
(1968) 06 MAD CK 0028

In the Madras High Court

Case No : Company Application No. 121 of 1959 in O.P. No. 227 of 1955

K.V. Desinga Raja and Others

APPELLANT

Vs

D.K. Raju

RESPONDENT

Date of Decision : 28-06-1968

Acts Referred:

Companies Act, 1913 — Section 221, 235

Citation : (1968) 06 MAD CK 0028

Hon'ble Judges : Ramaprasada Rao, J

Bench : Single Bench

Advocate : K.G. Manickavasagam, for the Appellant; V. Thyagarajan, for the Respondent

Final Decision : Dismissed

Judgement

Ramaprasada Rao, J.—In this company application the applicants are seeking u/s 476 of the Code of Criminal Procedure and Rule 9 of the Company Rules, for directions to deal with the respondent criminally or civilly for making false statements in his affidavit in Application No. 909 of 1957 and for being dealt with in accordance with law for having drawn amounts belonging to the company without authority and justification. Certain facts may be noted before considering the relevant contentions of the parties. This company which was an electricity undertaking company was taken over by the Government on September 20, 1951. On September 28, 1952, the members of the company voluntarily resolved to wind up the same and the respondent was appointed the voluntary liquidator thereto. It, however, transpired that the court exercising its jurisdiction u/s 221 of the Indian Companies Act, 1913 (hereinafter referred to as the Act) wound up the company in accordance therewith by exercising supervision over the voluntary winding up, which was by then sought by the members of the company and which was continuing. This order of court was made on April 1, 1959. The applicants stated that during November 11, 1952 and June 5, 1956, the respondent, as voluntary liquidator, drew moneys belonging to the company

twice over, in the sense that he once drew such allowances as a, member of the then Madras Legislative Assembly and at another time as the voluntary liquidator of the company in liquidation and appropriated both the amounts for the same journey or journeys and therefore the respondent is guilty of misapplication of the funds of the company. The applicants also state that in a counter affidavit, marked as exhibit A, in these proceedings, filed in Application No. 909 of 1957, the respondent has categorically admitted that he has incurred expenses for and on behalf of the company and recouped himself of such expenses from the funds belonging to the company. In fact, the respondent would state that the travelling expenses, which are referred to in paragraph 5, were all incurred by him. This counter affidavit was filed in or about August, 1957. To a similar effect, though not as effective as above, references are made by the applicants as well as the respondent to ancillary proceedings in this winding up, viz., Application No. 595 of 1957. Based on such averments of the respondent in Applications Nos. 909 of 1957 and 595 of 1957, the applicants are seeking to make out a case that the respondent has retained the funds of the company without authority or justification and therefore is guilty of misfeasance and liable to be dealt with accordingly u/s 235 of the Act.

2. This application is opposed by the respondent. I am not for the present adverting to the merits on which the respondent rests his countermand to the application of the petitioners, but suffice it, however, to consider the preliminary objection raised by the learned counsel for the respondent that this application is beyond time and therefore not maintainable. In this context only, this application is being dealt with, though on an earlier occasion this court made an order that this application along with others have to be dealt with together and decided upon.

3. Sri V. Thyagarajan, learned counsel for the respondent, raising the preliminary objection as above, states that u/s 235 of the Act, which is the Section applicable to the instant case of winding up, the claim made by the applicants under the aforesaid Section is barred as having been made beyond three years from the date when the first liquidator was appointed in the course of winding up of the company. Even otherwise also his case is that this application is beyond time. Sri Manickavasagam, learned counsel for the applicants, on the other hand, raised four contentions, the first amongst which mainly concerned itself with the point of limitation. His case is that u/s 235 of the Act, the date which has to be taken for purposes of working out the period of limitation prescribed therein is the date on which the court acted u/s 221 of the Act to wind up the company subject to its supervision. As already stated, the date on which the order u/s 221 of the Act was made, was April 1, 1959. He therefore contends that the present application filed in November, 1959, is well within time. He would elaborate his argument thus. In Section 235 the expression used while delimiting the period of limitation, is " within three years from the date of the first appointment of a liquidator in the winding up ". While emphasising the Article the in the parenthesis excerpted above, the learned counsel states that the " winding up " referred to should have

