

(1979) 03 DEL CK 0006
In the Delhi High Court
Case No : C.A. No. 303 of 1978

Youngmen Benefit Chit Fund P. Ltd. (In liquidation)	APPELLANT
Vs	
Jagdish Parshad Gupta and Others	RESPONDENT

Date of Decision : 27-03-1979

Acts Referred:

Citation : (1979) 49 CompCas 858

Hon'ble Judges : S. Ranganathan, J

Bench : Single Bench

Advocate : V.V. Sastri, for official liquidator, for the Appellant; Satish Chandra, for the Respondent

Judgement

Ranganathan, J.—This application by the official liquidator in the case of Youngmen Benefit Chit Fund (P.) Ltd. ("the company", for short) has been filed against the three respondents under Sections 446 and 477 of the Companies Act. Respondents Nos. 2 and 3 are ex parte but respondent No. 1 is represented by Sri Satish Chandra who states that the first respondent denies liability in respect of the amounts claimed by the official liquidator.

2. The claim of the company in brief is that the first respondent had been enrolled as a subscriber for chit No. YBC 11/25 under which a sum of Rs. 100 per month was to be paid in 40 monthly Installments commencing from March, 1972. At an auction held on November 12, 1972, the first respondent became the successful bidder and was paid Rs. 2,600 (being the amount of the chit money less a discount of Rs. 1,400) on December 9, 1972. But, under the Rules of the chit fund, the successful bidder had to continue to pay the Installments due in respect of the chit and, apart from executing a promissory note for this purpose, he had also to produce two sureties for the due fulfillment of the above obligation. The respondent thus undertook to continue to pay the balance amount of Rs. 3,000 in monthly Installments of Rs. 100 each and respondent Nos. 2 and 3 guaranteed such payment. The first respondent made a few further payments but committed default after the 13th of April, 1970, leaving a balance

of Rs. 2,600 due to the company from the respondents. It is for the recovery of this amount together with interest at 12% per annum that the application has been filed by the official liquidator.

3. On behalf of the first respondent a reply has been filed in which the preliminary objection has been taken that the application is barred by time. I have heard counsel for the applicant and counsel for the respondent on this preliminary objection and this order is confined to the said preliminary objection. The point made by the respondent is that, since the amounts had become due from the respondents in April, 1973, the application filed on; July 14, 1978 is clearly out of time.

4. In order to appreciate the above contention it is necessary to give a few dates. The company had originally gone into voluntary winding up by means of a resolution passed at a meeting of the creditors of the company held on April 27, 1973. The company appointed two persons, B. L. Sharma and O. P. Malhotra as joint liquidators. By an order made on November 13, 1975, in C.P. No. 85 of 1974 the winding up was brought under the supervision of this court, and is continuing till to-day under the supervision of this court except that, by an order dated September 3, 1976, in C.A. no. 591 of 1975, the two voluntary liquidators previously appointed were removed and the official liquidator was appointed as the sole liquidator of the company.

5. On behalf of the applicant it is submitted that the last payment towards the chit had been made by the first respondent on April 13, 1973. The date of commencement of the winding up is April 27, 1973 (vide Section 441). Therefore, on the date of commencement of the winding up, the company had an enforceable claim against the respondents. In respect of this claim the liquidator was entitled to file an application u/s 446. The right to make an application u/s 446 arose for the first time only when the winding up was brought under the supervision of the court by the order dated November 13, 1975. This being so, under Article 137 of the Limitation Act, the application u/s 446 could be presented at any time within three years from the said date. Hence this application, filed on July 14, 1978, is claimed to be within time.

6. On the other hand, Sri Satish Chandra, counsel for the first respondent contends that the application is out of time for the following reasons :

(1) An application u/s 446 is only an alternative and concurrent remedy to the filing of a suit for recovery of the amount due to the company. If the company had filed a suit in respect of the amounts due after 13th of April, 1976, the suit would have been barred by limitation. Section 446 cannot enable the official liquidator to service claims of the company which had become extinguished by limitation.

