

(2006) 04 KAR CK 0043

In the Karnataka High Court

Case No : Company Application No. 8 of 1998 in Company Petition No's. 49 of 1994 and 157 of 1992

Shivamoni Steel Tubes Ltd.

APPELLANT

Vs

Durgapur Steel Plant

RESPONDENT

Date of Decision : 03-04-2006

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 446 (2) (b), 449, 458 A

Citation : (2006) 04 KAR CK 0043

Hon'ble Judges : V.G. Sabhahit, J

Bench : Single Bench

Advocate : Deepak, for the Appellant; M. Raviprakash, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Sabhahit, J.—This application has been filed by the Official Liquidator on behalf of the applicant - M/s. Shivamoni Steel Tubes Limited (in liquidation) u/s 446(2)(b) of the Companies Act, 1956 ("the Act") and Rule 9 of the Companies (Court) Rules, 1959, seeking for recovery of a sum of Rs. 91,662.64 ps. with interest on the sum of Rs. 46,720 at 12 per cent per annum from the date of application i.e., 6-10-1997 till the date of judgment and for payment of future interest and costs.

2. It is averred in the application that by order dated 8-9-1995 passed in Company Petition Nos. 49/94 and 157/92, M/s. Shivamoni Steel Tubes Limited was ordered to be wound up and the Official Liquidator attached to this Court became the Liquidator of the said Company by virtue of the provisions of Section 449 of the Act. It is further averred, that as per the statement of affairs and the books of account submitted by the Ex-Directors of the applicant-company, a sum of Rs. 46,720 was due to be paid by the respondent as on 1 -10-1989 and on addition of interest at 12 per cent per annum on the said sum and including notice charges of Rs. 30, the total amount due to be paid by the respondent is

Rs. 91,662.64 ps. Notice was issued to the respondent on 7-2-1997 calling upon it to pay the amount due and the respondent did not pay the amount and wherefore, the application for recovery of the abovesaid amount.

3. The respondent appeared and filed objections to the application averring that the claim made by the Official Liquidator is not tenable and the respondent is not liable to pay any amount to the applicant-company and in spite of the respondent's request, the Official Liquidator has not filed any supporting document in the application except the copy of the ledger extract purported to have been maintained by the company in liquidation, which reflects that the transaction relates to October 1989 and the said transaction contained in the account books is not admitted by the respondent and the same is denied. It is further averred that the Official Liquidator has not submitted any balance sheet or invoice or purchase orders of the respondent-company for the year 1989 and the statement of affairs is filed by the Ex-Directors of the Company in liquidation without any supporting document and the claim made by the applicant is barred by time and the applicant is put to strict proof of the averments made in the application and wherefore, the application is liable to be rejected.

4. On behalf of the applicant, the paid assistant in the office of the Official Liquidator, has been examined as PW1 and he got marked Exs. P1 to P3. On behalf of the respondent, no oral evidence was adduced nor any document was got marked.

5. I have heard the learned Counsel appearing for the parties and having regard to the contentions urged, the points that arise for determination in this application are:

1. Whether the application filed is barred by time?
2. Whether the applicant is entitled to recover Rs. 91,662,64 ps. or any amount from the respondent as sought for in the application ?

6. I answer the points for determination as follows:

Point No. 1 in the affirmative and Point No. 2 in the negative for the following reasons:

Re: Point No. 1:

The respondent has specifically contended in the objection statement that the application filed by the Official Liquidator of the Company in liquidation is barred by time. On the other hand, it is the contention of the applicant that the application filed on 10-12-1997 is not barred in view of provisions of Section 458A of the Act. It is clear from the perusal of the material on record that the Company Petition No. 49/1994 was registered on 6-4-1994 as per the order passed by the AAIFR dated 19-12-1993. The present application has been filed on 10-12-1997. It is clear from the provisions of Section 458A of the Act that the period from which the winding up proceedings commenced to the date of winding

up order and one year thereafter has to be excluded while computing the period of limitation while filing the application. The contents of said section has been considered by the Hon''ble Supreme Court in the case of Karnataka Steel and Wire Products and Others Vs. Kohinoor Rolling Shutters and Eng. Works and Others, wherein, Hon''ble Supreme Court after considering the relevant provisions of the Act has laid down as follows:

3. On a plain reading of the provisions contained in Section 458A of the Companies Act, it is crystal clear that the aforesaid provision merely excludes the period, during which a company was being wound up by the Court from the date of the commencement of the winding up till the order of winding up is made and an additional period of one year immediately following the date of the winding up. In other words, in respect of a legally enforceable claim, which claim could have been made by the company on the date on which the application for winding up is made, could be filed the Official Liquidator by taking the benefit of Section 458A of the Companies Act and getting the period of four years to be excluded from the period of three years, as provided under Article 137 of the Limitation Act. The Legislature, byway of an amendment, brought into force the provisions of Section 358A, so that an Official Liquidator, who is supposed to be in custody of the assets and liability of the company, would be able to file a claim on behalf of the company, which was legally enforceable on the date of winding up, after excluding the period, indicating u/s 458A of the Companies Act, so that the company or its shareholders will not suffer any loss. But by no stretch of imagination, the said provisions contained in Section 458A can be construed to mean that even a barred date or a claim which was not enforceable on the date of the winding up, would stand revived, once a winding up application is filed and order is made by virtue of Section 458A of the Companies Act. We therefore, affirm the view taken by the Karnataka High Court under the impugned Judgment and dismiss these appeals. There will be no orders as to costs.

It is clear from the abovesaid principle laid down by the Hon''ble Supreme Court that if the claim against the debtor was determined when the winding up proceedings commenced, the period from the date of commencement of winding up proceedings till the date of passing of winding up order and the period of one year thereafter has to be excluded in computing the period of limitation and if the period of limitation had already expired when the winding up application was filed, the question of extending the period of limitation would not arise. In the present case, having regard to the abovesaid facts of the case, it is clear that what is claimed by the applicant in the application is the amount alleged to be due from the respondent as per the entry in the ledger of sundry debtors and creditors as per Ex.P3 dated 1-10-1989 and the period of limitation for recovery of the amount will be three years would expire on 1-10-1992 and wherefore, it is clear that even on the date when the winding up proceedings commenced on 6-4-1994 or even assuming that the winding up proceedings came to be allowed by the AAIFR on 19-2-1993, it is clear that the period of limitation had expired when the winding up proceedings commenced. It is contended by the learned

Counsel for the Official Liquidator that the date on which the application was filed before the BIFR and the time taken before the BIFR for placing the order of AAIFR dated 19-2-1993 must also be excluded and if such period is excluded, the application would be in time. There is no merit in this contention as it is clear from the provisions of Section 458A of the Act that the period which has to be excluded has been specifically stated in the said section and the period from which the winding up proceedings commenced till the passing of the order of winding up and one year thereafter is the period to be excluded and the application before the BIFR cannot be said to be an application for winding up and wherefore, the contention of the learned Counsel appearing for the Official Liquidator is devoid of merits and accordingly, I hold that the application filed by the Official Liquidator is barred by time and answer point No. 1 in the affirmative.

Re: Point No. 2:

It is clear from the perusal of the material on record that the application is filed for recovery of the amount due to be paid by the respondent as per the entry in the Register of sundry debtors and creditors as per the statement of affairs submitted by the Ex-Directors. According to the applicant, in the Register of sundry debtors as on 1-10-1989 the outstanding balance due to be paid by the respondent was Rs. 46,720 and adding interest at the rate of 12 per cent from the date of the application amounts to Rs. 44,912.64 ps. and plus notice charges of Rs. 30, the total claim is Rs. 91, 662.64 ps. On behalf of the Official Liquidator of the company in liquidation, the paid assistant working in the office of the Official liquidator has been examined and he has sworn to the affidavit as regards the entry in the list of debtors as on 1-10-1989 and apart from getting marked the said entry in the Register and the balance sheet for the year 1995, no other material is produced to support the contention that respondent was due in a sum of Rs. 46,720 to the applicant-company in liquidation. The said entry is not supported by any vouchers or documents or purchase orders and the person who had maintained the books of account on behalf of the company has not been examined to show that the accounts had been maintained in the regular course of the company and wherefore, the entry in the account books does not substantiate the debt due by the respondent nor the claim is supported by entries in vouchers or documents to prove the debt. The facts elicited in the cross-examination of PW1 would clearly show that the balance sheet for the year 1989 was not produced and the balance sheet for the year 1995 is produced. However, the account book for the year 1995 is not produced. There is no acknowledgement of the debt as elicited in the cross-examination of PW1 as he has stated that he is not aware of acknowledgement of debt of the respondent from 31-3-1989 to 31 -12-1985 and wherefore, the claim made by the applicant has not been proved. Accordingly, I answer point No. 2 in the negative and pass the following order:

ORDER

Application is dismissed with no order as to costs.