
(1973) 08 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Original Side No. 220 of 1973

Techno Metal India (P.) Ltd.

APPELLANT

Vs

Prem Nath Anand

RESPONDENT

Date of Decision : 17-08-1973

Acts Referred:

Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1956 — Section 434, 439(2), 634, 643
Limitation Act, 1908 — Article 181
Limitation Act, 1963 — Article 136, 137

Citation : (1973) 43 CompCas 556 : 77 CWN 957

Hon'ble Judges : S.K. Mukherjee, J;S.K. Dutta, J

Bench : Division Bench

Advocate : P.K. Sen, for the Appellant;G. Chakraborty and U. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mukherjee, J.—This appeal is directed against an order of Roy Chowdhury J. dated July 19, 1972, by which the learned judge refused to stay an application for winding up. The petitioner before his Lordship, who is the appellant before us, was liable to pay a large sum of money to the respondent who was at a certain point of time a director of the appellant-company. On January 15, 1966, the respondent made an application for winding up of the appellant-company. Thereafter, on January 28, 1966, the appellant applied to this court for an order that the said winding-up application being Company Petition No. 6 of 1966 be taken off the file, and alternatively all other proceedings including advertisement of the said company petition be permanently stayed. On April 4, 1966, the application made by the appellant was disposed of by an order of B. C. Mitra J. by consent of parties in accordance with certain terms of settlement filed in court. It will be necessary for the purpose of this appeal to set out some of these terms in extenso :

" (i) The company admits that a sum of Rs. 38,000 on account of principal and

Rs. 12,519 as interest up to October, 1965, is due to the petitioning-creditor. The company also admits that it is liable to pay the petitioning-creditor's interest on the principal amount at 9% per annum from November, 1965, till payment.

The company hereby creates a floating charge on all its presents as per schedule below and future fixed assets as a first charge.

(ii) The company will pay the entire dues of the petitioning creditor as aforesaid within 31st March, 1969. The company will pay Rs. 10,000 within 4th April, 1966, and in respect of the balance the company will pay a sum of not less than Rs. 6,000 every six months, first of such payment is to be made on or before the 31st October, 1966, but the company in any event will pay out of the half yearly amount of Rs. 6,000 mentioned above a sum not less than Rs. 500 per month. First of such monthly payments is to be made on or before the 15th May, 1966.

In default of the initial payment of Rs. 20,000 or any monthly minimum payment of Rs. 500 or in case in any half year the monthly payment during the said half-year do not amount to the minimum of Rs. 6,000 the petitioning creditor will at once have right to realise his dues then remaining due in such manner as he may think fit. "

2. It is not in dispute that the appellant paid to the petitioning-creditor who is the respondent before us a total sum of Rs. 16,000 by October 1966, after which all payments ceased.

3. On May 2, 1967, the respondent served a notice on the appellant u/s 434 of the Companies Act. In that notice the solicitor for the respondent claimed that after crediting the sum of Rs. 16,000 paid by the appellant which the respondent had appropriated towards payment of interest on the principal, the balance of Rs. 37,369 together with interest till realisation had become payable by the appellant. It is quite clear that the position taken by the respondent was that in view of the defaults made in payment of instalments payable under the consent order the entire balance then remaining due had become payable. Thereafter, an application for winding up was presented by the respondent but was withdrawn on March 13, 1969, with liberty to make a fresh application. It appears that another notice u/s 434 of the Companies Act was served on the appellant on June 3, 1969, but no action was taken on the same. On November 19, 1970, one more notice u/s 434 of the Companies Act was served on the appellant by the respondent and in January, 1971, a petition for winding up was presented by the respondent for winding up of the appellant-company. The said petition was duly admitted and a notice was sent to the appellant-company by which intimation of the admission of the petition by the court was duly given. On May 18, 1971, an application for stay of winding up was made by the appellant-company. The said application was disposed of by Roy Chowdhury J. by an order dated July 19, 1972, dismissing the application. From that order the company has come up in appeal.

4. It appears from the judgment that the main arguments made in support of the

application before the learned judge were : (1) that the petitioning-creditor having been a secured creditor was not competent to make an application for winding up unless he satisfied the court that the security was insufficient to cover his debt ; (2) the claim of the petitioning-creditor had become at the material time barred by limitation and, in that view of the matter, the claim on the basis of which the winding-up application has been made is a claim not enforceable in law. The learned judge held on good authority that a secured creditor is entitled to make an application for winding up, and in doing so, it was not necessary for him to satisfy the court that the security was inadequate. On the other question, the learned judge held that the petitioning creditor was entitled to waive and had waived the stipulations for payment in instalments on the due dates. In that view of the matter, the learned judge found that the date of limitation commenced from 31st March, 1969, by which date the company was liable to pay the entire dues of the petitioning-creditor in terms of the consent order. The application for winding up having been made on the 18th May, 1971, no question of limitation arose and the learned judge, therefore, held against the appellant on that point.

