

(1991) 03 AP CK 0025

In the Andhra Pradesh High Court

Case No : Company Application No. 312 of 1987 in Company Petition No. 5 of 1981

Official Liquidator

APPELLANT

Vs

T.J. Swamy and Others

RESPONDENT

Date of Decision : 05-03-1991

Acts Referred:

Companies Act, 1956 — Section 448, 449, 456, 456(1), 456(2)

Citation : (1991) 2 ALT 113 : (1992) 73 CompCas 583 : (2008) 3 CompLJ 478

Hon'ble Judges : S. Parvatha Rao, J

Bench : Single Bench

Judgement

Parvatha Rao, J.—This is an application of the official liquidator under sub-section (1) of section 543 of the Companies Act, 1956 (hereinafter referred to as "the Act"), made by summons in Form No. 121 under rule 260 of the Companies (Court) Rules, 1959. The respondents were, during the material and relevant times, directors and officers of Sri Jaya Investments Private Limited, the company in liquidation. The winding-up order in respect of the company under liquidation was made on August 28, 1981, in Company Petition No. 5 of 1981 which was presented on July 20, 1981. The present application was filed on October 5, 1987.

2. Notice was ordered in the application. Respondents Nos. 4 and 6 died. Respondents Nos. 1, 2, 5 and 7 to 10 appeared through their counsel. The third respondent was set ex parte on July 29, 1988. Counters were filed for respondents Nos. 1, 2, 5 and 7 to 10.

3. In the counter dated February 15, 1988, filed by the second respondent, the contention raised is that the present application is barred by limitation as it is beyond the time prescribed in sub-section (2) of section 543 of the Act. It is stated that as the winding-up order was passed on August 28, 1981, and the official liquidator was appointed on the same day for the company in liquidation and the acts of misfeasance or breach of trust, if any, on the part of the

respondents were prior to August 28, 1981, the present application is barred by time as it was filed after five years. Respondents Nos. 1, 5 and 8 to 10 filed separate counter-affidavits dated April 28, 1988, adopting the second respondent's counter-affidavit and contending that the present application is barred by time. The seventh respondent filed a separate counter-affidavit dated June 16, 1988, wherein he also contends that the present application is barred by time. In this order dated April 29, 1988, B. P. Jeevan Reddy J. required counsel for the official liquidator to satisfy this court as to how the application filed u/s 543 was in time. The official liquidator filed his report on June 17, 1988, to satisfy the court as to how the application was in time. According to the said report, section 458A of the Act is attracted to the present application and, under the said section, the period from the date of commencement of the winding up to the date of the winding-up order (both inclusive) and one year immediately following the date of winding-up order are to be excluded for the purpose of computation of limitation and, therefore, if the said periods are excluded, the application will be within the five-year time prescribed by sub-section (2) of section 543. After the said report was filed by the official liquidator, the second respondent herein filed additional counter-affidavits dated November 15, 1989, on behalf of himself and respondents Nos. 1, 5, 8, 9 and 10 wherein he contends that section 458A is not applicable to the present application because section 543 itself specifically stipulated the period of limitation.

4. In view of the objection raised by the respondents as regards limitation, arguments on both sides are heard on the question whether the application is barred by limitation.

5. Sri S. Ravi, appearing for the official liquidator, relied on the judgment of a single judge of this court in *Arkay Chit and Commercial Trading Co. P. Ltd., In re* [1982] 52 Comp Cas 174. In that case also, it was contended on behalf of the official liquidator that, by virtue of the provisions of section 458A introduced by the Amendment Act (LXV of 1960), in computing the period of limitation, the period from the date of commencement of the winding up of the company to the date on which the winding-up order was made (both inclusive) and a period of one year immediately following the date of winding-up order should be excluded, and if that period was excluded, the application made u/s 543 of the Act in that case would be in time. Rejecting the contention raised on behalf of the respondents in that case that only one year from the date of the winding-up order could be excluded and not the period from the filing of the application for the winding up of the company up to the date of the winding-up order, this court observed as follows (at p. 177) :

"I am unable to agree with the contention of Shri. N. Seshachary that only one year from the date of the winding-up order has to be excluded for an application u/s 543(2) read with section 458A. The provisions of section 458A are clear and both the periods, i.e., the period from the commencement of the winding up of the company to the date of the order of winding up and also the period of one

year from the date of the order of winding up have to be excluded in computing the period of limitation.

Sri N. Seshachary sought to content that section 458A does not apply to the instant application as it is filed under Order VI, rule 17, Civil Procedure Code. But this argument is devoid of any force. The substantive relief claimed in the application by way of an amendment falls u/s 543(1). Therefore, the provisions of section 543(2) and section 458A are attracted to this application and as such the application is in time."