reference to the final order made by this court u/s 235, when it assumed supervision over the voluntary liquidator in the course of voluntary winding up and it cannot have any reference to the liquidator voluntarily appointed at the general meeting of the company in the course of its voluntary winding up. Thus he would say that his application is within time. Incidentally, he referred to the decision of our court in *Parandhamiah v. Narasimha Rao*, in support of his contention that three distinct and separate modes of winding up of companies are provided for and contemplated in the Act and in the light of such an express provision like Section 155 of the Act, it is but necessary that an order of court under each and every of such modes prescribed therein should be treated separately and dealt with accordingly. Whilst so, the order of court u/s 221 being therefore a severable, distinct and separate order, in exercise of the powers of this court to supervise the acts of the voluntary liquidator, such an order must be taken to its full length and interpreted as an order whereby and whereunder there was a first appointment of a liquidator for this company. I may at once state that the ratio in *Parandhamiah v. Narasimha Rao*, [1950] 20 C.C. 1. does not support this contention. In fact, the only point that was decided in that case was that the company court has power to initiate misfeasance proceedings even in the case of voluntary liquidation either against the managing director or a liquidator. We are not concerned with the principle laid down in that case, as we are mainly considering in this application the Rule of limitation as contained in Section 235 of the Act.

4. The third argument of the learned counsel is that u/s 543 of the Indian Companies Act, 1956, the application is sustainable and maintainable as a larger period of limitation is envisaged therein. But the learned counsel, however, in all fairness, did not pursue this argument in view of Section 647 of that Act. On a slightly different basis, *Sri Manickavasagam* wanted to sustain this application as in time; that was on the ground that the amounts expended illegally or unjustifiably by the respondent should be deemed to have been retained by him and continued to be retained by him as on date and therefore no question of limitation arises at all.

5. In reply to the argument as above, *Sri V. Thyagarajan* reiterated his contentions that the first liquidator referred to in Section 235 of the Act can only mean the liquidator appointed for the first time in point of chronology by an act voluntary or involuntary on the part of the company or otherwise. In the instant case it was a voluntary liquidation supervened by an order of court whereby the court exercised supervision over such voluntary liquidation. Therefore, the voluntary liquidator appointed by the company on September 28, 1952, should be deemed to be the first liquidator appointed within the meaning of Section 235 of the Act and this is the crucial date for computing the period of limitation.

6. In Part V under the caption "winding up", the Indian Companies Act, 1913, provides for three modes of winding up of a company. They are : (1) by the court, (2) voluntary and (3) subject to the supervision of the court. It is not

seriously disputed that these three modes of winding up are distinct and separate. It cannot also, equally, be disputed that a company in liquidation, although the administration has passed on to the liquidator, retains its existence, Section 221 of the Act enables the court to wind up a company, already voluntarily wound up by a special or extraordinary resolution of the company, by exercising its supervision thereon. But Section 221 expressly recites that the court may make an order " that the voluntary winding up shall continue, but subject to such supervision of the court, as it may deem fit". Thus, the continuance of the winding up voluntarily imposed by its members is preserved. By such an express preservation it is but proper to conclude that the first liquidator appointed in the course of the winding up of a company voluntarily does continue, notwithstanding the supervision that is sought to be exercised by the court u/s 221. Section 235 begins by saying : " Where, in the course of winding up a company... ..the court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, director, manager, liquidator, etc." The opening sentence of Section 235 " where, in the course of winding up a company " has to be read in conjunction with the expression " from the date of the first appointment of a liquidator in the winding up " appearing in the body of the section. The application contemplated in this Section has to be filed within three years from the date of the first appointment of a liquidator in the winding up. The argument of Sri Manickavasagam, learned counsel for the applicants, is that the expression " in the course of winding up a company " has to be understood in the light of the circumstances and facts of each case. In the instant case the court passed an order u/s 221 to exercise supervision over the voluntary winding up of the company. Pursuant thereto, the person who was already a voluntary liquidator, was reappointed as the liquidator of the company, but he was directed to be subject to the supervision of the court. On this basis, it is sought to be made out that for all purposes and for all considerations it is such a liquidator appointed u/s 221 of the Act who should be deemed to be the first liquidator for the purpose of computing the period of limitation prescribed in Section 235. There is a fallacy in this argument. If this is to be accepted then one has to ignore the winding up of the company up to the date when the court exercised its power u/s 221. As rightly pointed out by Sri V. Thyagarajan, the liquidation anterior to the date when the order u/s 221 was passed should be deemed to be non est and for all purposes non-existent. This is an extreme contention and it is not supported by any precedent whatsoever. Further, the expression "in the course of winding up a company " appearing in the opening portion of this section, must be read in consonance and in harmony with the other expression " from the date of the first appointment of a liquidator in the winding up". It is a well-settled principle of law that when similar expressions appear in the text of a Section of an enactment, then the Rule of harmonious construction has to come into play. Can it be said that the company was not being wound up when a