5. Mr. P.K. Sen appearing on behalf of the appellant submitted before us that an application for winding up by the secured creditor is not maintainable. It is now too late to argue that a secured creditor cannot successfully prosecute an application for winding up, especially in view of Sub-section (2) of Section 439 of the Companies Act, 1956, a provision which was lacking in the Indian Companies Act of 1913. Apart from the fact that for the purpose of winding up, the term " creditor " includes a secured creditor, there are judicial precedents established in cases decided under the earlier Act where it was held that a secured creditor is fully competent to make such an application. In this connection, reference may be made to the case of *Karnatak Vegetable Oils and Refineries Ltd. Vs. Madras Industrial Investment Corporation Ltd.* and Another, Reference may also be made to two decisions of learned single judges of our court in *In the matter of In Re: The India Electric Works Ltd., and Calcutta Safe Deposit Co. Ltd. Vs. Ranjit Mathuradas Sampat*, . These were cases decided under the Act of 1956. The precedents as well as the provisions of Section 439(2) of the Companies Act, 1956, are against the contention of Mr. Sen and we cannot accept the proposition that the respondent being a secured creditor is not entitled to apply for winding up unless he abandons his security or satisfies the court as to its inadequacy.

6. On the question of limitation, we feel that the consent order dated April 4, 1966, upon which the winding-up petition is founded, is an order for payment of money and as such is enforceable in law. The relevant article governing the question of limitation is Article 136 which provides that the period of limitation for the execution of any decree or order of any civil court is 12 years and the time from which the period begins to run is where the decree or any order directs any payment of money when default in making the payment takes place. The default in payment having been made in October, 1966, the respondent in making the present application for winding up, which he made in January, 1971, is well within the period of limitation. In that view of the matter, no question of

limitation really arises. The order dated April 4, 1966, in our opinion, an order by consent though it is, is fully enforceable like any decree or order for payment made by a civil court. The order was made in winding-up proceeding under the Companies Act, 1956. Section 634 of the Act of 1956 provides that any order made by the court under that Act may be enforced in the same manner as a decree made by the court in a suit pending therein. The order is, therefore, as we have indicated, fully enforceable by execution at any time within a period of 12 years from the date of default. So long as the respondent's claim under the order of April 4, 1966, is enforceable in law, the respondent on the basis of that claim is entitled to present and prosecute an application for winding up, which he has done. In our opinion, the question of waiver is immaterial in this case. The period of limitation being 12 years under Article 136, the respondent in prosecuting the application for winding up is fully within the period of limitation irrespective of any waiver on the part of the respondent of any of the stipulations for payment of instalments made in his favour in the terms of settlement. In other words, even on the basis that there has been no waiver by the respondent of any of the terms, the claim is not barred by limitation.

7. Mr. Sen submitted before us that the order having been an order by consent, the provisions of Rule 3 of Order 23 are attracted which provides as follows :

" Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

8. He submitted that the order for payment does not relate to a stay of winding-up proceeding for which the application was made. He went further and contended that the order does not relate to winding-up proceedings either. In that view of the matter the direction for payment is outside the limits of an order which can be made in stay of winding-up proceedings under Rule 3, Order 23, of the Code. Mr. Sen heavily relied on a Division Bench decision in Trilok Chand Kapur Vs. Dayaram Gupta, , where one of the terms of the consent decree consisting of an agreement for sale, was held to be outside the scope of a decree passed in compliance with Order 23 or in accordance with Order 23, Rule 3, and, therefore, inexecutable. In our opinion, the decision is referable to the facts of that case. An agreement for sale containing a multitude of terms and conditions which is a part of the terms of settlement on the basis of which a decree is passed by consent is a far cry from an order made by consent for payment of a specific sum of money. Be that as it may, we do not desire to rest our decision merely on the difference between an agreement for sale and an undertaking to pay, though the difference is substantial. In our opinion, the stipulation for payment in the terms of settlement in the present case relates to the winding-up proceeding as also to the stay of winding-up proceeding which is an off-shoot of

the former. In making the order for payment the court simultaneously stayed the winding-up proceeding. The application for stay of winding up was finally disposed of and the winding-up proceeding, for all practical purposes, came to an end. It has been said that a winding-up proceeding is a mode of enforcing payment of a just debt. In Palmer's Company Precedents, Part II, 1960 edition, at page 125, it is said :

" It is the mode of execution which the court gives to creditor against a company unable to pay its debts."

