

(1962) 02 MAD CK 0041
In the Madras High Court

S. Abdul Muthalibu

APPELLANT

Vs

K.M. Mohammed Abdul Khader

RESPONDENT

Date of Decision : 05-02-1962

Acts Referred:

Companies Act, 1913 — Section 168
Limitation Act, 1963 — Section 3
Provincial Insolvency Act, 1920 — Section 28(7)

Citation : (1962) 2 MLJ 414

Hon'ble Judges : Venkataraman, J

Bench : Division Bench

Judgement

Venkataraman, J.—This appeal came up for hearing in the first instance before Rajagopalan, J. and he referred the matter to a Bench since so far there is no authoritative pronouncement of this Court on the question involved. The question involved is one of limitation in respect of a claim put in by the appellant Muthalibu in the winding-up proceedings of the Pioneer Board Mills, Ltd., Dindigul. He advanced a sum of Rs. 375 on 12th January, 1952 and a further sum of Rs. 50 on 1st March, 1952. The application for winding-up was preferred on 22nd November, 1954. The Company was ordered to be wound up on 14th October, 1955, reckoning the period of three years from the date of the debts, the claim was barred by limitation on 14th October, 1955, but not on 22nd November, 1954. The learned-District Judge held that the claim was barred by limitation and the appellant preferred this appeal. Rajagopalan, J., referred the matter for decision by a Bench. as stated.

2. The claim itself was put in on 26th March, 1956. The matter has to be decided with reference to the Companies Act (VII of 1913) which was the Act in force on that date though there is no real difference whether that Act is applied or the Act now in force (1956 Act) is applied. Hence it will be sufficient if we refer to the provisions of the 1913 Act indicating within brackets the corresponding provisions of the present Act. By the word Act in the rest of this judgment we mean the 1913 Act.

3. The Company in question is an insolvent Company and Section 229 is the section which directly applies. We shall quote both Section 228 and Section 229 (528 and 529 of 1956 Act).

228. In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency" and all claims against the company, present or future, certain or contingent shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value

" 229. In the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to by virtue of this section.

4. It will be seen that u/s 229 the provisions of the Provincial Insolvency Act (V of 1920) are made automatically applicable in the matter of proofs. Section 34(2) of the Provincial Insolvency Act reads:

Save as provided by Sub-section (1) all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become-subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act.

This provision read by itself would permit proof only of debts not barred at the date of the adjudication. But this has to be read along with Section 28(7) of the Provincial Insolvency Act which reads:

An order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made.

In fact it is settled law under the Provincial Insolvency Act that we can admit proof of a claim which is not time-barred on the date of the presentation of the petition for adjudication even though the claim may become barred on the actual date of adjudication. So far as this Court is concerned it is enough to refer to A. Subramania Aiyar Vs. S. Meenakshisundaram Chettiar, . The decisions of the other High Courts are all discussed in Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd., cited by the learned advocate for the appellant. Reference may also be made to the decision of the Bombay High Court in Byramji Bomanji Talati Vs. The Official Assignee of Bombay, .

5. Corresponding to Section 28 (7) of the Provincial Insolvency Acts there is a

provision, Section 168 in the Companies Act, 1913, which says:

A 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. (Section 441 (2) of 1956 Act.)

It seems to us in these circumstances that the principle laid down in the cases decided under the Provincial Insolvency Act will apply equally to the case before us and the claim would therefore be in time. This position emerges from a natural and normal interpretation of the provisions of the Provincial Insolvency Act and likewise the Companies Act.

6. Sri A.R. Krishnaswami, learned Counsel for the respondent however contends that the Explanation to Section 3 of the Limitation Act creates a difficulty. Section 3. of the Limitation Act runs:

Subject to the provisions contained in Sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the First. Schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation : A suit is instituted, in the ordinary cases, when the plaint is presented to the officer : in the case of a pauper, when his application for leave to sue as a pauper is made, and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the Official Liquidator.

