(1997) 09 KAR CK 0017

In the Karnataka High Court

Case No : C.R.P. No''s. 1073, 1074 and 817 of 1993

Sudarshan Trading Co. Ltd. APPELLANT

Vs

Veeranna and others, Shilton Blocks and others and T.A. Ramprasadam and others RESPONDENT

Date of Decision : 30-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, Order 9 Rule 3, Order 9 Rule 4, 151
Companies Act, 1956 — Section 458 A, 466 (2) (b)
Limitation Act, 1963 — Section 5

Citation : (1998) 91 CompCas 13

Hon'ble Judges : Mohamed Anwar, J

Bench : Single Bench

Advocate : M.A. Humayun, for the Appellant; Padubidri Raghavendra Rao, for the Respondent

Judgement

Mohamed Anwar, J.—These three revisions arise from the orders of the court below dated December 8, 1992, in Misc. Cases Nos. 435 of 1988, and 433 of 1988, and order dated February 2, 1993, in Ex. Case No. 51 of 1991, respectively, passed dismissing the common petitioner''s applications filed under Order 9, rules 3 and 4 of the Civil Procedure Code, 1908, in the said Misc. Cases Nos. 435 and 433 of 1988, and application under Order 21, rule 10 of the Civil Procedure Code, 1908, in Ex. Case No. 51 of 1991 as time barred.

2. Certain undisputed facts are that petitioner (hereinafter called "the company") had filed the suit in S.C. No. 3342 of 1981 against respondents in C.R.P. No. 817 of 1993 and S.C. No. 3341 of 1981 against respondents in C.R.P. No. 10074 of 1993, for recovery of certain debts due to the company from them. On December 9, 1982, both the said suits were dismissed for default by the trial court.

Thereafter, the respective applications under Order 9, rules 4 and 5 read with section 151 of the Civil Procedure Code, 1908, were made by the company before the court below in Misc. Cases Nos. 433 of 1988 and 435 of 1988, along with I.A. No. 1 u/s 5 of the Limitation Act, praying to restore the said suits in S.C. Nos. 3341 of 1981, and 3342 of 1981, to its file by condoning the delay caused in making of the said applications and permit the company to prosecute further proceedings in the suits.

3. In Ex. Case No. 51 of 1991, the company had filed the execution petition on June 26, 1991, in the court below seeking execution of money decree dated August 21, 1972, against the judgment-debtor passed in S.C. No. 74 of 1972, for recovery of a sum of Rs. 745.70 claiming benefit of section 458A of the Companies Act saving the period of limitation.

In both the aforementioned cases in Misc. Cases Nos. 435 and 433 of 1988, the reason for the delay in making the said applications is sworn to in the affidavit of the company''s official filed in support of respective I.A. No. 1. The cause for the delay averred therein is that on the winding up petitions of its creditors made before the High Court of Kerala in Company Petitions Nos. 8, 9 and 49 of 1981 on its original jurisdiction side against the company, the winding up order dated October 13, 1981, was passed by that company court appointing a provisional liquidator and on appeal therefrom filed by the company in M.F.A. Nos. 518, 519 and 520 of 1981, the High Court of Kerala passed its order dated October 8, 1982 [See Sudarsan Chits (India) Ltd. Vs. Sukumaran Pillai and Others, , therein keeping the said winding up order in abeyance subject to condition relating to deposit of certain amount by the company. That condition is said to have been complied with by it. Admittedly, the said order dated October 8, 1982, passed in the said appeals is still said to be in force. Thereafter, in 1985, the company moved an application before the High Court of Kerala in the said appeals seeking permission to take necessary legal action to recover the amounts due from its debtors. Then an order dated July 31, 1985, was passed by the High Court authorising the officers of the company to represent it in suits or other legal proceedings filed by or against the company in various subordinate courts. On appointment of the provisional liquidator by the High Court by its order dated October 13, 1981, the said liquidator had taken complete charge of the affairs of the company together with all books, accounts, etc. After the said permission was granted to the company by the High Court under its order dated July 31, 1985, the company''s concerned officials had to collect back the relevant company''s records, documents, etc., from the said provisional liquidator which took considerable time. Hence, the said delay in making of the said applications in the said Misc. Cases Nos. 433 and 435 of 1988.

4. Alternatively, the aid of section 458A of the Companies Act, 1956 ("the Act" for short), was invoked by the company claiming exemption from operation against the applicability of the Limitation Act, 1963, to its above said legal proceedings.