9. This passage was cited with approval and relied on by the Supreme Court in *Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan*, . In that view of the matter if an application is made for enforcement of payment of a debt by a winding-up application, and in an application by the company for stay of winding up a payment order is made by consent, on the basis of which a stay is granted, it can hardly be contended that the order for payment is not related to the application for stay of winding up. We are unable to agree that a consent order for payment in such an application is outside the scope of Order 23, Rule 3, of the Code. In the Division Bench judgment, *Trilok Chand Kapur Vs. Dayaram Gupta*, to which reference has already been made, Banerjee J. observed with reference to the case of *Manindra Nath Biswas Vs. Radhasyam Biswas*, as follows :

"A consent decree for money which provides for security of the decretal debt payable by instalments may be treated as operative part of the decree and may not be quite unrelated to the suit."

10. Having regard to the concept of winding up as a mode of enforcement of payment of a debt, an application for winding up is on a par with a suit for enforcement of a debt. Observations of Banerjee J. in that case or the Bench decision in *Manindra Nath Biswas v. Radhasyam Biswas* does not support the contentions of Mr. Sen.

11. Lastly, Mr. Sen contended that there is a bona fide dispute as to whether the petitioning-creditor's claim is or is not barred by limitation. It may be conceded that the dispute raised is bona fide, the contentions of Mr. Sen being that the terms of settlement in the consent decree are to be treated as a simple contract and not as an order of court for the purpose of limitation. The dispute is, however, one which a winding-up court is perfectly able to resolve, the question being purely a question of law when the facts are not in dispute. It is nobody's case that the facts in this case are in dispute. The question is one of interpretation of facts and the proper application of law to those facts. That is a function which a winding-up court is well able to discharge. On a careful consideration of the matter we have held that the petitioning-creditor's claim is not barred by limitation.

12. Lastly, we ought to point out that Mr. Sen relied on a host of cases on the question of waiver of a term of a contract by a party for whose benefit the term exists.

13. Mr. Sen cited the cases in *Basanta Kumar Singha and Another Vs. Nabin Chandra Shaha and Others*, , AIR 1942 138 (Nagpur) , AIR 1948 225 (Nagpur) , *Sarat Lakshi Dassya Vs. Narendra Singha and Another*, and *Gokhul Mahton and Others Vs. Sheoprasad Lal Seth and Others*, . We have not gone into those decisions in our judgment, because the stipulations for payment are founded on an order of court. The case is governed by Article 136 of the Limitation Act. The debt is still legally recoverable. The winding-up proceedings have been initiated well within the period of limitation even if it is assumed that the petitioning creditor did not waive any of the terms of settlement in accordance with which the consent order dated April 4, 1966, was passed by B. C. Mitra J.

14. Mr. Sen also argued that the court in exercise of its discretion should have granted permanent stay of winding up because the winding-up proceedings are vexatious and mala fide. They are vexatious because two winding-up proceedings have previously been initiated and not proceeded with. Moreover, it was contended that instead of trying to execute the order for payment in the usual course, the respondent used the winding-up proceedings for the purpose of enforcing its claim under the order. We are unable to hold that the application is mala fide only because similar applications have been withdrawn by the respondent. To say so will be to render the leave of the court by which the petitioning-creditor was entitled to initiate fresh winding-up proceedings nugatory. As regards the argument that the respondent should have executed the order instead of coming to the winding-up court all that is necessary for us to say is that the choice is his. In that view of the matter, this contention of Mr, Sen must also fail.

15. Finally, it was contended that the application for winding up is barred by limitation. The relevant article, counsel claimed, is Article 137 of the Limitation Act which reads :

Part II - Other applications.

Description of suit Period of limitation Time from which period begins to run

137.

Any other application for which no period of limitation is provided elsewhere in this Division

Three years When the right to apply accrues.