(2) Even assuming that the provisions of Section 446 could be invoked by the company this section became applicable immediately the company went into voluntary liquidation--that is on April 27, 1973. By virtue of Section 518, the

voluntary liquidator could have moved the court to exercise its powers u/s 446 for recovering the amounts due from the respondents. The application u/s 446 should, Therefore, have been filed at the latest on or before April 27, 1976.

7. The first contention of Sri Satish Chandra that the application cannot be maintained because a suit in respect of the amount, if filed at the same time, would be barred by limitation is clearly untenable. In support of this contention, Sri Satish Chandra relied upon the following observations made by Anand J., in *Official Liquidator v. Pushpa Wati Puri* [1978] 48 Com Cas 385 :

".....section 446(2)(b) does not create new rights but lays down a summary procedure for the enforcement of existing rights and liabilities in that it lays down a special procedure and a machinery for the adjudication of certain claims and determination of liability in relation to a company which is being wound up. That being so, it is difficult to hold that such a machinery or procedure should enable the company, which is being wound up, or the creditors of such a company, to make claims which are barred by time.....the provisions of the said section do not bar the institution of a regular suit.....with the permission of the court, which is winding up the company, and to hold to the contrary would lead to an anomalous position in that such claims would be hit by the bar of limitation in a regular action while it would be immune from such a disability in the company court. It must, Therefore, be held that the claim or liability sought to be enforced under the provisions of Section 446(2)(b) must relate to an enforceable claim and a claim which is not legally enforceable could not be pursued under this section....."

8. The above decision does not support the learned counsel for the respondent. In fact, it was held in that case that the official liquidator can file an application u/s 446 provided the company has an enforceable claim at the date of commencement of the winding up. If on the date of the commencement of the winding up itself, the claim of the company against the respondents had become barred by limitation there would be no valid and enforceable claim which could be sought to be enforced by resort to Section 446. But once there is an enforceable claim in respect of which an application u/s 446 can be filed, the period of limitation for such an application should be decided with reference to Article 137 of the Limitation Act and Section 458A of the Companies Act. The period of limitation for filing such an application is a period of three years from the date on which the right to apply under that section accrues to the company, after excluding the period permitted by Section 458A. This is now settled by the decisions of the Supreme Court in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, , and of a Full Bench of this court in *Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd.*, .

9. The more difficult question posed on behalf of the respondent is as to the date when the right to apply u/s 446 accrued to the company. According to Sri Satish Chandra this right accrued on the date the company went into voluntary

liquidation, viz., April 27, 1973. He says that though it was a voluntary liquidation, the joint liquidators were entitled to come to the court, by virtue of Section 518, with an application u/s 446 against the present respondents. He argues that there is no justification for the assumption that the provisions of Section 446 can be enforced only in a winding up by the court and invites attention to the wide language of Section 518 of the Act.

10. Section 518, in so far as is relevant here, runs as follows :

" (1) The liquidator.....may apply to the court--.....

(b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court."

11. On the strength of this provision, even in a voluntary winding up, the court has exercised the powers available to it u/s 466 to stay a winding up [Dimples Pvt. Ltd. v. Registrar of Companies [1978] 48 Com Cas 98, u/s 446(1) to stay proceedings instituted against the company [Sebastian v. Rubber Board [1967] 37 Com Cas 117 and, u/s 468, to direct an agent to pay to the liquidator his dues to the company [Bharat Traders Ltd. v. Sadhu Singh [1968] 38 Com Cas 537 . In view of the above decisions, it has been contended that it is open to a voluntary liquidator also to invoke the aid of the court by an application u/s 446(2).

12. The argument is very attractive but I do not think it can be upheld. The voluntary winding up of the company, whether it be a member's voluntary winding up or a creditor's voluntary winding up, is a course of action adopted by the company or its creditors to wind up the affairs of the company in accordance with law on their own without any recourse to or intervention of the court. The intervention of the court is contemplated only in certain eventualities. Section 518 enables the liquidator and others to approach the court where, without the invocation of the court's powers, it will be difficult to deal with the situation such as, to restrain actions against the company, for examination of directors or for taking misfeasance proceedings. The court's help can also be sought to determine " any question arising in the winding up". The intervention of the court has also been provided for to assure that the winding up is conducted properly and without "detriment to public interest. Thus, even after the winding up is completed by the voluntary liquidators, the company will not be allowed to be dissolved unless the official liquidator goes into the affairs of the winding up and certifies that the winding up as well as the affairs of the company have been conducted without any prejudice to public interest (Section 509). Again, if at any stage any shareholder, contributory or liquidator feels that the voluntary winding up is not progressing satisfactorily he may apply to have the liquidator removed (Section 515) or liquidation brought under the supervision of the court (Section 522) and if necessary the voluntary winding up can be superseded by a compulsory winding up. But. these are overriding and supervisory powers

