

(1963) 10 MAD CK 0029
In the Madras High Court

S.V. Venkatasubbu and Others

APPELLANT

Vs

The Utilities (India), Limited

RESPONDENT

Date of Decision : 08-10-1963

Acts Referred:

Companies Act, 1956 — Section 543

Citation : (1964) 1 MLJ 20

Hon'ble Judges : G.R. Jagadisan, J

Bench : Division Bench

Judgement

G.R. Jagadisan, J.—This appeal is from the judgment and decree in Original Suit No. 216 of 1958 on the file of the Sub-Court,

Coimbatore. The decree has been passed against the appellants, defendants in the suit, for payment of a sum of Rs. 19,585-23 nP. to the plaintiff-

respondent, which is a company under voluntary liquidation. The correctness of this decree is called in question by the appellants mainly on the

ground that the suit is not maintainable.

2. The facts are these. The Utilities (India), Limited, a company registered under the Indian Companies Act, which will be referred to in this

judgment as the Company was managed by a certain Venkatesalu Naidu. The defendants are his sons. The Company did not function properly,

and consequently the members (share-holders) passed a special resolution in the General Body meeting held on 24th August 1955 that the

company be wound up voluntarily. One of the directors, R. T Naidu was appointed as the liquidator The Managing Director, Venkatesalu Naidu

had in his hands a sum of Rs. 25,585-23 nP. belonging to the company, and was also in possession of the company's account books. In spite of

the request of the liquidator he failed to hand over the cash or the account books. He, however remitted into the bank to the credit of the company

various amounts between 21st October 1955 and 18th April, 1957 aggregating to Rs. 6,000. Venkatesalu Naidu died in or about July, 1957. In

this suit the Liquidator claims, after giving credit to the sum of Rs. 6,000 paid by Venkatesalu, the balance of Rs. 19,585-23 nP left with him. It is

alleged in the plaint that the defendants are his undivided sons, and that the amount claimed belong to the company, but was improperly utilised by

Venkatesalu for the purpose of his family business and for improving his family lands It is stated further that the defendants were benefited by

reason of the utilisation of the company's funds, and that therefore they are liable to repay the amount to the company from and out of the assets of

their joint family.

3. The defendants no doubt resisted the suit but they did not deny that Venkatesalu their father, had with him the amount claimed in the suit,

belonging to the company" They contended that Venkatesalu was not the only Managing Director, that the management of the company was with a

firm of managing agents called Mitra & Co consisting of two partners, Venkatesalu Naidu and the present liquidator, R. T. Naidu They pleaded

that the Liquidator was as much a person liable to make good the payment to the company as Venkatesalu himself and that, therefore, the suit

against the legal representatives of Venkatesalu would not be maintainable. They also stated that no amount of the company remained with them.

They alleged that a sum of Rs. 15,000 was used by Venkatesalu himself, for the purpose of acquisition of the shares belonging to the other

members of the company and that another sum of Rs. 12,000 had been paid by Venkatesalu on various occasions. In effect therefore their plea

was twofold (1) discharge and (2) non-maintainability of the suit At the time of the trial of the suit, it appears that the defendants further pleaded

that the suit itself was barred by reason of Section 543 of Indian Companies Act These contentions on the part of the defendants were over-ruled

by the learned Subordinate: Judge, who, as stated already, granted a decree in favour of the plaintiff as prayed for

4. Learned Counsel for the appellants frankly conceded that the finding of the Court below, as regards the plea of alleged discharge, cannot be

successfully challenged, in view of the state of evidence in the case. It is, therefore, clear that Venkatesalu was liable to pay the sum of Rs. 19,000

and odd, and his legal representative, the present defendants having got or being in possession of the joint family assets, are equally liable for the

payment of the amount. Learned Counsel, however, strenuously contends that Section 543 of the Indian Companies Act, operates as a bar to the

maintainability of the suit, and also contends that R. T. Naidu the Liquidator, being himself a member of the managing agency firm, cannot maintain

the suit. We may at once state that there is no substance in the point that R. T. Naidu cannot institute the suit, as the suit has been filed by him in his

capacity as liquidator. Whether R. T. Naidu is also jointly and severally liable for the suit amount is a matter upon which we express no opinion in

this appeal.