16. The company having failed to make the minimum monthly payment of Rs. 500 in November, 1966, the entire balance of the petitioning-creditor's dues became payable on 1st December, 1966, in terms of the order of April 4, 1966. On May 2, 1967, the petitioning-creditor served a notice u/s 434 of the Companies Act. No action was taken by the company on the said notice. The present application was made in January, 1971, after the lapse of more than three years from when the petitioning-creditor's right to apply accrued. The application being barred by limitation having regard to Article 137, the learned

judge should have directed permanent stay. The question, therefore, arises in this appeal as to whether an application for winding-up under the Companies Act is governed by Article 137.

17. Article 137 is analogous to Article 181 of the Limitation Act of 1908. It is common knowledge that by a series of judicial decisions culminating in the decision of the Supreme Court in *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, it was held that Article 181 applied only to applications under the Code of Civil Procedure. These decisions were founded on the application of the principle of *ejusdem generis* in construing Article 181 before Articles 158 and 178 were brought into the statute by amendment. The introduction of the said articles by which provision was made for certain applications under the Indian Arbitration Act does not appear to have made any difference. In *Sha Mulchand's* case, the Supreme Court observed :

" It does not appear to us quite convincing, without further argument, that the mere amendment of Articles 158 and 178 can ipso facto alter the meaning which, as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in Article 181. This long catena of decisions may well be said to have, as it were, added the words " under the Code" in the first column of that article."

Article 181 reads as follows:

Description of application	Period of limitation	Time from which period begins to run
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181.		
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Application for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Code of Civil Procedure, 1908.		
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Three years	When the right to apply accrues.	
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18. The similarity between the text of Article 181 of the Act of 1908 and Article 137 of the Act of 1963, substantial though it is, has to be considered in the context of the respective Acts and the history of legislation on the law of limitation. The preamble to the Act of 1908 is in these terms :

" Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to courts. "

19. The Act of 1963 has hardly any preamble. Its long title reads :

" An Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith. "

20. Under the provisions of Section 2 of the Act of 1963 "applicant" includes " petitioner " and " application " includes " petition ". In the Statement of Objects and Reasons it is stated in respect of Clause (2) of the Bill, which became Section 2 of the Act :

" Clause 2.--A new definition of " application" is inserted so as to include a petition, original or otherwise. The object is to provide a period of limitation for original applications and petitions under special laws as there is no such provision now. Consequential changes have been made in the definition of " applicant"."

21. In respect of Article 137, it is stated in the Statement of Objects and Reasons :

" As in the case of suits, Article 136, which corresponds to existing Article 181, is the residuary article for applications, including petitions. "

22. It is to be noted that Article 136 in the Bill is Article 137 of the Act.

23. It will be readily seen that the Act of 1908 provided not for all applications but only for certain applications. In the long title of the Act of 1963 there is no such limitation. It provides for limitation of suits and other proceedings, without any qualification. The object of including " petition " in " application " and " petitioner " in " applicant ", as was made clear in the Statement of Objects and Reasons, was to include a petition, original or otherwise. Furthermore, the object was specifically to provide for a period of limitation for petitions under special laws for which no provision had been made under the earlier Act.

24. It was also made clear in the Statement of Objects and Reasons that Article 137 is the residuary article for all applications. Add to this the fact that Article 137 unlike old Article 181 falls under a separate and self-contained part of the Act, namely, Part II of the third division of the Schedule. It seems to us that by the Act of 1963 the legislature intended to provide for limitation in all applications to courts and Article 137 is the residuary article which governs those applications for which no provision for limitation has been made in the Act or elsewhere, no matter whether those applications are made under the CPC or under any special enactment. The basis for holding that the residuary article governs only applications under the CPC has disappeared having regard to the fact that Article 137 has been placed in a separate part of the Act in the context of which the ejusdem generis principle has no application, the article standing as it does, in splendid isolation.

25. Learned counsel for the appellant relied on an unreported decision of P. B. Mukharji J. in *In re Turner Morri son & Co. Ltd.* (C.P. No. 274 of 1967, decided on June 23 and 24, 1970), where it was held that Article 137 applied to applications u/s 397 and Section 398 of the Companies Act, 1956. Reference was also made to the decision in *Ram Kumar Kajaria Vs. Chandra Engineering (India) Ltd.*, , where M. M. Dutt J. held that Article 137 is not restricted to applications under the CPC but also applies to applications and petitions under other enactments. Had the matter been res integra we should have had no hesitation in holding that Article 137 is fully applicable to an application for winding up under the Companies Act. But it seems to us that we are not free to do so having regard to a decision of the Supreme Court in *Town Municipal, Council, Athani Vs. The*

Presiding Officer, Labour Courts, Hubli and Others etc., to which attention of the learned single judges who decided those cases does not appear to have been drawn. In the Supreme Court case it was observed :

