

(2006) 04 AP CK 0098

In the Andhra Pradesh High Court

Case No : Company Application No. 160 of 1995

Official Liquidator, Suganti Alloys Castings Ltd.

APPELLANT

Vs

Edupuganti Subba Rao

RESPONDENT

Date of Decision : 19-04-2006

Acts Referred:

Companies Act, 1913 — Section 235

Companies Act, 1956 — Section 453(1), 457, 458A, 543, 543(1)

Limitation Act, 1963 — Section 5

Citation : (2006) 72 SCL 201

Hon'ble Judges : S. Ananda Reddy, J

Bench : Single Bench

Advocate : M. Anil Kumar, for the Appellant; V.S. Raju and M. Jagadish Kumar, for the Respondent

Final Decision : Allowed

Judgement

S. Ananda Reddy, J.—This is an application filed by the Official Liquidator u/s 543(1), read with Section 458A of the Companies Act, 1956 (for brevity "the Act") seeking for an order against the respondents-Ex. Directors for reimbursing the amount of loss caused to the company under liquidation by their inaction in not recovering the debts due to the company under liquidation, which are specifically mentioned in Schedules II and III of the Statement of Affairs filed by the first respondent.

2. It is stated that against the company under liquidation, originally one of the creditors filed C.P. No. 35 of 1987 on 6.4.1987 in which an order of winding-up of the company was passed on 19.2.1988. The said order of winding-up was subsequently stayed by order dated 16.9.1988. While the said orders were continuing, another creditor viz., Jaypore Sugar Company Limited, Rayagadh District, Orissa State, filed another petition in C.P. No. 68 of 1988 on 2.11.1988 seeking winding-up of the company under liquidation, pursuant to which an order of winding-up was passed on 27.7.1990 and the Official Liquidator was appointed

as liquidator of the company. Subsequent to the winding up order, as per the directions of this Court dated 11.7.1991 in C.A. No. 142 of 1991, the Ex-Managing Director, first respondent herein, filed the statement of affairs on 3.12.1991. The Statement of Affairs contains, apart from other details, Schedules II and III containing the list of sundry debtors (Trade Debtors). As per Schedule II there are about 80 debtors and the total amount due and recoverable was shown at Rs. 12,10,032.75. Similarly, under Schedule III, an amount of Rs. 4,93,815 is due and recoverable from six major debtors. Thus, the total amount of debts due and recoverable comes to Rs. 17,00,088.67 after deducting the amount recovered. It is stated that since the first respondent-Ex-Managing Director did not furnish the details with correct addresses of the debtors, though the Official Liquidator has taken steps by issuing notices to all the debtors, he was not able to recover any of the amounts, except a sum of Rs. 3,759.08. The inability of the Official Liquidator from recovering the debts is due to the negligent act of the respondents-Ex. Directors, including the first respondent-Ex. Managing Director in not taking appropriate action, therefore, the present application is filed alleging that the loss was caused due to the misfeasance or breach of trust in relation to the company committed by the Ex. Directors, including the first respondent-Ex. Managing Director, and therefore, they are liable to compensate and reimburse the same to the company under liquidation.

3. Separate counters have been filed on behalf of the first respondent as well as respondents 3 and 4. The first respondent denied all the allegations that are made by the Official Liquidator in the application. According to the first respondent, the present application filed u/s 543 of the Act is not maintainable, as it is barred by limitation, as it has been filed after the expiry of 5 years from the first appointment of the Liquidator in the winding-up petition. It is stated that the applicant has not made out any case for mis-application or misfeasance or breach of trust in relation to the funds of the company and the applicant ought to have been taken timely action immediately after filing the statement of affairs on 3.12.1991 and the present application is filed after the expiry of 5 years. This clearly shows that the applicant has not taken timely action for recovery of the claims due to the company. The allegations made against the respondents is only that they have failed to give full addresses of the list of debtors, and mere lack of information as averred by the applicant does not constitute a prima facie case u/s 543 of the Act.

4. Without prejudice to the above contentions, it is stated that the winding-up petition was originally filed on 6.4.1987 and winding-up orders were passed on 19.2.1988. The said order was set aside on 16.9.1988 on condition of paying a sum of Rs. 10,000 to the petitioner-creditor and on payment of the said amount, on 16.9.1988 winding-up order was set aside. It is further stated that several of the creditors have filed winding-up petitions viz., C.P. No. 22 of 1986, C.P. No. 63 of 1987, but they were closed by order dated 11.11.1988 since the company became a sick industrial company and made a reference to BIFR. It is stated that

a direction was given to the company under liquidation to inform the respective petitioners, once in six months, about the progress of the case before the BIFR and also shall not alienate the assets without the leave of the BIFR for a period of six months and the winding-up petitions were closed with a liberty to the petitioners therein to make applications for reviving in the event of its become permissible by virtue of the subsequent decision of the BIFR.