5. The only point which deserves serious consideration is as regards the scope of Section 543 of the Indian Companies Act, and whether that

provision negatives the jurisdiction of the civil Court to sustain a claim of the present description. We shall immediately refer to the provision itself,

in so far as it is material.

6. Section 543(1):

If, in the course of winding up a company, it appears that any person who has taken part: in the promotion or formation of the company, or any

past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of the company ;

(a) has misapplied or retained or become liable or accountable for any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

The Court may, on the application of the Official Liquidator, or the liquidator...made within the time specified in that behalf in Sub-section (2),

examine into the conduct of the person, director, managing agent...and compel him to repay or restore the money or property or any part thereof

respectively, with interest at such rate as the Court thinks just, or to contribute such, sum to the estate of the company by way of compensation in

respect of the misapplication, retainer misfeasance or breach of trust as the Court thinks just.

(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,

Section 425 of the Indian Companies Act provides for three modes of winding up. Section 543 comprehends in its scope all the modes of winding

up, and this is made; clear by the generality of the language used, "" If in the course of winding up a company, it appears...."" The Liquidator, in a

voluntary winding up, is. within the section. Vemuri Parandhamiah Vs. R. Narasimha Rao and Another, .

7. The learned Subordinate Judge has missed the real scope of the section in stating that what can be done thereunder is to assess damages against

delinquent directors. The compensation for misapplication of company's moneys or for misfeasance or breach of trust is only one of the reliefs

contained in the section. Repayment or restoration of the money or property of the company retained or misapplied by a director can be asked for

under the machinery of this section. It cannot be said that what falls within the section is only an unliquidated claim for damages. A claim for

recovery of a specified sum of money is plainly within its compass. The view of the learned Subordinate Judge that the suit claim is outside the

section militates against its language and cannot be supported.

8. But then the question is, does the section bar the remedy of a suit in a civil Court, as regards matters covered by it ? Learned Counsel for the

appellants contends that, if an application is competent under the section in respect of any claim, the claimant should pursue only that remedy and

no other remedy. In other words, the contention is that there cannot be two remedies in respect of the same cause of action, one by way of suit,

and another by way of an application in the Company Court, and that the special procedure in the shape of application excludes the general

procedure in a civil forum. This argument is interesting but unsustainable. Section 9 of the CPC enacts:

The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance

is either expressly or impliedly barred.

Any civil right can be agitated in a suit, but the Legislature can enact a measure

barring the jurisdiction of the civil Courts, in respect of certain classes of suits. Generally, the barring statute contains express words like, "" No civil Court shall entertain a suit...", or, "" the decision passed by a certain officer shall not be called in question in any civil Court "...There can be no difficulty in understanding such explicit words as ousting the jurisdiction of the civil Court. The problem assumes proportions, when the question is, whether in any given case, the civil Court's jurisdiction is impliedly barred. This is a vexed question, which has often come up for consideration before the Courts. Cases on the subject are many. They are of such varied types that they elude analysis and formulation, notwithstanding the development of law to attune to the needs of a fast changing, society. The locus classicus on the subject is the following observation of Willes, J., in *Wolverhampton New Water Works Co. v. Hawkesford* 6

C.B. (N.S.) 336:

There are three classes of cases in which a liability may be established founded upon statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law ; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides, no particular form of remedy ; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law, is created by a statute which at the same times gives a special and particular remedy for enforcing it...The remedy provided by the statute must be followed; and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The House of Lords approved this enunciation of the principle of law in *Neville v. London Express Newspaper, Limited* L.R. (1919) A.C. 368 ; and the Judicial Committee reaffirmed it in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co.* L.R. (1935) A.C. 532 and *Secretary of State v. Mask & Co.* (1940) 2 M.L.J. 140 : LR 67 IndAp 222 : ILR (1940) Mad. 599 : 44 C.W.N. 709.

