

(1994) 06 BOM CK 0023

In the Bombay High Court

Case No : Appeal No. 64 of 1991 with Com. Petition No. 1248 of 1983

M. Thankamani of Calcutta and others	APPELLANT
Vs	
Official Liquidator and another	RESPONDENT

Date of Decision : 09-06-1994

Acts Referred:

Companies Act, 1956 — Section 446(2), 458A
Limitation Act, 1963 — Article 137, 35, 10, 12, 13

Citation : AIR 1995 Bom 156

Hon'ble Judges : M.L. Pendse, J; M.D. Vyas, J

Bench : Division Bench

Advocate : R.G. Menon and V.S. Khemka, for the Appellant; S.S. Joshi, instructed by . Shah and Sanghavi, R.A. Kapadia and Paresh Shah, for the Respondent

Judgement

Vyas, J.—Appeal No. 64 of 1990 is filed impugning the judgment of the learned single Judge dated 15th February 1990 making the Judge's Summons absolute. As far as Company Application No. 1248 of 1983 is concerned, the same has been referred to the Division Bench in view of the decision impugned in Appeal No. 64 of 1990.

2. A question which requires to be considered in both these matters being common, both the matters are being disposed of by a common judgment. The short question that requires consideration in the present appeal is as to how time for filing a suit or an application for recovery of a claim on behalf of a Company which is ordered to be wound up is to be calculated in view of the provisions of S. 458A of the Companies Act, 1956.

3. As far as the facts of both the matters are concerned, there is hardly any dispute. It would suffice to mention brief facts of the appeal which are as follows: A promissory note was executed on 16th January, 1976. On 7th July, 1978 a petition for winding up of the company, being petition No. 497 of 1978, was filed. On 19th January, 1979 winding up order of the company was passed. On 14th

June, 1983 Company Application No. 657 of 1983 was filed by the Official Liquidator praying that the respondents be ordered and decreed to pay to the applicant a sum of Rs. 11,995.02 with further interest in which the judgment appealed from was delivered.

4. Before the learned single Judge, it was the contention of the appellants that the claim was time barred. The learned single Judge, following the decision of this Court in the matter of Ch. S. Rao Vs. Prabhudas S. Budhwani, , rejected the said contention and made the Judge's summons absolute. Hence the present appeal by the original respondents Nos. 1 to 3. As far as S. 458A is concerned, it provides for exclusion of certain time in computing the period of limitation. It provides that notwithstanding anything in the Indian Limitation Act, 1908, or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Court, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made and a period of one year immediately following the date of the winding up order shall be excluded. The learned single Judge has followed the decision of this Court in the case of Ch. S. Rao Vs. Prabhudas S. Budhwani, . It was inter alia held in the case of Ch. S. Rao (supra) that as far as Official Liquidator was concerned, he got a right under S. 446(2)(d) of the Companies Act to recover the claim by the Company for the first time when the winding up order is made, and that any application made by him for this purpose was governed by Art. 137 of the Limitation Act, 1963 under which the period of limitation is three years for applications not otherwise provided for from the date when the right to sue accrues. The learned single Judge in the case of Ch. S. Rao v. Prabhudas S. Budhwani relied on a 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., . As against these decisions, a Division Bench of the Madras High Court has in the case of Official Liquidator, Radel Services P. Ltd. v. Southern Screws P. Ltd. reported in (1988) 63 Com Cas 749 inter alia held that S. 446 of the Companies Act, 1956, does not prohibit or oust the Civil Court's jurisdiction for commencement of a suit or legal proceeding against a company in liquidation nor continuance of pending suits or legal proceedings, but only provides that leave of the Company Court will have to be obtained for commencement or proceeding further with pending matters and that at the same time sub-sec. (3) of S. 446 confers concurrent jurisdiction on the company Court to entertain or dispose of any suit or legal proceeding which had already been instituted on being transferred to it. As far as computation of limitation for filing a suit or an application in the name on behalf of a company which is being wound up in concerned, it was held that the provisions of Ss. 4 to 24 of the Limitation Act will have to be taken into account and the period computed and that further, in the case of an application under S. 446(2), the provisions of S. 458A of the Companies Act also will have to be taken note of. According to the Division Bench of the Madras High Court, the time during which

the Company Petition for liquidation was pending is also a period of one year from the date of the winding up order will have to be excluded.

5. From the plain reading of the provisions of S. 458A of the Companies Act, it appears that the said provision excludes certain time in computing period of limitation for filing any suit or application in the name and on behalf of the Company. It specifically mentions "...in computing the period of limitation prescribed for any suit or application....". The Limitation Act, 1963 prescribes the period of limitation for filing of suits or applications and further provides under several of its sections the period which can be excluded while computing period of limitation. In our opinion S. 458A of the Companies Act provides for a further exclusion of period and it contains a non obstante clause. Thus from the language of the said provision it is obvious that it does not provide for a period of limitation or even for that matter, a fresh period of limitation. But provides for exclusion of time from the date of filing of the winding up petition to the date of the winding up order and further, a period of one year thereafter. Thus in respect of a cause of action accruing in favour of the Company being wound up after the date of the filing of the petition for winding up, the time would start running only after a period of one year from the date of the winding up order. As far as a cause of action which has accrued prior to the filing of the petition for winding up is concerned, the period of limitation which has started running would remain suspended for the period excluded i.e. the period from the date of the winding up petition to the date of the order for winding up and one year thereafter, and would start running again after the excluded period. Let us see whether in the light of the above, the application filed by the Official Liquidator is barred by limitation or not.