It is stated that BIFR at its final hearing on 1.2.1988 found that the company is deemed to be a Government Company by virtue of the shares held by the APIDC, and therefore, held that the company under liquidation do not come within the purview of the BIFR and accordingly the proceedings were closed before the BIFR. Thereafter, it is stated that the first respondent approached the APIDC, APSFC and Andhra Bank for revival of the Unit and while the first respondent was busy with the revival proposal, meanwhile, C.P. No. 68 of 1988 was filed by M/s. Jaypore Sugar Company Limited, where an order of winding-up was passed on 27.7.1990. It is stated that the APSFC being the secured creditor, took possession of the assets of the company and effected the sale after following the procedure and in the process, all the books and records of the company were in the factory premises, which were seized by APSFC, therefore, he could not file the statement of affairs immediately. It is also stated that the first respondent came to know of the winding-up order through the other Directors and a copy of the order was not served on him and finally he submitted the statement of affairs on 3.12.1991. It is further stated that as and when the winding-up orders were passed, all the Directors have resigned from the Board and the first respondent has alone left with the company under liquidation and it has taken time to co-opt the additional Directors to enable him to file the statement of affairs and he filed the statement of affairs only on 3.12.1991 duly certified by the company Auditor M/s. Shankaran & Krishnan, Visakhapatnam.

It is further stated that along with the statement of affairs, the Books of Account and records of the company maintained up to the date of winding-up were handed over to the Official Liquidator and the same was acknowledged by the applicant/Official Liquidator. It is denied that he did not handover the Books of Account of the company up to the date of winding-up, which are required by the Official Liquidator. The acknowledgement issued by the Official Liquidator shows that the first respondent handed over all the Books and records of the company maintained up to the date of winding-up order. It is stated that in the sundry debtors list, under Schedule II, the debtors to the extent of Rs. 12,10,032.79 were shown to be recovered by the company from sundry debtors, numbering to 80. It is stated that it is evident from the statement of affairs that the first respondent has given all the addresses as far as possible to the Official Liquidator to realize the debt amounts. The applicant by letter dated 24.7.1982 has called for certain clarifications and asked the first respondent to appear before him on 3.8.1992 and at the request it was posted to 13.8.1992 when the first respondent appeared and the clarifications are given as sought for. It is stated that the first respondent has given the clarifications, apart from showing various

entries made in the Books of Account, which were handed over by him.

It is also stated that with reference to Schedule III of the statement of affairs, under the Head "Loans and Advances" a sum of Rs. 4,93,815 was shown as recoverable by the company from six major debtors. It is further stated that in some cases, these advances were kept as a deposit with Sales Tax Department, A.P. State Electricity Board, Employees Deposit Linked Insurance and deposit with Andhra Bank and Central Excise Department etc. Since these are the advance and security deposits kept with them for the amounts due and payable by the company, these authorities might have adjusted these amounts due from the company and the first respondent is no way responsible for their adjustment, as these amounts are due and payable to them. It is stated that after 13.8.1992, he never called for any clarifications and it is only 31 years thereafter the present application is filed for which the first respondent denied any personal liability, therefore, sought to dismiss the application as not maintainable.

5. A separate counter is filed on behalf of respondents 3 and 4, which was sworn in by the fourth respondent. It is stated that they are not guilty of misappropriation or misfeasance in relation to the above named company. It is stated that he retired as Director in the Annual General Body Meeting held on 23.2.1988 and afterwards not reappointed. The said fact was informed to the Official Liquidator by letter dated 17.10.1990. Form 32 has also been submitted to the Registrar of Companies on 10.6.1988 about his retirement, hence the petition is not maintainable against him and he is not liable for any amount. It is stated that the application is not maintainable for non-joinder of necessary parties. The nominated Directors and Auditor have not been included as parties, which militates against the maintainability of the petition. It is also stated that the role of each Director is not specified either in the summons or in the petition, as such, the petition is bad in law.