9. The liability of a director to pay or return the company's money or property is general or a common law liability, if such an expression can be used, with reference to the law in India. The obligation to restore any money or property to the original owner is not merely common honesty but a legal liability. The fact that the debtor is a director and the creditor a company in liquidation would not affect the true nature of the liability. In such a case, the liability is not one arising under the Indian Companies Act. The relationship between the director and the shareholders of the company is of a fiduciary character and is analogous to that of a trustee and cestui que trust. Of course, a director is not an express trustee. The right of the company to realise its money from the hands of a fraudulent director is in no sense a special statutory right.

10. In Halsbury's Laws of England 3rd Edition, Volume 6, Simonds Edition, page 622, the nature of misfeasance proceedings is described thus:

The foregoing provision does not create any new liabilities or new rights ; it only provides a summary mode of enforcing rights including rights

created by the winding up which must otherwise have been enforced by the ordinary jurisdiction of the Court.

11. We are of opinion that Section 543 is only an enabling provision, and it cannot be construed as depriving the aggrieved parties of a remedy by

way of suit by reason: only of the special procedure provided for therein. The present case falls directly within the first category of cases described

by Willes, J., in *Wolverhampton New Water Works Co. v. Hawkesford* 6 C.B. (N.S.) 336. There is no principle of law, so far as we are able to

see, which would disable a suitor from pursuing one of several remedies which he may have under the law of the land. The utmost that can be said

is that he should not pursue all the remedies concurrently, as that would result in multiplicity of proceeding and perhaps also in conflicting judicial

pronouncement. So long as a right of suit cannot be said to have been taken away expressly or by necessary implication, the suit must be held to

be maintainable. In our opinion, the Court below reached the correct conclusion, in holding that the suit is not barred u/s 543 though the reasons

given are not sound.

12. There is another aspect of the matter, which would also go to show that the suit is maintainable. The suit is not laid against a director as such. It

is only a claim against the legal representatives of the director quo ad his estate in their hands. In *In Re: Peerdan Juharmal Bank (in liquidation)* by

Joint Official Liquidator, a Division Bench of this Court held that the proceedings taken u/s 235 of the Indian Companies Act, 1913 (the provision

corresponding to the present Section 543) against the director of a banking company which has been ordered to be wound up, for assessing

damages on charges of misfeasances, etc., cannot be continued after his death, and the liability of such director cannot be enforced against his legal

representatives in those proceedings. The ratio of that decision is that the misfeasance proceedings under the Companies Act are only available

against the specified enumerated persons mentioned therein and not against their executors, administrators, heirs or legal representatives.

13. Section 543 corresponds to Section 333 of the English Act of 1943. Buckley (Companies Act, 12th Edition) states at page 682:

The section is personal only against the Director or officer and does not apply as against the executors of a deceased director or officer.

In England, the law has been materially altered by the Law Reform (Miscellaneous Provisions) Act, under which subject to the provisions of

Section 1, on the death of any person after the commencement of the Act all causes of action subsisting against or vested in him survive against or,

as the case may be, for the benefit of his estate. In Halsbury's Laws of England (Volume 6, 3rd edition), the following rule is stated at page 622:

The executors of a deceased officers are not officers and were therefore not liable before the commencement of the Law Reform (Miscellaneous

Provisions) Act, 1934 to misfeasance proceedings.

The foot-note refers to the case *In re, British Guardian Life Assurance Company* (1880) L.R. 14 Ch. D. 335 That case arose u/s 165 of the

English Act of 1862 (which was substantially in the same form as Section 333 of the 1948 Act) and it was held that proceedings against executors

must be by action and not by summons under the section. But "whatever the position may be in England, as far as proceedings u/s 543 are

concerned, we respectfully agree with the view taken in *In Re: Peerdan Juharmal Bank (in liquidation)* by Joint Official Liquidator, . On this

ground, we are of opinion that the suit was competent. The Liquidator could not have proceeded against the defendants, who are the heirs of a

deceased director, u/s 543.

14. In the result the appeal fails and is dismissed with costs.