

(1977) 04 DEL CK 0013

In the Delhi High Court

Case No : Civil Appeal No. 200 of 1972

Official Liquidator of Security and Finance P. Ltd.

APPELLANT

Vs

Pushpawati Puri

RESPONDENT

Date of Decision : 25-04-1977

Acts Referred:

Citation : (1978) 48 CompCas 385 : (1977) RLR 391

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Advocate : A.K. Jain, Santosh Jain, S.P. Aggarwal, Daljit Singh and P.C. Khanna, for the Appellant;

Judgement

H.L. Anand, J.

(1) This judgment would dispose of certain questions of limitation arising in this application u/s 446 of the Companies Act, 1956. (for short, the Act), which are common to a large number of application under the aforesaid provision, as indeed under Sections 542 and 543 of the Act and Consideration of which was being postponed from time to time to await the outcome of a reference of some of these questions by a Division Bench of this Court to a larger Bench in 1974. Having regard to the pendency of the reference ordinarily the examination of the question would have been held over until the reference had been answered but such a course, to my mind, would be unnecessary, and perhaps unfair, in view of the fact that two recent decisions of the Supreme Court have made a qualitative change in the context in which the reference was made.

(2) The Questions that arise are :- (a) Whether the Limitation Act, 1963 (for short, the Act of 1963) governs the proceedings under the Act by virtue of Article 137 of the Schedule to it ? (b) Whether the expression "claim" in Section 446(2) (b) of the Act means a claim enforceable at law and would, Therefore, exclude claims which had become barred by time before the commencement of winding up ? (c) Whether a claim against any person which had become barred by time

at the commencement of the winding up of a company could

(3) As regards question at (a) above the legal position has since crystallised and does not admit of any further controversy. The Indian Limitation Act of 1998 (for short, the Act of 1908) had no application to proceeding under the Act. Article 181 of the Schedule to that Act, which provided for limitation for applications, not otherwise provided, was held to be confined to applications under CPC ., Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd., . The decision was affirmed by the Supreme Court even after a change was brought about in the Act of 1908 in the year 1940 so as to provide for certain applications under the Arbitration Act, 1940, Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others, . In its Third Report the Law Commission had recommended that the expression "application" in the defining provision of the Act of 1908 should be re-defined so as to include a petition so as to extend the Act of 1908 to petitions and applications under special laws as it was felt that there was no such provision until then. The Act of 1963 repealed the Act of 1908. The Act of 1963 inter alia redefined the expressions "applications" and "applicant" by Sections 2(a) & 2(b) of it and incorporated Article 137 in the Schedule to provide for any other application for which no period of limitation was provided elsewhere in the Division relating to applications. According to the Statement of Objects and Reasons of the Act of 1963 this was being done with a view to provide a period limitation for applications and petitions under "special laws". A number of High Courts E. S. I. Corp. Vs. Bharat Barrel D. M. Co. M. R. 1967. Bom. 472; Ram Kumar Kajaria Vs. Chandra Engineering (India) Ltd., , took the view that, having regard to the language of Article 137 and the historical background in which it was incorporated, it was wide enough to take within its ambit applications under special statute such as Employees State Insurance Corporation Act, 1948 and West Bengal Land Reforms Act. Unfortunately, however, and I may so with utmost respect, in the case of Town Municipal Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc., , Bhargava, J. speaking for the Supreme Court, inter alia, held that the Act of 1963 had not made any difference in the position that obtained under the Act of 1908 and that it was not possible to hold that the intention of the legislature was to drastically enlarge the scope of the Article so as to include all applications, whether they had any reference to the CPC or not. In the case of Nityarand N. Joshi Vs. L. I. C. AIR. 1970. S.C. 202, Sikri J (as he then was), and who spoke for the Court, cast a veiled doubt on the correctness of the aforesaid decision but did not take the matter any further because it was not necessary to express a considered view on the question. The decision in the case of Town Municipal Council, Athani Vs. Therefore, continued to hold the field until in the case of The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, the Supreme Court ruled that, having regard to the change brought about by the Act of 1963 Article 137 of the Limitation Act will apply to any petition or application filed under any Act to a civil court It must, Therefore, be held that the various applications and petitions under the Act would be governed by the Act of 1963

except in so far as the Act itself makes a provision for limitation such as Section 543 of the Act and that these applications and petitions would be governed by Article 137 of the Schedule to the Act of 1963.