It is further stated that the Company Petition is barred by limitation, since the first winding-up order was passed on 19.2.1988 from which date the limitation is to be computed. The insufficiency of the addresses cannot be a ground for maintaining this petition because it is subjective in nature. It is also stated that to proceed against the Directors, it should be specifically stated about who are personally guilty of misfeasance, as otherwise the petition is not maintainable, and, therefore, they claim that they are not liable to be proceeded with for misfeasance. In the counter, the fourth respondent did not say even a word about the third respondent.

6. In view of the contest and the dispute raised by the respondents, oral evidence was adduced on behalf of the applicant/Official Liquidator and a Junior Technical Assistant in the office of the Official Liquidator was examined as P.W. 1. In the Chief-examination, he has reiterated the events and the failure of the respondents to recover the debts due to the Company and also the steps taken by the office of the Official Liquidator for the recovery of the debts that are shown in the statement of affairs under Schedules II and III. Notices were sent

to various debtors from Exs. A. 4 to A. 65. It is stated that with reference to all the notices that are sent, some of them are returned unserved because of the incorrect address and with reference to the addressees, who received the notices, they have denied their liability and in some cases even clarifications were sought for with reference to the purchase orders, sale invoice etc., which could not be supplied for want of those particulars, therefore, the Official Liquidator was not able to realize any amounts and according to P.W. 1, the Managing Director and other Directors of the Company under liquidation are responsible for the loss caused to the company under liquidation on account of non-recoverability of the debts referred to above. P.W. 1 was cross-examined on behalf of the first respondent, where it was suggested that the clarification sought for was furnished by the Ex. Managing Director under Ex. A. 68.

7. In the cross-examination, it was also stated that some of the debtors have sought for clarification under Exs. A. 6, A. 8, A. 12, A. 14 and A. 16 and admitted that no replies were given for those clarifications, as there are no details available in the statement of affairs. In the cross-examination, it was also admitted that with reference to some of the companies, which are the major debtors, notices would not be sent as the addresses are not clear, therefore, a letter was addressed under Ex. A. 69 to the first respondent. This witness admitted that out of an amount of Rs. 12,10,032.79, only a sum of Rs. 3,759.08 was recovered. In the cross-examination, on behalf of respondents 3 and 5 to 8 (R. 5 to R. 8 are the legal heirs of R. 4, who is no more) P.W. 1 admitted that the third respondent ceased to be a Director with effect from 20.4.1989 and Ex. B.3 is the certified copy of Form-32 and he was not reappointed later. Similarly, fourth respondent ceased to be the Director with effect from 23.2.1988 and he was also not re-appointed as Director and Form-32 was submitted before the Registrar of Companies on 10.6.1988. He denied the suggestion as to his knowledge whether respondents 3 and 4 are responsible for the day-to-day affairs of the company. He also deposed that he does not know whether respondents 5 to 8 inherited any property after the death of fourth respondent.

8. From the above rival contentions, the following issues arise for consideration.

(1) Whether the respondents-Ex Managing Director and Directors have committed misfeasance or breach of trust in taking necessary steps for recovery of the debts that are due to the company under liquidation, and whether any or all of the respondents-Ex Directors are liable for reimbursement of the loss caused to the company under liquidation?

(2) Whether the application u/s 543(1) of the Act is barred by limitation?

9. Issue No. 1 : Admittedly, the 1st respondent is the former Managing Director of the company under liquidation while the respondents 2 to 4 are the Directors. During the pendency of this application, Respondent No. 4 died and therefore, respondents 5 to 8, who are the legal heirs of the said deceased Director, are brought on record. It is stated that the Company in question was ordered to be

wound up by an order dated 27.7.1990 in Company Petition No. 68 of 1988 and the Official Liquidator was appointed as the Liquidator of the Company. The respondents-Directors were obligated to file statement of affairs within three weeks from the date of the winding-up order. However, the statement of affairs was filed by the 1st respondent only on 3.12.1991, pursuant to the orders passed on 11.7.1991 in CA No. 142 of 1991. The statement of affairs apart from others contains Schedules II and III showing the list of sundry debtors. There are about 80 debtors as per the Schedule II and the total amount due and recoverable was shown as Rs. 12,10,032.75 paise. Similarly, as per the Schedule III, an amount of Rs. 4,93,815 was shown as due and recoverable from six major debtors. It is the case of the Official Liquidator basing on the addresses of the debtors that are furnished by the 1st respondent, steps were taken to recover the said amounts. But, however, the Official Liquidator could recover only a sum of Rs. 3,759.08 paise out of the debts shown in the Schedule-H of the statement of affairs. With reference to the rest of the debtors, either they disputed the claim of the Company or sought for furnishing of the evidence as to the liability or in some cases, the notices sent by the Official Liquidator were returned unserved for want of full address. With reference to Schedule-III, the information received by the Official Liquidator is that the debtors have adjusted the amounts, which were kept with them in the form of deposits against the amounts payable to them by the company under liquidation. Therefore, the Official Liquidator was unable to recover any amount.

