

(1994) 04 P&H CK 0042
In the Punjab And Haryana At Chandigarh
Case No : Company Appeal No. 9 of 1989

M/s. Maruti Udyog Ltd.

APPELLANT

Vs

M/s. Bule Star Ltd. and another

RESPONDENT

Date of Decision : 22-04-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 29, 446, 446(2), 468, 529
Court Fees Act, 1870 — Article 1
Limitation Act, 1963 — Article 137
Provincial Insolvency Act, 1920 — Section 34(2) , 46

Citation : AIR 1995 P&H 45 : (1999) 95 CompCas 108

Hon'ble Judges : R.P. Sethi, J;G.C. Garg, J

Bench : Division Bench

Advocate : J.S. Narang, for the Appellant; Gopi Chand, for the Respondent

Judgement

R.P. Sethi, J.—Giving benefit of the claim of set off to respondent No. 1 the learned Company Judge dismissed the petition of the appellant-company filed under Sections 446 and 468 of the Companies Act read with Rule 9 of the Company (Court) Rules, 1959. It is contended that the benefit of set off could not be granted against the company which was in liquidation and that the claim of set off preferred by the respondent was barred by time.

2. Some of the facts relevant, in the case for proper adjudication of the controversy are that petitioner No. I, that is M/ s. Maruti Ltd. was ordered to be wound up and a provisional liquidator appointed on 22-7-1977. Upon final order of winding up dated 6-3-1978, the appellant herein acquired the undertaking of the wound up company by virtue of Maruti Limited (Acquisition and Transfer of Undertakings) Act, 1980 along with all rights, title and interest. The Accounts Books of the Company showed a balance of Rs. 4,556.62 recoverable from the respondent. The Official Liquidator sent a registered notice calling upon the respondent to pay the amount with interest at the rate of 12 per cent per annum

from the date the amount fell due. The amount was not paid with the result that a petition for recovery was filed in this Court. In the written statement filed on behalf of the respondent, it was submitted that a sum of Rs. 22.617.66P. was due to it from the company in liquidation. As the amount had not been paid, set off without payment of Court-fee was pleaded.

3. On the pleadings of the parties, the following issues were framed:--

1. What is the effect of non-issuance of "C" Forms by the petitioner-company to the respondent? OPD.

2. Is the official liquidator bound by the respondent's liabilities of the Company before the passing of the winding up order? OPD.

3. Whether the claim of the petitioner is barred by limitation? OPD.

4. Is the respondent entitled to an amount of Rs. 27,174.28 by way of set off?

5. Relief.

4. An ex parte decree was passed by the learned Company Judge on 30-11-1984 and upon application moved the ex parte decree was recalled. After recording the evidence, the learned Company Judge vide his order dated 6-3-1987 referred the question covered under Issue No. 3 to the Larger Bench. The Division Bench after hearing the parties held that the period of limitation for an application for claim u/s 446(2) of the Act was to commence from the date of winding up order and the period from the date of commencement of the winding up of a company to the date of winding up order is made, both inclusive, and a period of one year following the date of winding up shall be excluded in computing the period of three years provided by Article 137 of the Limitation Act. The respondent-company admitted the claim of the petitioner but pleaded that in fact a sum of Rs. 27,174.28?, was payable by the petitioner-company to the respondent. The learned Company Judge held the appellant liable to reimburse the respondent for the extra payment towards sales tax and accepting the claim of set off dismissed the petition of the company vide order impugned.

5. Heard.

It is not disputed that in exercise of the powers conferred u/s 643 of the Act, the provisions of the CPC have been made applicable to the proceedings conducted under the Act. Order 8, Rule 6 of the Code of Civil Procedure, 1908 (for short the Code) provides that in a suit for recovery of money the defendant can claim to set off against the plaintiffs demand any ascertained sum of money, not exceeding the pecuniary limits of the jurisdiction of the Court. In such circumstances the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect of both of the original claim and of the set off. In order to enable the defendant to claim set off, the following pre-conditions are required to be satisfied:

(a) That the claim must be for the recovery of money;

- (b) the defendant must prefer a claim in the written statement which is legally recoverable from the plaintiff;
- (c) Such claim must be for ascertained sum of money;
- (d) Both the parties must fill the same character; and
- (e) the sum claimed by way of set off should not exceed the pecuniary limits of the jurisdiction of the Court.