intended for special circumstances. Normally the proceedings in a voluntary winding up are not subject to the supervisor of the court and the court has no role to play in such proceedings. It is against this background and broad scheme of the Act that Section 518 is to be interpreted. This section no doubt empowers the liquidator and certain other persons even in a voluntary winding up to approach the court for appropriate orders. This can be done principally in two sets of circumstances. The first is when it becomes necessary to determine " any question arising in the winding up". One can perhaps think of questions such as fraudulent preference, priority of claims and the like. The second is when it becomes necessary for the liquidators, in order to carry out the winding up satisfactorily and properly, to invoke the aid of court for enforcement of calls or the stay of proceedings and " any other matter ". In the present case, we are not concerned with the powers of the court to enforce calls or to stay proceedings. Can this be described as " any other matter " within the meaning of Section 518(1)(b) ? A question had arisen regarding the scope of this expression in *Bharat Traders v. Sadhu Singh* [1968] 38 Com Cas 537 and it was pointed out that there is a difference of judicial opinion as to whether the expression " any other matter " can be read ejusdem generis or not. But, without deciding this controversy and even assuming that these words envisage a wider interpretation, can the section be interpreted in the manner now sought ? I think not. I have already pointed out that any such construction would be opposed to the nature and scheme of a voluntary liquidation. If by such interpretation all the powers of the court in a compulsory winding up were to be automatically imported into a voluntary winding up via Section 518, there would hardly be any real difference between those procedures. Section 446 of the Act is a necessary aid to efficacy in the case of the winding up of a company by the court intended to enable the official liquidator to carry out the affairs of the winding up expeditiously. It helps the official liquidator in various ways. Proceedings in other courts can be stayed or withdrawn to the company court. Recourse to costly and protracted litigation in a number of courts is avoided by permitting recourse to a simple application to the company court. These are special powers and remedies necessary in the case of a compulsory winding up, having regard to the fact that the proceedings are conducted by a public officer at public expense in the interests of the general public. It would not be correct in principle or expedient in practice that such summary and extensive rights should be extended to a voluntary liquidator who must manage his affairs in the normal course seeking the court's aid only when it is a must.

13. There are some indications in the Act to show that all the powers of court in a compulsory winding up are not necessarily attached in a voluntary winding up despite the very wide language of Section 518. For instance, Section 511A would not at all be necessary if Section 518 itself were wide enough to attract all corresponding provisions in a compulsory winding up. Again Section 519 makes specific provisions enabling a liquidator in voluntary winding up to invoke the powers of the court u/s 478 of the Act. This again would be meaningless and

unnecessary if as Shri Satish Chandra contends the language of Section 518 itself has to be construed very widely and if in view of the use of the words " any other matter " in Section 518, the court can do in a voluntary winding up anything that can be done in a compulsory winding up. The specific cases to which Sri Satish Chandra invited my attention are clearly distinguishable and were concerned with reliefs such as stay of winding up or other proceedings, an order for delivery of property and the like where the court's help is inevitable. I am, Therefore, unable to accept the plea of Sri Satish Chandra that even while the company was under voluntary winding up it was open to the liquidator to have filed an application u/s 446 and that, Therefore, the right to make an application u/s 446 in this case had accrued even as early as April 27, 1973.