10. According to the Official Liquidator as per the application filed u/s 543(1) of the Act, the respondents, who are the Managing Director and Directors of the company under liquidation, have deliberately allowed the above debts to become unrealizable due to their failure to take timely action. This was even reiterated by P.W. 1 in his evidence by stating, "At the time of submission of the statement of affairs on 3.12.1991 the sundry debts were time-barred." Though this witness was cross-examined on behalf of the 1st respondent as well as the respondents 3, 5 to 8, nothing was elicited nor any suggestion was made that the debts were not barred by time by the time of filing of the statement of affairs by the Respondent No. 1. In view of the above, the Official Liquidator sought for an order against the respondents awarding compensation for the acts of misfeasance, negligence or breach of trust, which had resulted in the loss caused to the company under liquidation to the extent of the debts, which are barred by limitation and were unrecoverable. In fact, on behalf of the Official Liquidator, all the notices that were issued to various debtors are marked as exhibits from Ex. A-1 to Ex. A-65 and the ledger for the year 1986-87 (updated to 1.4.1991), containing 412 pages, marked as Ex. A-66. A perusal of Ex. A-66 shows that the most of the debts were, in fact not related to the transaction that took place during the year 1986-87, but, however, they were brought forward from the earlier year, which is evident from the ledger. Further, they were shown without any continuity of entries as if brought forward for the year 1991-92 by making entries on 1.4.1991. From, this it is evident that debts were as a result of the

transaction that took place even prior to 1-7-1986 and for recovery of such debts, steps are to be taken within a period of three years. It is not the case of the respondents that they have taken any steps to recover the amounts within a period of three years either from 1.7.1986 or even from the earlier date on which the transactions took place resulting in the debts. Therefore, even by the date of the entries made as on 1.4.1991, the debts were barred by limitation and are not recoverable.

11. However, the contention of the learned Counsel for the respondents is that the Official Liquidator did not take steps immediately after filing of the statement of affairs on 3.12.1991, and, therefore, the delay caused by the Official Liquidator had resulted in the debts to become time-barred. Alternatively, according to them, the Official Liquidator did not take immediate necessary steps to recover the debts, which had resulted in the loss to the Company, and therefore, the respondents are not responsible for the loss caused as a result of the inaction on the part of the Official Liquidator. Therefore, they cannot be held liable either for the misfeasance, negligence, or breach of trust. Therefore, the learned Counsel sought for dismissal of the application.

12. The learned Counsel also contended that in the application no specific allegations are made with reference to each of the Director or the Managing Director as to the action or omission, which had resulted in misfeasance, negligence or breach of trust. In the absence of any such specific plea, the respondents are not liable to be held guilty of such acts.

13. In support of the said contentions, the learned Counsel relied upon the decision of the Apex Court in *The Official Liquidator Vs. Raghawa Desikachar and Others*, . In that case, on an application filed by the former Managing Director of the Company filed an application for compulsory winding-up and the District Court passed an order of winding-up where the Official Liquidator appointed sought for public examination of the Directors, who are respondents 1 to 5 before the Appellate Court in appeal. Basing on the depositions given by them, an application was filed u/s 235 of the Indian Companies Act, 1913, which is equivalent to Section 543 of the present Act, alleging that certain amounts have been withheld by the respondents 1 to 4, who are the Directors as on the date of the winding up order and sought for an order against them for refund of the said amount with interest. The said application was allowed by the District Judge. Though the respondents 1 to 4 filed their reply to the application filed by the Official Liquidator, and sought for permission to lead evidence, as well as they may be allowed to cross-examine the respondent No. 5, Ex. Managing Director, who filed the application for winding-up, the District Judge rejected the said application and passed the decree. An appeal was preferred to the High Court of Bombay against the order by which the District Judge refused the respondents 1 to 4 to lead evidence as well as to cross-examine the respondent No. 5. The said relief was granted by directing the Court below to record the additional evidence. Pursuant to the said order respondents 1 to 4 lead evidence by examining eleven

witnesses and also cross-examined the respondent No. 5, apart from filing certain documentary evidence. The Official Liquidator did not adduce any evidence. Basing on the material, the High Court passed a decree against the respondents 1 to 3 for a sum of Rs. 11,973.12 annas in respect of certain stock-in-trade, furniture, motor cycle and motor car, and for a sum of Rs. 2,686.83 being a part of the debt remitted by the Company as interest on the aforesaid amount, until payment. The remaining claim was set aside, against which the appeal was filed. The Apex Court while confirming the order under appeal, however, observed:

It is only in answer to the show-cause notice that respondent Nos. 1 to 4 could lead evidence and cross-examine respondent No. 5. It may be mentioned that misfeasance action against the directors is a serious charge. It is a charge of misconduct or misappropriation or breach of trust. For this reason the application should contain a detailed narration of the specific acts of commission and omission on the part of each director quantifying the loss to the Company arising out of such acts or omissions. The burden of proving misfeasance or non-feasance rests on the Official Liquidator. The Official Liquidator, it may be mentioned, merely relied upon the evidence recorded in public examination of the directors and on a few documents tendered in evidence. At the stage of public examination there was no charge of misfeasance against the directors and they were not in a position to know what would be the grounds that would be alleged against them for recovering any amounts for the loss said to have been caused to the Company by reason of such misfeasance. The application made by the Official Liquidator did not give sufficient particulars which, in our view, it should have. Once a show-cause notice was given to respondent Nos. 1 to 4, the Official Liquidator did not lead any evidence nor rely upon any other document, nor did respondent No. 5, who was instrumental in initiating the misfeasance case against the respondent Nos. 1 to 4, lead any evidence. In our view, there was no justification whatsoever for the District Court to reject the evidence which the respondents had intended to lead or to disallow the production of documents other than those already produced, and for that reason the High Court rightly ordered that additional evidence be recorded in this case.

In *O.L. of D.P. Mills (P.) Ltd. v. C. Khilachand* 2002 CLC 1376, the Official Liquidator appointed as a result of the winding-up order dated 17.12.1984, filed an application u/s 543(1) of the Act. On 11.6.1993 the Liquidator was directed by the Court to find out or indicate the exact instances of misfeasance attracting the provisions of Section 543(1) of the Act. Thereupon the Official Liquidator filed a report dated 25.6.1993 seeking permission of the Court to get the points of claim prepared by a Chartered Accountant, and accordingly Chartered Accountants were appointed, who filed their report opining that losses were incurred by the Company was due to poor debtor's management, high interest and production costs and lower sales pricing of product of the Company. The Gujarat High Court while considering the rival contentions held-

Thus seen, a Director while carrying out activity which he is otherwise empowered to carry out under the law, performed in such a manner that the same is improper and such impropriety has to be wilful so as to cause loss to the company. In other words, the act of commission or omission or negligence should be with the intent and knowledge to cause loss to the Company and at the same time resulting in personal gain. Not all acts which result in loss to the Company can be treated as acts of misfeasance, making a Director liable u/s 543 of the Act, because while carrying on business there is every likelihood that loss may be incurred in a transaction or number of transactions. It is only when such loss to the Company results in wrongful gain the Director in question that it would fall within the scope of provisions of Section 543 of the Act.

In view of the absence of specific acts of misfeasance, negligence or breach of trust the application filed by the Official Liquidator was rejected.

In *M/s. Faridabad Rubber Soles Private Limited (in Liqn) Vs. S.L. Chopra* and another, another learned Single Judge of Punjab & Haryana High Court held that mere inaction on the part of the Directors of a Company to recover amounts due to the Company does not amount to misfeasance within the meaning of Section 543 of the Act. In the facts of that case, as the factory was ceased and kept under lock by the Bank since 1982 and the books and records were inside, which were made available to the Company only in the year 1988, it was held that the Directors could not initiate action for recovery of the amounts due to the Company, and therefore, no action was called for against the Directors u/s 543 of the Act.