6. The principles of set off can be defined as the extinction of debts of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another. The claim of set off is distinguishable from the plea of adjustment. The distinction between the two was noticed in *Gupta Pvt. Loan Committee Vs. Moti Ram and Others*, , and it was held (at p. 39):

"One of the basic factors which has to be taken into consideration while determining whether a plea raised in defence is a plea of set off or of payment by adjustment is to find out as to whether a separate action could be maintained by the defendant on the basis of the claim made by him. In case a separate claim could be maintained by him and put forward in a separate suit, then the plea would be a plea of set off and court-fee will have to be paid on the claim. On the other hand, if adjustment had been made prior to the filing of the suit, no court-fee would be payable on the amount, which stood adjusted prior to the institution of the suit, as the plea in that case would be a plea of adjustment by payment. Under Sec. 1, Art. 1 of the Court-fees Act, ad valorem court-fee is payable on the set-off claimed but no court-fee need be paid on the plea of adjustment for the simple reason that the plea of adjustment is in the nature of informing the court that prior to the institution of the suit, the amount of part of it stood adjusted and the plaintiff was not entitled to claim that amount."

7. In the instant case, the respondent-company had not claimed adjustment but in fact had preferred a claim of set off with respect to the amount allegedly payable by the company in liquidation from the date commencing from 22-2-1974 to 30-12-1975 in a petition filed in the year 1980, admittedly at a time when the period of limitation for filing the suit for the recovery of the said amount had already expired. If the set off was a claim in defence like in a suit against the appellant company, the same could not be preferred being barred by time. The learned Company Judge appears to have completely ignored this aspect of the matter while allowing the claim of set off.

8. The learned counsel appearing for the respondents has argued that the set off claimed by the respondents was within limitation as according to him the transaction pertaining to the period commencing from 22-2-1974 to 3-7-1974 was within limitation as the final order of winding up was made on 6-3-1978. In support of his submissions, he has relied upon the judgments of this Court reported in *Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd.*, and *Official Liquidator, High Court, Karnataka Vs. James Edwin and Others*, Official

Liquidator of High Court of Karnataka Vs. Smt. V. Lakshmikutty, .

9. The Division Bench of this Court in the instant case has held that,

"..... that the period of limitation for an application for claim u/s 446(2) of the Act on behalf of the petitioner-company which is being wound up shall commence from the date of winding up order and the period from the date of commencement of the winding up of the company to the date of winding up order is made, both inclusive, and period of one year immediately following the date of winding up shall be excluded in computing the period of three years provided by Art. 137 of the Limitation Act....."

Such a plea for the purposes of calculating the period of limitation cannot be pressed into service where set off is claimed in a petition under Sections 446 and 468 of the Act and is filed by the Company.

10. In Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd., their Lordships considered the provisions of the Indian Companies Act and the Provincial Insolvency Act and found on facts that the claim of the creditor was within limitation from the date of the winding up of the company and held that claim of the said creditor in respect of Rs. 2,359-7-9 has been proved, It was found that there was a close analogy between the Insolvency Law and the Law - under the Companies Act by virtue of the provisions of the then Section 29 of the Companies Act. It was further held that under the Insolvency Law the debt which is payable on the date of the filing of the application for insolvency is proved to be a provable debt within the meaning of Section 34(2) of the Insolvency Act. The creditor in that case is not shown to have preferred his claim by way of suit but the matter was adjudicated on a petition by the Official Liquidator for the settlement of the list of creditors.

11. In Official Liquidator, High Court, Karnataka Vs. James Edwin and Others, the Karnataka High Court considered the scope of Section 46 of the Provincial Insolvency Act in relation to a company in liquidation and held on facts that the sureties were entitled to set off against the moneys due to them under their independent chits.

12. In Official Liquidator of High Court of Karnataka Vs. Smt. V. Lakshmikutty, , the Supreme Court held that Sections 529 and 530 of the Act provide that whenever any creditor seeks to prove his debt against the company in liquidation the provisions of Section 46 of the Insolvency Act shall apply and only that amount which is ultimately due from them at the foot of the account in respect of mutual dealings should be recoverable from him and not that the amount due from him should be recovered fully while the amount due to him from the company in liquidation should rank in payment after the preferential claims provided under the Act.

13. The learned counsel has relied upon the judgment of the Allahabad High Court in Thakur Prasad Chaudhari Vs. Official Liquidator, Benares Bank Ltd. (in

Liquidation), to urge that no period of limitation should be held prescribed for preferring a claim of set off. We are not in agreement with the general submissions made by the learned counsel and also find that the judgment cited by him does not support his case. It is well settled principle of law that once the limitation starts running against a party, it cannot be stopped by any intervening circumstances. It is also settled that the law of limitation only bars a remedy and does not take away the right. A party may satisfy the claim of the creditor even though the said claim has become barred by time but is debarred from enforcing such a barred claim in a Court of law. In this context the court noticed the distinction and noted (at P279):

"There is a distinction between the right of set-off which the Official Liquidator has under the mutual credit clause of the Insolvency Act and the right of set-off which a defendant in a suit governed by the Code exercising under O. 8, Rule 6. Under the Code it is required as a condition precedent to a set-off that the money should be legally recoverable by the defendant from the plaintiff whereas the set-off which the Official Liquidator exercises has no such condition precedent. The Official Liquidator can appropriate so much of the sum that the depositor owes to the company in satisfaction of what the company owes to the depositor even though the company's claim is not legally recoverable by lapse of time."