5. The learned judge of the court below found the company''s claim to exemption from the applicability of the Limitation Act untenable, and that its explanation for

the delay in making the said applications was not sufficient and satisfactory. He has held that the company was not entitled to exclusion of the time stipulated in section 458A of the Act as the same could be claimed only when an effective winding up order is passed against it by the company court, since there being no such order as yet against the company in the winding up proceeding commenced against it in the said Company Petitions Nos. 8, 9 and 49 of 1981. Therefore, he has passed the impugned orders rejecting the company''s applications filed under Order 9, rules 4 and 5 of the Civil Procedure Code, in Misc. Cases Nos. 433 and 435 of 1988, and in Ex. Case No. 51 of 1991, as time-barred.

6. Mr. Humayun, learned counsel appearing for the company, attacking the legality of the orders under revision submitted that in view of section 458A of the Act, the law of limitation became inapplicable to the proceedings in the said S.C. Nos. 3341 and 3342 of 1991, and Ex. Case No. 51 of 1991, on and with effect from the date of commencement of the winding up proceeding against the company initiated by the said Company Petitions Nos. 8, 9 and 49 of 1981. His argument was that by virtue of section 458A of the Act the period of limitation under the Limitation Act stopped flowing against the company from the date January 16, 1981, on which date the first Company Petition No. 8 of 1981, was filed in the company court, the second Company Petition No. 9 of 1981, having been filed on April 13, 1981, and the third one being the last such petition filed before it. Elaborating his contention, he submitted that the limitation period remains suspended until the said order dated October 8, 1982, of the Kerala High Court passed in the said appeals keeping the winding up order dated October 13, 1981, in abeyance is recalled and till the expiry of one year''s period next thereafter. Therefore, he submitted, that both the trial court''s impugned orders dated December 18, 1992, and the impugned order dated February 2, 1993, are patently illegal and without jurisdiction.

7. Mr. Padubidri Raghavendra Rao, learned counsel appearing for the respondents, argued otherwise upholding the validity of the orders under revision. His contention was that section 458A of the Companies Act is not attracted and is inapplicable to the instant proceedings disposed of on the file of the court below, because section 458A becomes applicable only on the passing of an effective winding up order by the company court. To support this contention reliance was placed by him on a Full Bench decision of the High Court of Kerala in K.P. Ulahannan and Others Vs. The Wandoor Jupiter Chits (P) Ltd., 41. His further contention was that when section 458A was not attracted to the said proceedings the company was bound to show satisfactory and sufficient cause for the long delays of over six years, 10 months which occurred in the making of the said applications in Misc. Cases Nos. 433 and 435 of 1988, seeking restoration of its suits in S.C. Nos. 3142 and 3143 of 1981, and also the execution application in Ex. Case No. 51 of 1991. He maintained that the trial court has rightly come to the conclusion that the cause for the delays shown in the said affidavits of the company''s official filed before it in support of I.A. No. 1 in both the miscellaneous proceedings is not sufficient and satisfactory.

8. The material question, therefore, that calls for determination is :

Whether the company is entitled to invoke the aid of section 458A of the Act in respect of the proceedings in the said S.C. Nos. 3342 of 1981 and S.C. No. 3341 of 1981, the said Misc. Cases Nos. 433 and 435 of 1988, as also in Ex. Case No. 51 of 1991, on the basis of the commencement of the winding up proceedings against it by the said Company Petitions Nos. 8, 9 and 49 of 1981; and, if so, whether the operation of the Limitation Act in relation to these proceedings has remained suspended and inapplicable in the face of the existing order dated October 8, 1982 [See Sudarsan Chits (India) Ltd. Vs. Sukumaran Pillai and Others, , of the High Court of Kerala passed in the said M.F.A. Nos. 518, 519 and 520 of 1981 holding the company court''s said winding up order dated October 13, 1981, in abeyance ?

The decision on the above question depends upon the interpretation and legal effect of section 458A of the Companies Act which reads :

"458A. Exclusion of certain time in computing periods of limitation. - Notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908), or in any other law for the time being in force, 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 of 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."