In *Official Liquidator v. D.P. Gupta* [1999] 98 Comp. Cas. 59, the Official Liquidator, who was appointed originally as a Provisional Liquidator, and thereafter the Company was wound-up, filed an application basing on the report prepared by the Chartered Accountant dated 10.9.1992, alleging that certain cash and furniture were not handed over to the Official Liquidator, and, therefore, they are guilty of misfeasance and breach of trust. The other side denied to be guilty of misfeasance or breach of trust. The Court found that basing in a subsequent report the cash on hand as on 20.10.1982 was found to be Rs. 29.28 paise, therefore, it was held that there cannot be any breach of trust with reference to the said amount. Insofar as the furniture and assets of the company are concerned, it was found that they were in possession of the Punjab National Bank since 1982 and remained in its possession for seven years and for two years they remained in the possession of the Official Liquidator. Those items were sold in the year 1991 after taking all care. Under the above circumstances, it was held that there was no misfeasance, negligence or breach of trust.

14-15. On the other hand, the learned Standing Counsel for the Official Liquidator relied upon the following decisions:

In *Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others*, the Apex Court while considering the case of misfeasance u/s 235 of the

Indian Companies Act, 1913 observed. Para 40 of AIR

It is certainly a question of fact, to be determined upon the evidence in each case whether a Director, alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company.

In *Official Liquidator v. Vishnu Kumar* [2001] 103 Comp. Cas. 1026 a learned Single Judge of Rajasthan High Court while considering the provisions of Section 543 of the Act held that for liability for misfeasance to be fixed on a Director u/s 543 of the Act, it is not necessary that he should be a shareholder or that he should have actually participated in the management. On the facts, that the respondent was jointly and severally, liable with the other directors for the payment of the debt which had been allowed to become time-barred, on account of his breach of duty, which fell within the category of misfeasance against which action could be taken u/s 543 of the Act.

In *Expo Expert (P.) Ltd. v. Jai Gopal Angrish* [1999] 97 Comp. Cas. 913 a learned Single Judge of Punjab & Haryana High Court while considering the scope of Section 543 observed-

Where a Company suffers loss on account of breach of duty on the part of a director, he is liable to compensate the Company to the extent of such loss. Where the director and Managing Director of a Company in liquidation fail to take action for realization of debts owing to the Company and the debts become time-barred before the winding-up order is passed by the Court, it would be a fit case for passing a decree against the director and Managing Director for the amount of the debts.

16. If we examine the facts of the present case in the light of the above decisions relied upon by both sides, though it was the case of the respondents that unless specific action of misfeasance, negligence or breach of trust is alleged and proved against each Director, no order can be passed. But according to the learned Counsel for the Official Liquidator no such specific allegation of misfeasance, negligence or breach of trust is required as per the decision relied upon by him. If the facts of the present case are examined in the light of the

above decisions, admittedly, there are certain debts, which are due and recoverable. As per the ledger, Ex. A-66, the entries show that the debt was subsisting as on 1.7.1986. Though the ledger is for the year 1986-87, in the same ledger an entry of brought forward was made as on 1.4.1991. But a debt can be recovered by appropriate legal action, if the proceedings are initiated within a period of three years and not beyond. In the present case, admittedly, even assuming that the debt was due on 1.7.1986, action must be initiated on or before 1.7.1989. But, no action was initiated by the Directors/Managing Director within the stipulated time. By virtue of their position as Managing Director and Directors, they are obligated to take necessary action for recovery of the debt amounts, which they failed to take. The said inaction certainly amounts not only to negligence but also breach of trust, which had caused loss to the Company, shareholders, and creditors of the company.

17. In addition, the Official Liquidator also after filing the statement of affairs on 3.12.1991 attempted to recover the said debts by issuing notices. But the Official Liquidator failed to recover any amount, except a paltry amount of Rs. 3,759. Even if the Official Liquidator intends to take any action with reference to the debts specified in the Schedule-II of the statement of affairs, legally he is not entitled to proceed to recover the said debts, as they are barred by limitation, hi fact, specific averment has been made in the statement of affairs as well as in the evidence, which was not denied by the respondents. Therefore, they are liable for the loss caused to the Company in respect of the said debts.

18. Coming to the debts specified in Schedule-in, even here also the debts became unrecoverable. It was not the case of the respondents that they have specified any amounts payable to those debtors by the Company, when the alleged amount due to the debtors shown in the Schedule-III are not specified by the Directors in the statement of affairs, the claim of the Debtors that they have adjusted the amounts against the debts due to them cannot be accepted. Further, no material was brought before this Court to show that any amounts are due by the Company to the debtors shown in Schedule-III. In the absence of any such evidence even with reference to the debts shown in the Schedule-III, they have also become unrecoverable due to the negligence and inaction of the respondents. Therefore, they have to make a good the said loss caused to the Company by them.