The argument is that as a result of the Explanation, in the case of a claim such as the present, limitation will start from 26th March, 1956, the date when the claim was sent in to the Official Liquidator. At the same time Sri A. R. Krishnaswami was prepared to concede that so long as the claim of the creditor is within time on the date of the order of winding-up, it is immaterial even if it happens to get time-barred on the date when he actually sends in the claim, though this concession would not fit in with the provision in the Explanation to Section 3 of the Limitation Act. The truth of the matter is that the provision in question in the Limitation Act has nothing to do with the matter we are now concerned with. That relates to a suit which has been instituted in the regular civil Court, where previous to the institution of the suit the plaintiff has put in a claim against the company to the Official Liquidator. In such a case he can avail himself of the provision in the Explanation to Section 3 of the Limitation Act and reckon the date of his sending in the claim to the Official Liquidator as the date of the institution of the suit. As pointed out by the Privy Council in *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc., Co.* (1932) 64 M.L.J. 403 : L.R. 60 IndAp 13 : 6 ILR 54 All. 1067 (though in dealing with a different argument):

The ordinary rule is stated by the Explanation to be that the suit is instituted when the plaint is presented; but to this two exceptions are prescribed, viz... (1) the case of a suit by a pauper, the time at which the suit is (for purposes of

Section 3) instituted, is to be taken as an earlier date, viz., the date when the application for leave to sue as a pauper was made; and (2) in the case of a suit against a company which is being wound up by the Court, the institution of the suit is (for the purpose of Section 3) advanced also to an earlier date, viz., the date when the claim was first sent in to the Official Liquidator.

In this connection Section 171 of the Companies Act, 1913 (section 446 of 1956 Act) may be referred to. It runs:

When a winding-up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

This shows that a suit can be filed even when a winding-up order has been made if leave of the Court is obtained. In such a case, if a creditor institutes the suit after getting such leave, he can avail himself of the benefit of the Explanation to Section 3 of the Limitation Act. The two exceptions to the normal rule of limitation when a suit is instituted which have been enacted in the Explanation to Section 3, are meant in favour of the plaintiff and not to his detriment. We may also observe that a Company Court should remember that before referring a creditor to a suit in a complicated matter, the creditor can only have the benefit of the Explanation to Section 3 of the Limitation Act but not the benefit of the statutory provisions in Sections 168, 228 and 229 of the Companies Act, 1913, which he would be having if his claim is decided in the Company Court itself. In other words, it may happen that the date on which the creditor sends in the claim is beyond the period of three years from the date of the debt, and if the creditor is relegated to a suit, the suit would be time-barred, but it may not be time-barred if the claim is investigated in the Company Court itself, on account of the fact that the presentation of the petition for winding-up was within three years from the date of the debt. In this view, therefore, there is no conflict between the view which we are taking under the provisions of the Companies Act read with the provision of the Provincial Insolvency Act and the Explanation to Section 3 of the Limitation Act relied on by the learned Counsel for the respondent.

7. We have so far indicated that the view we have taken is what naturally follows if full effect is to be given to the principle of retrospective operation contained in Section 168 of the Companies Act which is in absolute terms and is not qualified by any exception. We may point out that this view is also what convenience and commonsense would dictate. The facts of the present case itself can be taken to illustrate our point. Here the creditor, the appellant, knew that the application for winding-up was presented on 22nd November, 1954 and he might have entertained a reasonable belief that in the normal course the company would be wound up. But naturally it takes some time for the Court to order the winding-up. The view pressed upon us by the respondent which is contrary to the view we are inclined to take, would demand that in order to save limitation the

appellant should have instituted a suit before 12th January, 1955 (three years from the date of the first debt) though it would normally be merely waste of money. On the other hand the view which we are taking would permit him to wait without instituting a suit and avail himself of the distribution of the dividends in due course, which is all that he could reasonably hope to get. Of course it may turn out in some cases that the petition for winding-up was frivolous and is eventually dismissed. In such a case the benefit of advancing the date of the claim to the date of presentation of the petition for winding-up will not be available. In such a case the creditor must obviously file a suit in time. But there is no reason why in a case where the winding-up order is made, the creditor should not be allowed to wait and should be forced to file a suit wasting money. In fact it may happen that even if he files and obtains a decree he may not be able to execute it in view of the terms of Section 171 of the Companies Act, 1913 (section 446). It is needless to add that the creditor cannot file any claim in the winding-up proceedings till after the winding-up order is made; and if retrospective effect is not given to the claim the usefulness of the winding-up proceedings would be considerably lost. These aspects of the matter have also been pointed out in *Byramji Bomanji Talati Vs. The Official Assignee of Bombay*, (a case under the Provincial Insolvency Act) and the decision of the Punjab High Court in *Ram Chand Puri Vs. Lahore Enamelling and Stamping Co. Ltd.*, . The decision of the Punjab High Court is in fact a direct decision on the question which we are considering, and the learned Judges took the same view as we are taking, but no reference is made therein to the Explanation to Section 3 of the Limitation Act.

8. In the result we hold that the claim was within time, and since that is the only point which has been raised before us the claim must be admitted.

9. The appeal is allowed, the appellant will get his costs from the Company. The respondent will bear his own costs.