14. The law of limitation was held no bar for the Liquidator to satisfy the claim of set-off of creditor as the Liquidator was held not a Court but the representative of the party in insolvency.

15. In order to prefer a claim of set-off the party preferring such a claim is under an obligation to prove that the amount was legally recoverable. The amount which is barred by limitation cannot be held to be amount recoverable. In *Aiyapan Pillai v. Narayan* AIR 956 ker 239, it was held that a debt barred by limitation is not legally recoverable and the defendant cannot be permitted to claim a set-off of such barred debts. For preferring a claim of set-off under Order 8, Rule 6 of the Code an obligation is cast upon a party claiming such relief to pay ad valorem court-fee as would be payable on a plaint claiming the same relief.

16. The argument of the learned counsel! for the appellant that claim of set-off cannot be preferred in proceedings initiated at the instance of Company which is wound up cannot be accepted. Reliance of the learned counsel in this behalf on *D. Sundaravaradan Vs. R. Narasimhachari*, Official Liquidator, is misplaced in view of the preponderance of the authorities that such a claim could be preferred by a creditor if the amount claimed is legally recoverable and is not otherwise barred. In the authorities *Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd.*, , Official Liquidator, High Court, Karnataka Vs. *James Edwin and Others*, , Official Liquidator of High Court of Karnataka Vs. *Smt. V. Lakshmikutty*, and *D. Sundarva-radan*'s case *supra*, cited herein above, it was specifically held that the plea by way of set-off can be preferred even against the company in

Liquidation.

17. Section 46 of the Provincial Insolvency Act provides:

"Where there have been mutual dealings between an insolvent and a creditor providing or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the, other in respect of such mutual dealings and the sum due from the one party shall be set off against any sum due from the other party and the balance of the account and no more, shall be claimed, or paid on either side respectively."

18. A perusal of this section would indicate that it recognises the right of party in equity and speak of mutual dealing between the insolvent and insolvent creditor. For the purposes of this section there must be relationship between the creditor and debtor and there must be mutual dealings between them directly in whatever capacity. No credit was claimed by the respondent-company on the basis of the mutual dealing. On account of the failure of the appellant-company to furnishing of "C" form which is said to have been the cause for the respondent-company to pay sum of Rs. 27,174.28 to the sales-tax authorities for and on behalf of the appellant in respect of the sales allegedly done by the respondents to the appellants. There was nothing on the record to show that the amount of sales tax was paid on the basis of either mutual dealing or according to the directions of the appellant company. The learned Company Judge is not shown to have applied his mind either to the scope of the plea regarding set off, applicability of the provisions of the Limitation Act, requirement of payment of Court fee and the provisions of Section 46 of the Provincial Insolvency Act while passing the judgment impugned in this appeal. Non application of mind by the learned single Judge resulted in dismissal of the petition of the Company. The learned Company Judge was not justified to hold that, respondent can legitimately claim set off in this petition. The finding of the learned Company Judge on issues Nos. 1, 2 and 4 is liable to be set aside.

19. The onus of proof of Issue No. 1 was upon the respondent-company and to discharge the onus they are shown to have produced Shri R.P. Mukheeja, Administrative Officer, as R.W. 1 in the case. The said witness nowhere is shown to have stated that the appellant-company was under an obligation to supply "C" form or that on account of non supply of "C" form with respect to Bill No. 39/44 dated 28-2-1974, No. 116/44 dated 17-6-1974, No. 14/49 dated 7-7-1974, No. 261/44 dated 30-12-1975 No. 33/44 dated 22-2-1974 and No. 9/49 dated 30-4-1974 any amount was paid for and on behalf of the appellant company with their consent either expressed or implied. There was, therefore, no justification for deciding Issue No. 1 in favour of the respondent-company. The finding on Issue No. I is reversed and the Issue is decided against the respondent-company.

20. The learned counsel appearing for the respondents has not shown any circumstance or the command of law regarding the responsibility of the Official Liquidator to be found by the respondents alleged liability of the company before

passing of the winding up order. Issue No. 2 was also not rightly decided by the learned single Judge. In view of what we have held hereinabove, it cannot be said that the respondent-company was entitled to claim a sum of Rs. 27,174.28 by way of set off.

21. The judgment of the learned Company Judge being against the fact and law cannot be sustained and is accordingly set aside. In the result the claim petition of the appellant-company is allowed and the decree for the recovery of Rs. 7189/- along with interest at the rate of 12 per cent per annum from the date of the petition till the decretal amount is paid as passed in favour of the appellant company and against the respondent No. 1 with costs throughout.

22. Order accordingly.