19. Under the above circumstances, the answer to the first issue is against the respondents and in favour of the applicant-Official Liquidator that the respondents have committed acts of misfeasance, negligence or breach of trust, which had resulted in loss to the Company as those debts became unrecoverable. Therefore, the respondents have to pay the said amount together with interest to the Company.

20. Issue No. 2: Coming to the issue of limitation, it was contended by the learned Counsel for the Official Liquidator that the Official Liquidator was appointed by an order dated 27.7.1990, while the application u/s 543(1) is filed

on 26.7.1995. Therefore, the same is well within the period of limitation of five years. It was the case of the Official Liquidator that though winding-up order was passed in C.P. No. 35 of 1987 on 19.2.1988, but the said order was set aside at the instance of the respondents by an order dated 16.9.1988 and that has become final. Therefore, the order of winding-up passed in C.P. No. 35 of 1987 cannot be considered relevant as the Official Liquidator did not take possession of the assets and in fact did not act as a Liquidator in respect of the Company under liquidation. The first appointment of the liquidator in winding-up means it must be effective and not mere appointment, which was later set aside. Therefore, the winding up order passed in C.P. No. 35 of 1987 cannot be considered, but only the order passed in C.P. No. 68 of 1988 on 27.7.1990 is relevant as the Official Liquidator has in fact proceeded to act as Liquidator in respect of the company under liquidation. The learned Counsel also contended that the extended period of limitation, as contemplated u/s 458A of the Act is applicable and if so applicable, the Official Liquidator would get an extended period of limitation. In support of his contention, the learned Counsel relied upon a decision of a Division Bench of this Court in T.J. Swamy and Others Vs. The Official Liquidator, High Court of A.P. and Others, . The learned Counsel also relied upon a decision of Punjab & Haryana High Court in Kainth Finances. Karam Singh Kainth [1999] 98 Comp. Cas. 131 where it was held that the limitation runs from the date of order of appointment of Official Liquidator and not from the date of resolution for voluntarily winding-up.

21. The counsel for the 1st respondent Sri V.S. Raju, on the other hand, contended that the provisions of Section 453(1) refers to the first appointment of the Official Liquidator. Therefore, the period of limitation has to be computed from the date when the Official Liquidator was appointed in C.P. No. 35 of 1987 and not from the date of the order in C.P. No. 68 of 1988. According to the learned Counsel the period of limitation would run from the date of order of winding-up or of the first appointment of the liquidator in winding-up or of the misapplication, retainer, misfeasance or breach of trust, whichever is longer, which means that the limitation has to be computed from the earliest point of time with reference to any of the above events. Therefore, the period of limitation has to be computed from the date of the first appointment of the liquidator or winding-up order, which was passed on 19.2.1988 and if five years is computed from that date, the present application filed is clearly beyond the period of limitation. The learned Counsel also relied upon a decision of the Karnataka High Court in Kabini Papers Ltd. v. M.D. Shivananjappa [1999] 98 Comp. Cas. 675, where a learned Single Judge of the Karnataka High Court held that five years period contemplated u/s 543(2) with reference to misfeasance shall not be extended by adding the period mentioned in Section 458A of the Act. To the same effect is the decision of the Orissa High Court in B. Pattnaik Mines v. Bijoyananda Pattnaik [1994] 80 Comp. Cas. 237, where a learned Single Judge of Orissa High Court held that the general powers vested in the Official Liquidator u/s 457 of the Act are distinguishable from the special powers conferred on him

u/s 543 of the Act. When the liquidator or a creditor or a contributory makes an application u/s 543, he does not do so as representing the Company but in his own independent right although for the benefit of the Company. Section 458A of the Act clearly applies only to suits and applications filed by the Official Liquidator on behalf of the Company. An Application filed by the Official Liquidator u/s 543 of the Act would not be construed as an application in the name and on behalf of the Company and, in such a case, the extended period of limitation provided u/s 458A of the Act would not be available.

In the light of the above decisions, the learned Counsel sought to hold that the application is barred by limitation.

22. Before considering the rival contentions on merits, it would be appropriate to refer to the provisions of Sub-section (2) of Section 543 of the Act, which reads-

543. (2) An application under Sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding-up, or of the misapplication, retainer, misfeasance or breach of trust as the case may be whichever is longer.