voluntary liquidator has been appointed ? Can it be equally said that by a supervening order u/s 221 the court appointed the liquidator for the first time? Both the questions posed by me have to be necessarily answered by me in the negative. It therefore follows that prior to April 1, 1959, the company was indeed being liquidated but by one of the accredited processes of winding up prescribed in Section 155 of the Act, namely, voluntary winding up. Therefore, it cannot be disputed that there was a liquidator who was functioning at a time prior to the date when the court exercised jurisdiction u/s 221. I am unable to be persuaded that the order of this court u/s 221 appointing the respondent as the liquidator under its supervision should be considered as the first appointment of a liquidator in the winding up of this company.

7. The next contention of Sri Manickavasagam is that the averments in Application No. 909 of 1957 read with those in Application No. 595 of 1957, would throw abundant light upon his contention that this application is maintainable. No doubt there is reference in exhibit A to the incurring of the expenses by the respondent. But that was not in a proceeding initiated by the applicants u/s 235 of the Act or u/s 543 of the 1956 Act. Rule 260 of the Companies (Court) Rules makes it clear that it is only in an application u/s 542 or Section 543 of the 1956 Act that the applicant need not file any affidavit in support thereof. Taking advantage of the text of this Rule, it is contended by Sri Manickavasagam that the averments admittedly made by the respondent are sufficient to keep alive this application in the eye of law. I am unable to agree. Both the Applications Nos. 909 of 1957 and 595 of 1957 were for securing different and specific directions and no prayer as such was made in those applications for securing redress against the respondent in connection with the travelling expenses alleged to have been misapplied by him and indeed those were not applications either u/s 235 of the Act or u/s 543 of the 1956 Act. It is also pertinent to observe that the averments referred to by the learned counsel for the applicants do not constitute what is ordinarily termed as acknowledgment of liability of the amount claimed by the applicants. Even this appears to be a pointer to reject the argument of the learned counsel for the applicants that the averments by themselves would save the bar of limitation. I have already stated that his other contention that the later Act of 1956 is applicable was not seriously pressed.

8. The last contention of Sri Manickavasagam was that, in any event these amounts expended, according to him, unjustifiably or illegally, should be deemed to be retained by the respondent even as on date, and as such an act of retention is being canvassed and questioned by him in this application, it is in time. No doubt the argument is attractive in the sense that what has been unlawfully expended by the respondent should be deemed to be retained by him. But in the instant case it cannot be said that the procedure specifically prescribed by Section 235 can be given the go-by by treating such retention as continuous and continuing and avoid a specific period of limitation prescribed by the statute. In my view, the three year Rule would commence and operate from the date

when the moneys were expended and therefore retained. It cannot, by fiction, be extended to illogical limits, such as retaining of such amounts even as on date and therefore the three year Rule would begin whenever an applicant chooses to apply. The argument, if accepted, would come to this. An applicant can keep mum for any length of time on the only ground that such retention is a continuing offence and apply u/s 235 of the Act or Section 543 of the 1956 Act any time he chooses and still maintain that his application is in time. This would run counter to the, spirit and letter of the Rule of limitation prescribed by the statute which has to be respected.

9. In these circumstances, I am unable to give the direction asked for in the judge's summons, as the application is out of time not having been filed within three years from the date of the first appointment of liquidator or within three years from the date when they were expended and therefore retained. I have already stated that the merits of this application have not been gone into as I consider it is not necessary for the purpose of this application. Therefore, the application is dismissed. There will be no order as to costs.