(4) As for question at (b) above a long line of decisions dating back to the year 1924 and culminating in the decision of the Supreme Court in 1976, without a single dissenting voice, would justify an answer to the question in the affirmative. In *Shri Narain Vs. Liquidator Air, 1924*, lab. 53 it was held by the Lahore High Court that a debt which was time barred and Therefore, unenforceable by a suit could not be enforced by a summary order u/s 186 of the Companies Act of 1913 on the ground that the Section did not create new liabilities or confer new rights but merely created a summary procedure for enforcing existing enforceable right and liabilities. In *Hanraj Gupta Vs. Dehra Dun-Mussoori E. T, Co AIR. 1933. P.C. 63*, this decision was approved and was described by the Judicial Committee as coinciding with the view expressed long ago in *Stringer's case (1869) 4. (9). Ch 475*. The Judicial Committee further held that the words ""any money due" in Section 186 of the Act of 1913 must be confined to money which was due and recoverable in a suit by the company and not include any money which at the time of the application u/s 186 of that Act could not have been recovered. A suggestion that the decision in the Lahore case (supra) was in conflict with a decision of the Allahabad High Court in the case of *Jagannath Prasad 38. 2nd ALL. 347* was dispelled with the observation that the Allahabad case had no relation to Section 186 of that Act, but related to money due on shares the liability for which on a winding up became a statutory liability u/s 156 of it. In *Hafizuddin Mandal Vs. M. C. GhoshMR. 1945. C al. 399* it was held that when a judgment debtor's application comes up before Debt Settlement Board under the Bengal Agricultural Debtors Act the Board has to determine the question of the existence of the debt, which implied the determination of the further question whether it was barred by time. In the case of *Raoji Bapuchand Pendharkar Vs. K.L. Bavachekar, , Chagla, C. J.*, as he then was, and who spoke for the Division Bench of the Bombay High Court, held that by reason of an application by a receiver u/s 4 of the insolvency , in preference to a regular suit the party against whom the application was made could not be deprived of his right to plead the statute of limitation. In the case of *Malabar Petroleum Co. by Partner K.V. Thomas Vs. Continental Oil Co. Ltd.*, "any money due" in Section 469 of the Act was held to mean the amount due and such amount could not be due if under the law of limitation the claim had become barred by time. In the case of *Jadeja Kiratsinhji Anandsinhji Vs. Patel Kana Vela*, the word "liability, in the definition of the expression "debt" in Section 2(5) of the Saurashtra Agricultural Debtors" Relief Act was held to mean a civil liability which could be enforced by a civil court. In the case of *New Delhi Municipal Committee Vs. Kalu Ram and Another*, Court could be said to have put a seal of approval out his line of thinking when it held that the word "payable" in Section 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 must mean "legally recoverable". It was further observed that if the recovery of an

amount was barred by the law of limitation, it was difficult to hold that the Estate Officer could still insist that the said amount was payable. The decision of the Judicial Committee in the case of *Hansraj Gupta* (Supra) was quoted with approval. A contention was raised in that case on behalf of the appellant that the law of limitation extinguished the remedy but not the right and if a new remedy was provided without attracting the bar of limitation the right could nevertheless be enforced. It was observed that "it is not questioned that a creditor whose suit is barred by limitation, if he has any other legal remedy permitting him to enforce his claim would be free to avail of it" and that "the question in every such case is whether the particular statute permits such a course". On the scheme of the Public Premises (Eviction of Unauthorised Occupants) Act it was held that such a course was not permissible. It was further observed that "if the recovery of any amount was barred by the law of limitation it was difficult to hold that the Estate Officer could still insist that the said amount was payable and that the duty cast on the authority to determine the arrears of rent involves the determination of the question in accordance with law and that "Section 7 only provides a special procedure for the realisation of rent in arrears and does not constitute a source or foundation of a right to claim a debt otherwise time-barred."