" The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as, when prescribing the three years" period of limitation, the first column giving the description of the application reads as " any other application for which no period of limitation is provided elsewhere in this division ". In fact, the addition of the word " other " between the words " any" and " application" would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of ejusdem generis should be applied when interpreting the new Article 137. This word " other " implies a reference to earlier articles, and, consequently, in interpreting this article, regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the Schedule refer to applications under the Code of Civil Procedure, with the exception of applications under the Arbitration Act and also in two cases applications under the Code of Criminal Procedure. The effect of introduction in the third division of the Schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this court in the case of Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd., We think that, on the same principle, it must be held that even the further alteration made in the articles contained in the third division of the Schedule to the new Limitation Act containing references to applications under the Code of Criminal Procedure cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of the legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure."

26. It was sought to be contended that the above observations are obiter as in that case the court was really concerned with the question as to whether the Limitation Act would govern applications to the Labour Court. An obiter dictum of the Supreme Court is binding on all other courts. But is it a case of obiter ? Subsequently, in Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, the court held that one of the grounds on which the above decision was founded was the interpretation of Article 137. It was however observed :

"..... that it may require serious consideration whether applications to courts under other provisions, apart from the Civil Procedure Code, are included within Article 137 of the Limitation Act, 1963, or not. "

27. To doubt the correctness of a decision is not to overrule it and the decision in Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc., still holds sway. It must, therefore, be held that the position at present is that Article 137 does not apply to applications for winding up of a

company under the Companies Act, 1956. In that view of the matter it is not necessary for us to consider the arguments advanced at the Bar as to when the right to apply accrues except to point out that a petition for winding up has to be presented within the period the debt is recoverable in law in cases where the ground for winding up is the inability of the company to pay its debts.

28. An alternative argument was sought to be built up on the basis that an application for winding up of a company u/s 434 of the Companies Act is an application under the provisions of the Code of Civil Procedure, a proposition in support of which counsel drew sustenance from a decision of a Special Bench of this court in *Asmatali Sharip v. Mujaharali Sardar*. Counsel referred to Section 643 of the Companies Act which confers power on the Supreme Court to make rules providing for all matters relating to the winding up of companies and also to make rules consistent with the CPC as to the mode of proceedings to be had for winding up a company in High Courts and in courts subordinate thereto. In pursuance of the said provisions the Supreme Court has made rules known as the Companies (Court) Rules, 1959. Under Rule 6 the practice and procedure of the court and the provisions of the Code as far as applicable, shall apply to all proceedings under the Act and its rules unless otherwise provided by the Act and the rules. It was submitted that these provisions have made the CPC applicable to all proceedings under the Act and accordingly Article 137 applies to applications made under the Companies Act.

29. In *Asmatali Sharip v. Mujaharali Sardar* AIR 1948 Cal. 48 [F.B.] it was held that an application for pre-emption by a non-notified co-sharer of a holding governed by the Bengal Tenancy Act is governed by Article 181 of the Limitation Act, 1908. In elaboration of the contention that an application for pre-emption under the Bengal Tenancy Act and an application under the Companies Act are in pan materia on the question of applicability of the Code of Civil Procedure, it was said that, no doubt, substantive rights, like rights of pre-emption or of winding up, are founded on special enactments but the CPC has been made applicable under the provisions of Section 143 of the Bengal Tenancy Act in one case and Section 643 of the Companies Act and Rule 6 in the other. The Special Bench held that an application u/s 26F of the Bengal Tenancy Act which confers power on the co-sharer of the transferor to purchase may be regarded as an application under the Civil Procedure Code. On a parity of reasoning the CPC will be applicable to an application for winding up having regard to Section 643 of the Companies Act and Rule 6 of the rules made thereunder as also u/s 141 of the Code of Civil Procedure. In that view of the matter Article 137 of the Limitation Act will be attracted to an application for winding up under the Companies Act. Section 141 of the Code provides that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. The court administering the Companies Act is a court of civil jurisdiction. Section 144 of the Bengal Tenancy Act provides for jurisdiction in proceedings under the Act. In Section 10 of the Companies Act provision had been made for jurisdiction of the court in

proceedings under the Companies Act, The decision of the Special Bench, therefore, applies *proprio vigore* to proceedings under the Companies Act and, therefore, an application for winding up under the Companies Act is an application under the Civil Procedure Code.