6. This case squarely supports the contention of the official liquidator that section 458A is attracted to an application under sub-section (2) of section 543 of the Act and, in that event, the present application is in time.

7. Sri G. V. R. S. Varaprasad, appearing for respondents Nos. 1, 2, 5, 8, 9 and 10 submits that, in *Arkay Chit and Commercial Trading Co. P. Ltd., In re* [982] 52 Comp Cas 174 (AP), it was not seriously contended that section 458A was not attracted to applications made u/s 543 inasmuch as the main contention was that only one year from the date of the winding up order could be excluded and not the period from the filling of the application for the winding up of the company up to the date of the winding up order and that the court was mainly concerned only with that contention. However, the passage quoted above shows that the court held that the provisions of section 543(2) and section 458A were both attracted to the application that was before the court in that case. Sri Varaprasad points out that there was no discussion on this aspect of the matter. He, therefore, invites me to enquire into the question in greater detail. He contends that section 458A deals with computing the period of limitation prescribed for any suit or application in the name and on behalf of the company which is being wound up by the court. He refers to section 457 of the Act dealing with the powers of the official liquidator which provides, inter alia, that the official liquidator in a winding up by the court shall have power, with sanction of the court to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of company; and reading that in conjunction with what is provided in section 458A, he argues that the exclusion provided for in section 458A applies only to suits or applications in the name and on behalf of the company filed after obtaining the sanction of the court and no to applications u/s 543 under which a specific period of limitation of five years is provided for. He also contends that the official liquidator did not obtain the sanction of the court before filing the present application, which, therefore, which does not attract by section 458A. Sri Ravi meets this argument by pointing out that an application u/s 543 also is in the name and on behalf of the company and for this he relies on a decision of a single judge of the Bombay High Court in *B. Mehta and Co. v. Puranmal Bubna* [1979] 49 Comp Cas 98. That was also a case of a misfeasance summons against former directors and officers of a company u/s 543 of the Act and a question arose in that case as to whether that application by way of misfeasance summons was by and on behalf of the company. While

holding that the said application was by and on behalf of the company, Mridul J., of the Bombay High Court, observed as follows (at pages 106 to 108) :

"A misfeasance proceeding is merely a proceeding of a summary character by which the court in the course of winding up a company assessed and compels the delinquent directors and officers to make payment in respect of the acts of misfeasance or malfeasance, breach of trust or wrongful retention or other misconduct. It was, therefore, held in *Kumarapuram v. Pestonjee* [1903] 5 Bom LR 633 that the misfeasance proceeding is merely a summary way of enforcing against directors or other officers a liability for breach of trust or other misconduct which previously might have been enforced by action. It is undoubtedly true that some judgments show and, in my opinion, correctly, that section 543 takes within its sweep not only enforcement of such rights which could have been enforced by a company but also such new rights as might have been created in favour of the official liquidator under the provisions of the Companies Act, 1956. But even so, the creation of the new rights in favour of the official liquidator which can be enforced in a proceeding u/s 543 of necessity is the enforcement of a right for and on behalf of the company. This is the true effect of the provisions of the material sections of the Companies Act, 1956 which sections deal with appointment of the liquidators and their powers, functions and duties. Section 448 of the Companies Act, 1956, provides for the appointment of an official liquidator. Section 449 provides for the appointment of an official liquidator as a liquidator of the company on a winding up of the company. It enjoins the official liquidator to perform such duties in reference to a company which is wound up as the court may impose in that behalf. Section 456 does not vest the property or rights, title and interest of the company therein or pertaining thereto in the official liquidator but merely given the official liquidator the custody of the property. Sub-section (1), in so far as it is material, provides that where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled. Sub-section (2) of section 456 by a legal fiction ordains that "all the property, and effect of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company". Thus, a combined reading of sub-sections (1) and (2) of section 456 merely shows that the custody of the court and the official liquidator as contra-distinguished from vesting thereof, the sections do not vest all or any property or the effects or actionable claims to which the company is entitled either in the court or in the official liquidator. Section 457 is of great importance. It enumerates the powers of the official liquidator. The said section, inter alia, authorises the official liquidator to "institute or defend any suit, prosecution or order legal proceeding, civil or criminal, in the name and on behalf of the company (section 457(1)(a)). It also authorises the official liquidator to carry on the business of the company so far as may be necessary for the beneficial winding up of the company (clause (b)) or to sell the immovable and movable