(5) Now it has never been in doubt that Section 446(2)(b) does not create new rights but lays down a summary procedure for the enforcement of existing rights and liabilities in that it lays down a special procedure and a machinery for the adjudication of certain claims and determination of liability in relation to a company which is being wound up. That being so, it is difficult to hold that such a machinery or procedure should enable the company, which is being wound up, or the creditors of such a company, to make claims which are barred by time. It may be useful to remember in this context that the provisions of the said section do not bar the institution of a regular suit which can still be instituted, even though with the permission of the court, which is winding up the company, and to hold to the contrary, Therefore, would lead to an anomalous position in that such claims would be hit by the bar of limitation in a regular action while would be immune from such a disability in the Company Court. It must, Therefore, be held that the claim or liability sought to be enforced under the provisions of Section 446(2)(b), must relate to an enforceable claim and a claim which is not legally enforceable could not be pursued under that while this section and the new jurisdiction has not been created by the Act to revive claims which had been quietened by lapse of time. In other words the expression "claim" in Section 446(2)(b) of the Act would exclude claims that had become barred time before the commencement of winding up, In terms of Section 441(1) of the Act in case of winding up by Court the winding up shall be deemed to commence at the time of the presentation of the petition for the winding up. It may be useful to point out that u/s 458-A to the Act in computing the period of limitation for any suit or application in the name or on behalf of the company, which is being wound up, the period from the date of commencement of the winding up of the

company the date on which the winding up order is made (both inclusive) and the period of one year immediately following the date of winding up order has to be excluded.

(6) As regards question at (c) above the answer to it would be in the affirmative. The reasons for the answer would, however, be different in the case of the two provisons.

(7) It is well settled that the provisions of Sections 542 and 543 of the Act do not create fresh rights but provide for an additional summary procedure for the enforcement of the existing rights and liabilities arising out of the conduct of the affairs of the Company. It is true that, subject to certain recognised exceptions, the law of limitation does not operate to extinguish rights but merely takes away specified legal remedies that it seeks to regulate. In cases where the bar of limitation does not extinguish rights the right survives the extinction of the remedy by the operation of the law of limitation. In such cases the person interested would be entitled to seek any other remedy for the enforcement of the right and the corresponding obligation which is not within the mischief of the law of limitation. As has been observed by the Supreme Court in the case of *New Delhi Municipal Committee (Supra)* the question in such a case will have to be whether the statute, which provides an alternative remedy, permits the adjudication of claims where a suit on the cause of action was barred by time. It has already been pointed out above that, having regard to the scheme of Section 446(2)(b) of the Act and the long line of decisions, it would not be possible to hold that a claim, which was barred by time, could nevertheless be made subject matter of an application u/s 446(2) of the Act because of the phraseology of that provision which seems to envisage maintainability of claims even though they may be barred by time under the ordinary law. In *C. P. 17-D of 1965* I had occasion to consider the question as to when the right to apply u/s 542 could be said to accrue in terms of Article 137 of the Schedule to the Act of 1963. This is how I looked at the question in my order on the preliminary objections made on April 19, 1977 : "Until the Limitation Act of 1963 there was no limitation for an application under Sec. 542 in as much as the residuary Article 181 in the Limitation Act of 1908, did not regulate proceedings under the Act, a position which is very well settled. It is also equally settled that the proceedings under the Act, "for which the Act does not prescribe any period of limitation would now be governed by Article 137 of the Limitation Act of 1963. The Article provides for applications for which no period of limitation is provided elsewhere in the Division relating to the applications. It is not in dispute that the Division relating to applications in the Limitation Act makes no provision for applications under the Act. Article 137 provides a limitation of 3 years for such applications and the time for such applications begins to run when the right to apply accrues. It is a well known common law principle that for the purpose of any proceeding time is to run from the moment the party first gets the right to initiate it. Ordinarily, Therefore, the right would accrue when the cause of action for the proceeding first arises. It is a well known principle that by the words "the right to

apply" is intended the right to apply on a particular cause of action and where there are different causes of action, there would accrue the right to apply as and when the subsequent cause of action arises. On an application of these principles ordinarily the right to apply u/s 542 of the Act would accrue when the persons sought to be liable committed the fraudulent acts or conduct in relation to which relief is sought. The scheme of the section is, however, such that the conduct of business complained of would not confer the right to apply is also dependent on two other conditions. One is that it must "appear" that any intent to defraud the creditors etc. and secondly that it should so appear in the course of the winding up of a company. It follows, Therefore, that the conduct complained of does not by itself give a cause of action to apply unless the other two conditions are satisfied. It is, Therefore, not possible to hold on the language of Section 542 of the Act that the right to apply accrues when the person concerned commits the fraudulent act or as guilty of the impugned conduct. Such a right accrues only if a certain state of affairs is disclosed in the course of winding up of a company. An indication as to when the right to apply would accrue may also be gathered from the provision of sub-section (2) of Section 543 of the Act where the Legislature made a specific provision with regard to limitation. According to this provision the application could be made within five years of the date of the order of winding up or of the conduct complained of whichever is "longer". It would be safe to infer from this provision that the right to apply u/s 542 of the Act would accrue when the order for winding up is made. But the further right to apply would accrue as and when disclosures are made in the course of winding up which may enable the Official Liquidator or any any creditor or contributory to seek relief u/s 542 of the Act. Such a right would accrue, inter alia, when the statement of affairs is filed because that is how disclosures are made with regard to the affairs of the company." I am still of that view. It appears to me that on the peculiar language of section 542 of the Act, Claims which have become barred by time before the commencement of winding up could form subject matter of an application u/s 542 so long as they satisfy the requirement of Article 137.