30. To deal with the contention raised on behalf of the appellant, it is necessary to refer to the relative provisions of the Bengal Tenancy Act :

" 143. (1) The High Court may, from time to time, with the approval of the Provincial Government make rules, consistent with the Act, declaring that any portions of the Code of Civil Procedure, 1908, shall not apply to suits between landlord and tenant as such or to any specified classes of such suits or shall apply to them subject to modifications specified in the rules.

(2) Subject to any rules so made and subject also to the other provisions of this Act, the CPC shall apply to such suits."

" 144. (3) When, under this Act, a civil court is authorised to make an order on the application of a landlord, or a tenant, the application shall be made to the court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the application is brought."

31. On a consideration of the relevant provisions the Special Bench was of opinion that the application u/s 26F is to be regarded as an application under the Code or at any rate an application for making of which the CPC gives authority. The court referred to the Bench decision in *Hindusthan Bank Ltd. v. Mehraj Din* [1920] ILR 1 Lah. 187 in which it was held that the court under the Companies Act, 1882, being a court of civil jurisdiction, is governed by the general provisions of the Code as made applicable u/s 141 and should in dealing with an application for setting aside an *ex parte* order proceed under Order 9, Rule 13, *mutatis mutandis* and further that Article 181 of the Limitation Act governs all applications for making of which the CPC gives authority. The Special Bench of this court came to the conclusion that *Asmat Ali Sharip Vs. Mujahar Ali Sardar and Others*, :

" The entire proceeding in an application u/s 26F is thus regulated by the CPC and we have no hesitation in holding that the residuary Article 181 of the Limitation Act would be applicable to such applications, except so far as any special provision has been made in regard to them in the section itself."

32. The relevant section of the Indian Companies Act, 1882, was as follows :

" Section 254 :

The High Court may from time to time make rules consistent with this Act and with the CPC concerning mode of proceedings to be had for winding up of a company in such court and the courts subordinate thereto....."

33. It is not clear if any rules were made or, if made, came up for consideration before the Lahore High Court. In any event, unlike the Lahore case which was

concerned with an application to which Order 9, Rule 13, of the Code was held to be applicable mutatis mutandis for which the Code itself gave ample authority, an application for winding up is a creature of the Companies Act unknown to the Civil Procedure Code. A perusal of the relevant provisions will make it clear that u/s 143(1) and (2) of the Bengal Tenancy Act the CPC has been made applicable in toto subject to prohibition against applicability of any portion of the said Code. This provision led the Special Bench to hold that the CPC is applicable to suits under the Act and by reason of Section 141 of the Code, the entire proceeding u/s 26F is regulated by the Code of Civil Procedure.

34. In our judgment, Section 141 of the CPC does not make an application made in any court of civil jurisdiction an application under the Code. If it were so, the application for rectification of the share register in *Sha Mulchand & Co. v. Jawahar Mills Ltd.*, to which we have already referred, and countless applications under special enactments made before courts of civil jurisdiction should have been treated as applications under the Code and Article 181 of the Limitation Act of 1908 should have been held to be applicable in those cases. The fact remains that Section 141 of the CPC speaks merely of procedure and nothing else. The ratio of the Special Bench decision is to be found not in Section 141 of the CPC but in Section 143 of the Bengal Tenancy Act itself.

35. In the Companies Act there is no provision for overall application of the Civil Procedure Code. No doubt, Section 643 confers power on the Supreme Court to make rules for winding up, but there is a difference in this regard between Sub-section (1)(a) and Sub-section (1)(b) of the said section. It is only in respect of the matters prescribed in Sub-section (1)(b) which are entirely matters of procedure that the rules made by the Supreme Court have to be consistent with the Code of Civil Procedure. No such limitation attaches to Sub-section (1)(a). It is abundantly clear from the marginal note and the text of Rule 6 of the Companies (Court) Rules that the provisions of the Code which have been made applicable to all proceedings under the Act are only in respect of procedure and nothing else. Section 643 does not authorise overall application of the Code to proceedings under the Companies Act. It may be pointed out that if it were not so, Rule 9 reserving inherent powers in the court in proceedings under the Companies Act would be redundant. To say that an application u/s 434 of the Companies Act for winding up of a company is an application under the Civil Procedure Code, is to ignore all distinctions and introduce a concept for which there is no authority in statute or in precedents. On a careful consideration of the matter, we are firmly of opinion that the present application is an application under the Companies Act alone and not under the Code.

36. In the view we have taken, the appeal fails and is dismissed with costs.

37. All ad interim orders are hereby dissolved.

S.K. Datta, J.

38. I agree.