property and actionable claims of the company either by public auction or by private contract (clause (c)). It authorises the official liquidator to raise on the security of the assets of the company moneys that may be required for the purpose of the beneficial winding up (clause (d)). It also authorises the official liquidator to do all such other things as may be necessary for winding up the affairs of the company (clause (e)). The reference to the company in clauses (a) to (e) of sub-section (1) of section 457 leaves no manner of doubt that the powers that are to be exercised by the official liquidator are the powers which are exercised by him for and on behalf of the company or for the benefit of winding up of the company or for the purposes of realising the assets or effects of the company. Thus, the official liquidator acts for the company. He is also required to act in the name of the company. Section 458 merely provides for the discretionary powers of the court. It does not detract from the basic position that the conferment of the powers upon the official liquidator by section 457 is for the benefit of the beneficial winding up of the company. The governing perimeter of the powers conferred upon the official liquidator is the beneficial winding up of the company and doing of things which subserve the said purpose. In my opinion, the actions that are taken or the rights and obligations of the official liquidator are all in his capacity as a statutory authority empowered to wind up the company subject to the supervision of the court. Under the provisions of law, the official liquidator is merely constituted a custodian of the properties, effects or actionable claims to which a company is entitled. Thus, the creation of new rights in favour of the official liquidator are more or less creation of rights in favour of the company which is being wound up. It would be anomalous to hold that the conferment of the power on the custodian of a company is not the conferment of the power on the owner of whom the custodian is merely a delegate or an agent by virtue of the provisions of law. It must, therefore, be held that the misfeasance proceedings are enforcement of the rights of a company in respect of the forms of misconduct which come within the pale or the purview of section 543 of the Companies Act, 1956."

8. I agree with the said observations of Mridul J. in *Gleidlargor (India) Pvt. Ltd. v. Mazagaon Dock Ltd.* [1985] 57 Comp Cas 742. A Division Bench of the Bombay High Court held as follows (p. 748) :

"Section 458A 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 process 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 recoveries of debts cannot but be on behalf of the company having regard to his source of authority of the provisions of the 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."

9. In that case, it was not disputed that the claim in the name of the liquidator was a claim in the same of the company and the court observed as regards debt owed to the company that "the official liquidator alone can enforce its recovery representing the owner-company on its going into liquidation". In *Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others*, , the Supreme Court was dealing with section 450 of the Banking Companies Act 1949. Sub-section (2) of section 45-O is as follows :

"(2) Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (IX of 1908), or section 235 of the Indian Companies Act, 1913 (VII of 1913), or in any other law for the time being in force and in respect of all other claims by the banking company its against its directors, the period of limitation shall be twelve years from the date of the accrual of such claims."

10. In that case, the official liquidator initiated the misfeasance proceedings against the directors and officers of the bank under liquidation. An objection was raised that the said section 45-O would apply only to a claim by the banking company and the Supreme Court rejected the said contention as follows (p. 392) :

"The objection that section 45-O of the Act would apply to claims made by the company itself and not to those by liquidator was rightly overruled on the ground that the liquidator really represented the company and that a claim made by the liquidator was, therefore, a claim "by the banking company ..."

11. These decisions clearly support the view that the misfeasance proceedings initiated by the official liquidator u/s 543 of the Act are on behalf of the company under liquidation and that they are in the name of that company only. I, therefore, hold that the present application made by the official liquidator under sub-section (1) of section 543 is made in the name of and on behalf of the company. It is to be noticed that section 458A which was introduced by Act 65 of 1960, begins with a non obstante clause and, therefore, has an overriding effect. It applies to all applications made in the name and on behalf of the company for which the period of limitation is fixed elsewhere. Inasmuch as an application of the official liquidator u/s 543(1) is also an application in the name of, and on behalf of, the company, the provisions of section 458A are attracted to such an application.

12. As an answer to the other contention raised by Mr. Varaprasad that no sanction of the court was obtained for the present application, Sri S. Ravi points out that this court, by order dated July 2, 1982, in Company Application No. 92 of 1982, accorded permission to the official liquidator to exercise all or any of the powers u/s 457(1) of the Companies Act which includes also the power to institute or defend any suit, prosecution, or other legal proceeding, civil or

criminal, in the name and on behalf of the company. Even otherwise, I am of the view that, for an application u/s 543(1), the sanction contemplated u/s 457 can be implied because the application is being presented to the company court itself; an express sanction u/s 457 is required where applications are to be made to forums other than the company court. Therefore, it is reasonable to hold that section 458A applies to all applications in the name and on behalf of a company whether instituted with or without the sanction of the court.

13. The present application, therefore, attract by section 458A. If the period covered by section 458A is excluded, the present applications is within time. For the above reasons, I hold that the company application is not barred by time. It shall be posted for preliminary hearing for directions, if any, under rule 261 of the Companies (Court) Rules, 1959, on March 12, 1991.