(8) As regards Section 543 there could be no doubt that the bar of limitation with regard to a claim under the law of limitation would not affect the right to apply u/s 543 of the Act for the simple reason that subsection (2) of that Section clearly provides that an application under sub-section (1) may be made within five years from the date of the order of winding up or of first appointment of liquidator the misapplication, retaining, misfeasance or breach of trust, as the case may be, "whichever is longer". This clearly makes the limitation for the complained acts under the ordinary law of limitation irrelevant. This is so because the provisions of sub-section (2) of section 543 would prevail over the law of limitation, being a provision in a special statute.

(9) As regards question at (d) above, the answer to it would vary with the two provisions. In so far as an application for enforcement of a claim u/s 446(2)(b) of Act is concerned the right to apply would accrue only when an order for the

winding up of the company is made because the Court which has jurisdiction to entertain or dispose of such a claim is the Court "which is winding up Company which has jurisdiction to entertain or dispose of such a claim is the Court "which is winding up the Company". The right to apply to such a court obviously would not arise unless the Court was winding up the company. Now it is true that u/s 441(2) the winding up of a company by the Court ""shall be deemed to commence at the time of the presentation of the petition for the winding up". But the commencement of the winding up relates back to the date of the presentation of the petition only after the winding up order has been made and not before. The expression "which is winding up the company" in sub-section (2) of Section 446 of the Act has also to be interpreted in the context of the provision of subsection (1) of Section 446 of the Act which comes into play only when a winding up order has been made. The right to apply u/s 446(2)(b) must, Therefore, be held to accrue on the winding up order. It must, however, be pointed out that even though Article 137 prescribed a period of three years from the accrual in actual practice the period may perhaps be reduced if on the conclusion of the winding up the company is dissolved before the expiry of the period of three years from the date of the winding up order because after the dissolution, court would not have the jurisdiction to entertain a claim because it could not be said to be winding up the company unless the dissolution is eventually declared to be void and the winding up proceedings are restored u/s 559 of the Act.

(10) The right to apply u/s 542 of the Act would arise where a winding up order is made and would continue to arise during the course of winding up such as where a statement of affairs is filed u/s 454 of the Act or a preliminary report is submitted by the Official Liquidator u/s 455 and when in the course of winding up "It appears that a person has become liable in terms of Section 542. The question has been dealt with more elaborately in my order of April 19, 1977, a relevant portion of which has been quoted earlier in this judgment.

(11) Two subsidiary questions of limitation arise but since these were not raised at the hearing I would not like to decide them but be content by merely stating the questions and leave them to be considered as and when they are raised.

(12) The first of these subsidiary questions is as to whether in the rather nebulous state of the law of limitation in relation to proceedings under the Act even after the Act of 1963 in view of the decision of the Supreme Court in the case of Town Municipal Council, A-thani (Supra), and until the controversy was laid to rest in the decision of the Supreme Court in Kerala State Electricity Board (Supra), it could be said that a person applying under the provisions of the Act had sufficient cause for not preferring the application within the period of limitation provided by Article 137 and he, Therefore, is entitled to the extension of the period prescribed by that Article. True, Article 137 was wide enough to include within its ambit applications under the Act and any applicant, Therefore, was bound, in terms of Section 3 of the Act of 1963, to apply within the period

allowed by law. However, only a veiled doubt was cast on the correctness the decision in the case of Town Municipal Council Athani (Supra) in the decision of the Supreme Court in the case of Nityanand M. Joshi(Supra) in the year 1970 but the earlier decision held unchallenged Sway. The true legal position was, however, restored only with the decision in the of Kerala State Electricity Board (Supra) in 1976. Explanation to Section 5 of the Act of 1963 lays down that the fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of the Section. If that be so, wouldn't the belief of the litigation based on a decision of the Supreme Court as to the true legal position of "limitation equally constitute sufficient cause within the meaning of the Section. The answer to the question appears prima facie to be obvious. But the consideration of the question may perhaps be deferred until the provision of Section 5 is invoked in any case and the parties affected have been heard.