6. Before the date of the filing of the Company Application No. 657 of 1983, the time had already begun to run from 16th January, 1976 being the date of the Promissory Note. From 7th July, 1978 which is the date on which the winding up petition was filed, it remained suspended up to the date of winding up order and one year thereafter and got revived thereafter. Thus on the date of the filing of the petition for winding up of the Company, out of 3 years available under Art. 35 of the Limitation Act in respect of a suit on a Promissory Note, 2 years 5 months and 20 days had elapsed. The time stopped running from 7th July, 1978 up to 18th January, 1980, the period to be excluded under S. 458 of the Companies Act and started running again, and the time remaining available was 6 months and 10 days. The same expired on 28th June, 1980. The Company Application was however, was filed on 14th June, 1983 and was thus hopelessly time-barred. We fail to agree with the view taken by the learned single Judge in the case of Ch. S. Rao (supra). In our view, there is no question of the Official Liquidator acquiring any right to file a suit or an application. The cause of action accrued in favour of the Company being wound up prior to the filing of the petition for winding up, enured in favour of the Official Liquidator and, therefore, there is no question of a fresh period of limitation in this favour. S. 458A does not at all contemplate such thing. At the same time there is no question of the Official

Liquidator availing of a further period of three years under Art. 137 of the Limitation Act. S. 446(2) of the Companies Act provides for a forum. Official Liquidator has an option of filing a suit in a Court competent to entertain the same or prefer an application in the Court winding up the Company. It cannot be that the Official Liquidator when adopting that latter course gets an additional time under Art. 137 of the Limitation Act. Period of limitation, subject to permissible exclusions, attaches to the cause of action and not to person who prosecutes the action. The Official Liquidator therefore, does not acquire a fresh cause of action.

7. A Division Bench of this Court in the case of Gleitlorgor (India) Ltd. and H. S. Kamlani, Official Liquidator v. Mazgaon Dock Ltd., reported in (1985) 57 Com Cas 742: 1983 T LR 2472 was also concerned with the interpretation of S. 458A of the Companies Act. However, the short question that arose for its consideration was whether the recovery of the dues from certain parties by the Judges Summonses taken out by the Official Liquidator under some understanding arrived by him with a Bank which was a secured creditor could be said to be "in the name and on behalf of the Company" as contemplated by S. 458A of the Companies Act. The parties before the Division Bench were ad idem that but for provisions of S. 458A of the Companies Act, the claim would be time-barred. The Division Bench inter alia held (Paras 7 and 13 of Tax LR):

"This section (S.458A of the Companies Act) thus provides for longer period of limitation for the suits or claims instituted "in the name and on behalf of the Company (under liquidation)". The period from the commencement of the winding up to the date on which winding up order is made and a further period of one year thereafter, is liable to be added to the ordinary period of limitation applicable under the Limitation Act. It is not disputed that the claim would be within time on the date of Judge's Summons if limitation is computed by adding this period."

.....

"Section 458 A is clearly intended to extend the limitation period for the benefit of the Company (in liquidation) and the Official Liquidator, appointed to carry on its winding up proceeding by collecting the assets and distributing the same between those entitled to the same. The underlying object in extending the limitation obviously is to enable the Liquidator to take charge of the company's affairs, to examine the records, account books, study the statements, decide against whom to proceed and in what manner. He has also to find resources for initiating and conducting the proceedings. The proceedings so initiated by him whether by way of suit or Judge's Summons, for enforcement of the recoveries of debts cannot but be on behalf of the Company having regard to his source of authority of the provisions of (he Companies Act, and the statutory obligation in discharge of which he has to act in this behalf. The Act does not contemplate his acting in the matter of such recoveries excepting as such Official Liquidator and excepting on behalf of the Company."

We are in complete agreement with the above view. To us it appears that the line of reasoning adopted by the learned single Judge in Ch. S. Rao's case 1978 Bom LR 685 is erroneous. Therein the learned single Judge followed the decision in Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd., .

8. In our view, the view taken by the Division Bench of the Madras High Court and the learned single Judge (Suresh, J. as he then was) in Company Application No. 1248 of 1983 is the correct view. In our opinion, u/s 458A, no new cause of action arises in favour of the Official Liquidator. The cause of action accrued in favour of the Company enures for the benefit of the Official Liquidator. Section 458A of the Companies Act on its plain reading shows how and to what extent the period is to be excluded and that the period is only from the commencement of the winding up proceedings to the passing of the winding up order and one year thereafter. It nowhere provides that the limitation once started would come to an end forever. The limitation started under Limitation Act would continue subject to the exclusion of the period mentioned u/s 458A. In these circumstances, the view taken by the learned single Judge in Company Application No. 657 of 1983 relying on the decision of the another single Judge of this Court in the matter of Ch. S. Rao (reported in Ch. S. Rao Vs. Prabhudas S. Budhwani, in our view is not the correct view. The decision in Ch. S. Rao's case is overruled.

9. In the result, the appeal has to be allowed and is accordingly allowed. The judgment and order dated 15th February, 1990 in Company Application No. 657 of 1983 is set aside.

10. As far as Company Application No. 1248 of 1983 is concerned, for the reasons mentioned hereinabove the claim appears to be time-barred and the same is dismissed. No order as to costs.

11. Appeal allowed.