14. Learned counsel next contended that if it is held that Section 518 would not enable the voluntary liquidator to apply u/s 446 then the position would remain unchanged even after the winding up had come under the supervision of the court. He invites my attention to Section 526 and points out that an order of the court bringing a winding up under the supervision of the court does not enlarge the powers of the liquidator. In fact, in spite of the supervision order, the same liquidators may continue and u/s 526(1) they would continue to exercise their powers without the sanction or interference of the court as if the company were in voluntary winding up. Thus, if the voluntary liquidator was not in a position to file an application u/s 446, the position of the liquidator after the matter was brought under court supervision (even if he be the official liquidator) is no different. In support of this contention, learned counsel referred to the decision of Avadh Behari J , in V. Rajaraman v. Hindustan Brown Boveri Ltd. [1975] 45 Com Cas 184 where it was held that in a winding up subject to the supervision of the court the liquidator can file a suit without the sanction of the court and that too in the winding up court itself u/s 446.

15. This is no doubt an interesting argument but this again, in my opinion, is based on a fallacy. Section 526(1) merely enables the liquidator to exercise his powers without the sanction or intervention of the court. But Sub-section (2) of Section 526 specifically says that such a liquidator can also invoke all the powers which the court could exercise in a compulsory winding up. In my opinion, the true nature of a winding up subject to the supervision of the court has to be gathered from the provisions of Sections 523 and 526(2). Section 523 provides that a petition for the continuance of a voluntary winding up subject to the supervision of the court shall for the purpose of giving jurisdiction over suits and legal proceedings, be deemed to be a petition for winding up by the court. Section 526(2) goes further to lay down that an order made by the court for a winding up subject to the supervision of the court shall be deemed for all purposes to be an order for winding up by the court. In my opinion, this is a complete answer to the plea of Sri Satish Chandra. The above provisions enact statutory fictions that have to be given their full effect. The result will be that when an order is made to bring a voluntary winding up subject to the supervision of the court, it is as if a winding up order by the court has been passed.

Thereupon the liquidator can invoke the powers of the court u/s 446. It is to be noticed in this context that both Sections 523 and 526 make a special reference to the powers of the court in regard to all suits and proceedings. Unlike Section 518 which confers qualified rights on the liquidator in a voluntary winding up to move the court, the language of Sections 523 and 526 is very much wider and makes it clear that a liquidator appointed in a winding up subject to the supervision of the court whether appointed by the parties or by the court u/s 514 or 515 has the rights of an official liquidator vis-a-vis Section 446. I am, Therefore, of opinion that in the present case a right to apply to the court u/s 446 seeking the recovery of the amounts due from the respondents was not available to the voluntary liquidator but became available for the first time only to the liquidators appointed when the matter came under the supervision of the court on November 12, 1975. On the strength of Article 137 of the Limitation Act, Therefore, the application could be presented at any time within three years thereafter. In this case, the application was presented on July 14, 1978 and was, Therefore, well within time.

16. Before concluding I may point out that in the present case strictly speaking, it is not even necessary to go into the question urged by Sri Satish Chandra as to whether the voluntary liquidator was competent to maintain an application u/s 446 or whether the liquidator became so competent when the matter came under supervision of the court on November 12, 1975, It seems to me that there is a simple and direct answer to the respondent's case if Sections 523 and 526 and 458A are read together. Even if we take, as argued by Sri Satish Chandra, that the voluntary liquidator could have applied u/s 446 and that the right to apply under that section arose on July 24, 1973, Section 458A provides that in computing any period of limitation prescribed for any application on behalf of the company, the period from the date of commencement of the winding up to the date of the winding up order should be excluded. In the present case, there is no dispute and indeed there cannot be any, that the date of the commencement of the winding up was April 27, 1973, when the company resolved to go into liquidation voluntarily (Section 441). The objection of the respondents that Section 458A cannot be applied because there is no winding up order is effectively answered by Section 526. Since this section states in clear terms that the order bringing the winding up under supervision of court shall be deemed to be a winding up order for all purposes of the Act, the date of the winding up order in the present case for purposes of Section 458A has to be taken as November 12, 1975. It, Therefore, follows that in computing the period of limitation for the application u/s 446, even if we take the starting point to be April 27, 1973, the period between April 27, 1973, and November 12, 1975, and indeed a period of one year thereafter has to be excluded. If this is done clearly the present application is very much within time.

17. For the reasons above discussed, I am of opinion that the contention of the respondent that the application is barred by limitation is not correct and cannot be upheld. This contention is, Therefore, rejected and the application will now be

listed for hearing on merits on 9th April, 1979.