(13) The second of these subsidiary questions relates to the administration of Section 30 of the Act of 1963. Sub-section (b) of this Section, inter alia, provides that any application for which a period of limitation is shorter than "the period of limitation prescribed by the Indian Limitation Act of 1908" may be preferred or made within a period of 90 days next after the commencement of the Act or within the period prescribed for such application by the old Act "whichever period expires earlier". The section, Therefore, makes ample provision for cases where the period of limitation provided under the Act of 1908 was longer than the corresponding provision in the Act of 1963. But what happens where the Act of 1908 did not prescribe any period of limitation at all for a particular proceeding. like the the proceedings under the Act, but the Act of 1963 does. Could it be said in such cases that the period prescribed by the Act of 1963 was "shorter" than the one prescribed by the Act of 1908 within the meaning of Section 30. The plain language of Section 30 would not justify such a conclusion. If that be so, how would the new provision providing for limitation for the first time in the Act of 1963 be administered ? An instance in point would be the provision contained in Article 137 of the Act of 1963 itself. The aforesaid Article is wide enough to include within its sweep applications and petitions under the Act, as has been held by (he Supreme Court. There was no provision for such applications in the Act of 1908. The starting point under the Article would be when the right to apply accrues and the period is three years. The right may have accused long before the repeal of the Act of 1908 which provided no period of limitation. Could such an application be ever filed under the Act of 1963 if Section 30 did not save it ? An appropriate provision to deal with such cases would apparently be necessary and the question may perhaps have to be considered with a view to determine if any legislative action in that behalf would be called for.

(14) The only question that remains to be considered is as to whether the present application u/s 446(2)(b) of the Act is barred by time in view of the aforesaid conclusions. The respondent is the wife of the former Managing

Director of the Company and had taken advances from the company from time to time between the years 1957 and 1967. A total sum of Rs. 1,01,988.60 claimed from the respondent includes the value of shares sold to the respondent by the company which was not paid for by the respondent and the amounts were debited to her account on December 30, 1959. The respondent has been making payment to the company from time to time. The last payment was made by the respondent on March 31, 1967. The winding up petition was filed on February 19, 1968, and the winding up order was made on July 17, 1969. The present claim was filed on March 20, 1972. The claim had admittedly become barred by time when it was filed on March 20, 1972, even if the last payment on March 31, 1967, is taken to be an act of acknowledge-ment. It could not be said that on that day the claim was enforceable in law unless the respondent was entitled to exclude the period from the date of winding up petition to the date of winding up order and a year thereafter by virtue of Section 458-A of the Act.

(15) The question that, Therefore, requires consideration is whether in computing the period of limitation for the purpose of determining if the claim had already become time barred and in computing the period of limitation for a claim u/s 446(2)(b) advantage could be taken of the provisions of Section 458-A of the Act or not. Section 458-A which was added to the Act by the Amending Act of 1960 provides that "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 the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded." It appears obvious on the plain language of this provision that the exclusion is permissible in relation to suit or applications that may be tiled in the name of or on behalf of a company. Having regard, however, to the fact that the Limitation Act of 1908 made no provision with regard to proceedings under the Act the aforesaid provision could not be intended to extend the period of limitation provided for proceedings under the Act eventually in the Act of 1963 and the provision could be taken advantage of only for the purpose of determining if a claim sought to be made under the Act had already become time barred or not. If the period from February 19, 1968, the commencement of the winding up to July 16, 1970, is excluded for the purpose of determining if the claim had become barred by time before it was made u/s 446(2)(b) of the Act it obviously follows that on March 20, 1972, when the present claim was filed, a civil suit could have been filed to recover the amount and, if that be so, it was an enforceable claim which could legitimately form subject, matter of the application u/s 446(2)(b) of the Act. The right to apply binder the aforesaid provision arose only when winding up order was made on July 17, 1969 and the application having been filed within three years from that date it conforms to requirement of Art. 137 as well. Objection with regard to limitation is Therefore, overruled.