behalf of a company in liquidation the period that 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 Liberty Finance P. Ltd''s case (49 Gomp. Cas. 287), Punjab Finance Pvt. ltd. case (48 Cotnp Cas. 271), Faridabad Cold Storage''s case (48 Comp. Cas. 432) and Unico Ttading & Chit Fund''s case (52 Comp. Cas. 340) referred to above and also the decisions in Fabrimats (Madras) P. Ltd. In re. Official Liquidator v Best and Crompton Engineering Ltd. (1982) 52 Comp. Cas. 501) and Arkay Chit and Commercial Trading Co. P. Ltd. In re Official Liquidator v. P. V. R. Kutty and another (1982)52 Comp Cas. 174) take the view that the aggregate of the two periods referred to in sec. 458A is to be excluded in computing the period of limitation. The decision in Mis. Brahmayya & Co. v. Mohammedsa Rowther (AIR (46) 1959 Madras 366) relied on by counsel for the appellants docs 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, la Mjs. Brahmayya & Cos case (1959 Mad. 366) the respondent died during the pendency of a claim under sec. 45B of the Banking Regulation Act, 1949. A petition to implead his legal representatives was filed long after the death of the respondent. The question was whether sec. 45-0 of the 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 sec. 45-0 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 the claims were not barred,.on the date of the winding up order does not exclude the applicability of sea 458A of the Companies Act.

10. The appellants rely also on the decision of Raman Nayar.J-in The Official Liquidator v. Dr. K. Ramakrishna Pllaig (1969 KLJ 748)9 KLJ, 748). The question in that case.was as to whether sec.5 of the Limitation Act would apply to proceedings under sec. 543 of the Companies Act read with sec. 45H of the Banking Regulation Act. It was held that sec. 5 applies by virtue of the provisions of sec,29(2) of the imitation Act. The learned Judge held that proceedings under sec.543 read with sec.45H of the Companies Act cannot be said to be "any suit or application in the name and on behalf of a company which is having wound lip by the. court within the meaning of sec.458A of the Companies Act. The question has 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.

11. The statute of limitation only bars the remedy, but does not extinguish the right except m regard to matters specified under. sec. 27 of,the Limitation Act, 1963. The Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, :

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 of the -Limitation Act provide that which: the period limited to a person for instituting a suit for.possession of any property has expired, his right in such property is extinguished. And the authorities have held-and rightly, that when he property is incapable of possession, as for example, a debt, the section has no application, and lapse of the: does not extinguish the right of a person thereto. Under S.25 (3) of the Contract Act, a hared debut is good consideration for a fresh promise to pay the amount* Whew a debtor makes a payment without any direction as to bow it is to be appropriated, the creditor has the right to appropriate it towards a barred debt. (Vide S 60 of the Contract Act). It-has also been field 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 33 Mad 30 (G) and Dil Muhammad v. Sainj Das, AIR 1927 Lah 396 (H). And when the creditor has a Hen 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 tome-barred. Vide ''Narendra Lai Kfaa v. Tarubala dhai ILR 48,Cal 8l7 at p. 823; Narhndrala Lal Khan Vs. Tarubala Dasi, . That is also.the, law in England. Vide Halabury''s Law of England (Hailshams Edition), Vol. 20. page 602,, para,756 and the observation! of LiBtdIey L. J.in Carter v. White (1883)25 Ch, D 666 S at p.672 (J) and of Cotton L.J. in Curwen v. Milburn, (1889) 42 ChD 424 at p. 434 (K). In American Jurisprudence, Vo, 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 j 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.

Sec. 458A in substance and effect provides for an extension of period of limitation prescribed under 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 Sec. 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.

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

The appeals fail and are accordingly dismissed. No costs.