9. This provision under the Act came up for consideration and interpretation before a Full Bench of this court in S. Premalatha Vs. Mysore Minerals Ltd. and Another, . At paragraphs 8 and 9 of its judgment, this court dwelt upon the ingredients and applicability of section 458A. At para 8 the following prerequisites to attract the applicability of section 458A are spelt out (page 101 of 78 Comp Cas) :

"Section 458A only provides for exclusion of certain time in computing the periods of limitation. A reading of the section which reproduced above, makes it clear that for the purpose of application, or attraction of section 458A of the Act, there are certain pre-requisites which are to be satisfied. They are :

(1) the period of limitation must have been prescribed by the Limitation Act or any other law for the time being in force;

(2) such prescription of the period of limitation must be in respect of any suit or application; and

(3) such suit or application is filed in the name and on behalf of a company which is being wound up by the court."

When these prerequisites are satisfied in a given case then the period that stands excluded by section 458A from computation of the prescribed period of limitation is stated by the High Court at para 9 of the judgment as under (page 101 of 78 Comp Cas) :

"If these conditions are satisfied, (a) the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive), and (b) a period of one year immediately following the winding up order shall have to be excluded. Therefore, this section only provides for exclusion of the period from the date of commencement of the winding up proceeding of a company plus one year following the date of the winding up order."

10. In the cases in hand the applications under Order 9, rules 3 and 4 of the Civil Procedure Code, were made by the company in Misc. Cases Nos. 433 and 435 of 1988, on August 16, 1988, and August 3, 1988, in the court below praying to restore to its file its said suits in S.C. Nos. 3341 of 1981 and 3342 of 1981, by setting aside its said orders both dated December 9, 1982. The period of limitation prescribed under article 122 of the Schedule to the Limitation Act to make such applications is 30 days from the date of order, which period stood expired in the normal course on January 8, 1983. The execution application in Ex. Case No. 51 of 1991 was filed on June 26, 1991, seeking execution of the decree passed on August 21, 1972. The limitation period of 12 years to seek execution of a decree prescribed by article 136 of the Schedule to the Limitation Act expired on August 21, 1984. The said suits and the said applications were filed in the name and on behalf of the petitioner-company. When the said orders dated December 9, 1982, were made by the court below in the said S.C. Nos. 3341 and 3342 of 1981, and when the said execution application was made on June 26, 1991, by the company, the winding up proceeding against it has already been commenced on and with effect from January 16, 1981, by the creditors with their respective applications made on January 16, 1981, April 13, 1981, and on a subsequent date, and on those petitions, a winding up order dated October 13, 1981, was also passed by the company court but the same is now held in abeyance by order dated October 8, 1982 [See Sudarsan Chits (India) Ltd. Vs. Sukumaran Pillai and Others, , of the High Court of Kerala made in the said M.F.A. Nos. 518, 519 and 520 of 1991. Thus, on the material dates, viz., December 9, 1982; August 21, 1984; August 16, 1988; August 13, 1988; June 26, 1991, and February 2, 1993, the company''s position was that it was being wound up, the winding up proceedings having commenced on and from January 16, 1981. Therefore, all the aforementioned prerequisites for applicability of section 458A to the proceedings in the said S.C. Nos. 3341 and 3342 of 1981, as on the date of their dismissal, i.e., December 9, 1992, and when the applications under Order 9, rules 3 and 4 of the CPC were made by the company on September 13, 1988, in Misc. Case No. 433 of 1988 and September 16, 1988, in Misc. Case No. 438 of 1988, and to the execution proceeding in Ex. Case No. 51 of 1991, initiated on June 26, 1991, are fulfilled. In that view of the matter section 458A of the Act gets clearly attracted and becomes applicable to all the said proceedings.

11. The contention of learned counsel for the respondents that the winding up order dated October 13, 1981, being kept in abeyance by order dated October 8, 1982, of the Kerala High Court, section 458A will not be applicable to the said proceedings is, therefore, unacceptable. Reliance on a Full Bench decision of High Court of Kerala in K.P. Ulahannan and Others Vs. The Wandoor Jupiter Chits (P) Ltd., , was placed by him to substantiate his submission. But this authority does not support his contention. The legal proposition laid down in that case is that "since the right of the official liquidator to apply u/s 446(2)(b) arises only on the passing of the winding up order or on the appointment of a provisional liquidator, the starting point of limitation for claims under the said sub-section is the date on which the winding up order is passed or a provisional liquidator is appointed. Since the claim is summary and is by way of an application, article 137 of the Limitation Act applies to such proceedings." In the instant case, we are not concerned with any application made or to be made by the official liquidator or provisional liquidator in respect of the claims enumerated in sub-section (2) of section 446. The claims of the company in all its said proceedings are not u/s 446 of the Act. Therefore, that authority of the Kerala High Court is without relevance.

