
(1962) 01 MAD CK 0020
In the Madras High Court
Case No : A.A.O. No. 274 of 1957

S. Abdul Muthalibu

APPELLANT

Vs

K.M. Mohammed Abdul Khader

RESPONDENT

Date of Decision : 05-01-1962

Acts Referred:

Companies Act, 1913 — Section 171
Limitation Act, 1963 — Section 3

Citation : AIR 1962 Mad 506 : (1962) 32 CompCas 1102 : (1962) ILR (Mad) 928 : (1962) 75 LW 441

Hon'ble Judges : S. Ramachandra Iyer, C.J; Venkataraman, J

Bench : Division Bench

Judgement

Venkataraman, J.

(1) This appeal came up for bearing in the first Instance before Rajgopalan 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 12-1-1952 and a

further sum of Rs. 50 on 1-3-1952. The application for winding up was preferred on 22-11-1954. The Company was ordered to be wound up on

14-10-1955. Reckoning the period of three years from the dates of the debts, the claim was barred by limitation on 14-10-1955 but not on 22-

11-1954. 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 26-3-1956. 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 applicable 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.

(2) The company in question is an insolvent company and S. 229 is the section which directly applies. We shall quote both S. 228 and S. 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 or 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, add make Such claims against the company

as they respectively are entitled to by virtue of this section.

(3) It will be seen that under S. 229, the provisions of the Provincial Insolvency Act (Act V of, 1920) are made automatically applicable in the

matter of proofs. S. 34(2) of the Provincial Insolvency Act reads:

Save as provided by sub-sec. (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 S. 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 v. Official Assignee*, Bombay AIR 1936 Bom 130: ILR 60 Bom 444.

(4) Corresponding to S. 28(7) of the Provincial Insolvency Act there is a provision in S. 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"" (S.

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.

(5) Sri A. R. Krishnaswami, learned counsel for the respondent, however, contends that the explanation to S. 3 of the limitation Act creates a

difficulty. S. 3 of the limitation Act runs:

Subject to the provisions contained In Ss. 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 proper 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 Mr. A. R.

Krishna. swami 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 S. 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 S. 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 *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 (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., (I) in the case of a suit by a pauper, the time at which the suit is (for purposes of S. 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 S. 3) advanced also to an earlier date, viz., the date when the claim was first sent to the Official

liquidator.

In this connection S. 171 of the Companies Act, 1913 (S. 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 S. 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 S. 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 S. 3 of the Limitation Act but not the benefit of the statutory provisions in Ss. 158, 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 be 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 3 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 S. 3 of the limitation Act relied on by the learned counsel for the respondent.

(6) 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 S. 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 22-11-1954 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 12-1-1955 (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 S. 171 of the Companies Act, 1913 (S. 446). It is needless to add that the creditor cannot file any claim on the winding up proceedings till after the wound 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 AIR 1936 Bom 130: ILR 60 Bom 444 (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 S. 3 of the limitation Act.

(7) 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.

(8) The appeal is allowed, the appellant will get his costs from the company. The respondent will bear his own costs.

(9) Appeal allowed.