23. A perusal of the above provision clearly shows that the period of limitation for making an application u/s 543(1) is five years and the same shall be computed from the date of the winding-up order or of the first appointment of the liquidator in winding up or of the misapplication, retainer or misfeasance or breach of trust, as the case may be whichever is longer. Though it was contended on behalf of the Official Liquidator that the extended period of limitation, as provided u/s 458A is applicable to an application made u/s 543(1). But, this contention is opposed by the Counsel for the respondents. But the issue is no more res Integra as far as this Court is concerned in view of the binding decision of the Division Bench of this Court in T.J. Swamy 's case (supra) where it was clearly held that the extended period of limitation is available for an application filed u/s 543(1). Therefore, it is not open to this Court to delve upon the said issue any more.

24. The other contention advanced by the Counsel for the 1st respondent is that the period of limitation has to be computed from the date of the first appointment of the Liquidator. According to the learned Counsel the liquidator was appointed on 19.2.1988, when an order of winding-up was passed in C.P. No. 35 of 1987. But the said order of winding-up was set aside at the instance of the 1st respondent by an order dated 16.9.1988. In the light of the said order of setting aside the winding up order, there is absolutely no merit in contending that the period of limitation has to be computed from that date. The intention of the Legislature in fixing up the period of limitation is to put an end to the litigation between the parties so as to complete and conclude the same within a reasonable time. But at the same time it is not intended to deny or deprive the rights of the parties. In fact, it is not the case of the 1st respondent that the

Official Liquidator was appointed and he was allowed to take possession, but no such material is placed before this Court (not even a copy of the order dated 19.2.1988). When once the said order was set aside at the instance of the 1st respondent, he cannot take advantage of such an order to deny the Official Liquidator to have the full period of limitation from the date of the winding-up under which he took possession of the assets of the Company. It is not disputed that the Official Liquidator took the charge as Liquidator only in pursuance of the order passed in C.P. No. 68 of 1988, dated 27.7.1990 and not prior to it. Therefore, there is no merit in the contention of the 1st respondent that the first order of winding-up has to be taken into account, which was not specified in Sub-section (2) of Section 543. Further, as per various decisions on this issue, the period of five years is either from the date of winding-up order or the first appointment of the Liquidator or the date of act complained viz. misappropriation, retainer, misfeasance or breach of trust or gross negligence, whichever is longer, that is, whichever gives a longer period of time or gives a later period for purposes of limitation. If the date of the act complained of is long prior to the order of winding-up or the appointment of the Liquidator, it is the date of the winding-up order or the date of the appointment of the Liquidator, whichever is the last date, that will count vide decision in K.N. Srinivasa Iyer Vs. The Joint Official Liquidators of Nurani Union Bank Ltd. (in liquidation) and Others, . In fact in Official Liquidators. K. Ramakrishna Pillai [1970] 40 Comp. Cas. 441 (Ker.), it was held that even Section 5 of the Limitation Act will also apply to the proceedings u/s 543(1) of the Act. To the same effect is the decision of the Punjab & Haryana High Court in Bharat Nidhi Ltd. Vs. Trade and Industries Corporation Ltd. and Others, . In Jwala Prasad Vs. Official Liquidator Jwala Bank Ltd., the Allahabad High Court held that the expression "whichever is longer" means whichever period expires later.

25. In view of the above decisions and in view of the fact that the Official Liquidator, in fact, was appointed to take charge of the company under liquidation only in pursuance of the order passed in C.P. No. 68 of 1988, dated 27.7.1990, the period of limitation has to be computed only from that date and if five years period is computed from that date, the application filed is within the period of five years, since the application was filed on 26.7.1995, even without the assistance or aid of the provisions of Section 458A of the Act. In the light of the above, the contention of the learned Counsel for the respondents is clearly devoid of merit, and therefore, this issue is accordingly held in favour of the Official Liquidator and against the respondents.

26. Under the above circumstances, in view of the findings on Issues 1 and 2, the application is allowed, holding that the respondents are guilty of misfeasance, negligence or breach of trust, as they have allowed the debts to become time-barred even by the date of passing of the winding-up order itself. Therefore, they are liable to compensate the loss caused to the company under liquidation. Since the 4th respondent retired as one of the Directors on 23.2.1988 by which date the debts have not become barred by limitation, he

cannot be held liable for misfeasance, negligence or breach of trust, and consequently the respondents 5 to 8 being the legal heirs of Respondent No. 4 are not liable. Therefore, the other respondents are jointly and severally liable to make good the said loss together with interest at the rate of 9 per cent per annum from the date of the application till the date of payment.

27. The Company application is accordingly allowed. No costs.