12. Support was sought to be drawn by him from the following observations of the Delhi High Court in Diwan Chand Kapoor Vs. New Rialto Cinema (P) Limited, that :

"Section 458A of the Companies Act provides for exclusion of certain time in computing periods of limitation where a winding-up order has been made, but the benefit of the section is confined to proceedings ''in the name and on behalf of a company which is being wound up by the court''. It is not available against the company which is being wound up."

13. He, therefore, maintained that as held by the court below, section 458A comes into play only when and after an effective winding up order against the company is passed by the court and not from the time of its commencement, without any legal force (sic). The above said observation of the Delhi High Court made in the context of the facts and circumstances in the case of Diwan Chand Kapoor Vs. New Rialto Cinema (P) Limited, does not lay down the proposition as sought to be canvassed by the respondents'' learned counsel and any such interpretation of section 458A runs counter to its object and clear meaning. A plain reading of this provision makes it crystal clear that notwithstanding anything contained in the Limitation Act or any other law for the time being in force, it provides two cut-off points of time for exclusion of time in computing the prescribed period of limitation under the Limitation Act for any suit or application filed or made by the company to enforce its claims that are not already barred by time before the winding up proceeding is commenced against it. They are : the time at which winding up proceeding is commenced by presenting a winding up petition u/s 439 of the Act and the date on which the period of one year immediately following the date of the winding up order made u/s 443 of the Act,

expires. The operation of the Limitation Act in respect of a company''s such applications pending or made in competent civil courts during this period remains suspended and the limitation point would be totally foreign to such legal proceedings. Therefore, the question of applicability of the provisions of the Indian Limitation Act to any such legal action taken by the company during the period stipulated u/s 458A of the Act to enforce its claims against a person which were enforceable before commencement of its winding up proceeding, does not arise at all. In the instant case, the winding up proceeding against the company is commenced on January 16, 1981, on presentation of a winding up petition by a creditor in Company Petition No. 8 of 1981. The winding up order dated October 13, 1981, of the company court is kept in abeyance by order dated October 8, 1982 [See Sudarsan Chits (India) Ltd. Vs. Sukumaran Pillai and Others, , of the Kerala High Court. So, section 458A of the Act has become operative in favour of the company from the time of commencement of its winding up proceeding, i.e., from the date January 16, 1981, on presentation of a winding up petition by a creditor in Company Petition No. 8 of 1981. Therefore, the Limitation Act became inapplicable to the company''s legal actions taken or to be taken to enforce its claims against its debtors which were not already time-barred. The Limitation Act remains suspended and inapplicable for all such claims of the company till the expiry of the period of one year immediately after the said winding up order dated October 13, 1981, in abeyance becomes effective. Hence, the said applications made by the company before the court below on September 13, 1988, in Misc. Case No. 433 of 1988, on September 16, 1988, in Misc. Case No. 435 of 1988, the cause of action for which applications had arisen on December 9, 1982; and the said execution application in Ex. Case No. 51 of 1991, filed on June 16, 1991, for execution of the decree dated August 21, 1972, the execution whereof was not barred by time as on January 16, 1981, were all maintainable before it in law, since they were all made during this suspended period of limitation. As such, there was no question of delay involved in the making of these applications by the company and it was not required in law to explain any delay as such. The company was entitled to initiate or prosecute any legal action in respect of its any claim which was not barred by time under any provision of the Limitation Act before the date of commencement of its winding up proceeding, i.e., January 16, 1981, till the said cut-off date of the outer limit of the time required to be excluded u/s 458A of the Act from computation of the prescribed period of limitation under the Limitation Act. Therefore, the court below was patently wrong in passing its impugned orders rejecting the company''s respective applications in Misc. Cases Nos. 433, 435 of 1988, and in Ex. Case No. 51 of 1991 as time-barred. These revisions are, therefore, entitled to succeed.

For the reasons aforesaid, all the revisions are allowed. The impugned order dated December 18, 1992, passed in Misc. Case No. 433 of 1988, the impugned order dated December 18, 1992, passed in Misc. Case No. 435 of 1988, and the impugned order dated February 2, 1993, passed in Ex. Case No. 51 of 1991, are set aside, and all these matters are remitted to it with a direction to dispose of them on their merits.

14. Parties to bear their own costs.

