

## PRIVY COUNCIL

Hansraj Gupta

Vs.

Dehra Dun-Mussoorie Electric Tramway Co. Ltd.

P.C.A.No.86 of 1930

(Lords Blanesburgh Russell of Killowen, J.Sir George Lowndes and Sir Dinshah Mulla JJ.)

16.12.1932

### JUDGMENT

#### LORD RUSSELL OF KILLOWEN J.

1. For the facts relevant to this appeal their Lordships refer to the judgment which was delivered in July last in the Privy Council *Appeal No. 127 of 1930, Hansraj Gupta v. N. P. Asthana* The re-argument, therein foreshadowed, of the appeal No. 86 of 1930, has taken place, and their Lordships now proceed to consider whether all or any of the three sums in question in that appeal (viz., Rs. 27,000, Rs. 35,000 and Rs. 7,703-13-0) are or is recoverable. The principal and most difficult points turn upon the true construction and effect of the Limitation Act, 1908, because their Lordships are of opinion that, apart from any questions of limitation, the three sums in question are all recoverable by the liquidators. This is obviously so as regards the Rs. 7,703-13-0. As regards the other two sums, it was contended by the appellants that these were not recoverable upon the ground that in each case the sum was paid as a deposit or earnest to secure the due fulfillment of a contract, and that since the company in each case made default and failed to carry out the contract, the executors were entitled to retain the moneys. Their Lordships are unable to accept this contention, which depends upon a true view of the construction of the respective contracts. Suffice it to say that, having heard the arguments adduced, and having considered the relevant documents, their Lordships are of opinion that the sums of Rs 27,000 and Rs. 35,000 were not, nor was either of them paid as a deposit or earnest money. They were payments in advance or anticipatory payments, and nothing else. Their Lordships now proceed to consider' the questions of limitation, the solution of which depends, in their view upon the true construction and effect of the Limitation Act, 1908, alone. Decisions in relation to

English statutes do not appear to be of assistance The material section of the Indian Act is Section 3, which runs thus :

"Subject to the provisions contained in Sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by Schedule 1, shall be dismissed, although limitation has not been set up as a defence.

Explanation - A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator."

2. Unless the application which the liquidators made on 26th March 1928, was a "suit instituted "or an "application made,"for which a period of limitation is prescribed by Schedule 1, no question of limitation in regard thereto can arise. There is no definition of suit in the Act, beyond the provision contained in Section 2, that unless there is anything repugnant in the subject or context, "suit "does not include an appeal or an application. The word suit"ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint. The application of the liquidators would not be a suit within Section 3, if that section stood alone, unaccompanied by the explanation. An argument however was addressed to their Lordships, founded upon the Explanation, to this effect : That the Explanation shows by its concluding sentence that a claim against a company in compulsory liquidation (even though made by a proceeding not instituted by the presentation of a plaint), is considered to be a "suit instituted"within those words in Section 3, and that a claim similarly made by or on behalf of such a company must necessarily, or may similarly, be treated as a "suit instituted"within the section.

3. Their Lordships are unable to accede to this contention. Even if such a claim against such a company could be held by virtue of the explanation to be a "suit instituted "within Section 3, there is nothing in the explanation to justify a similar holding in regard to a claim by such a company. But their Lordships do not accept the view that a claim against such a company (not made by a proceeding instituted by the presentation of a plaint) is by virtue of the explanation to be considered to be a "suit instituted "within the section. The explanation is not concerned with the question of what is a suit, or is to be considered a suit within Section 3. It is addressed to quite a different subject-matter. It assumes the existence of a suit which has been instituted by

the presentation of a plaint, and is concerned only with the point of time at which that suit is for the purpose of Section 3 to be treated as being instituted. The ordinary rule is stated by the Explanation to be that the suit is instituted when the plaint is presented; but to this two exceptions are prescribed, viz., (1) in the case of a suit by a pauper, the time at which that suit is (for purposes of Section 3) instituted, is to be taken as an earlier date, viz., the date when the application for leave to sue as a pauper was made; and (2) in the case of a suit against a company which is being wound up by the Court, the institution of the suit is (for the purposes of Section 3) advanced also to an earlier date, viz., the date when the claim was first sent in to the official liquidator. Their Lordships are unable to find in an Explanation, which on its face only deals with the point of time at which suits are instituted within the meaning of Section 3 any sufficient justification for extending the meaning of the word suit in that section. The application by the liquidators cannot therefore be dismissed as being a "suit instituted "after the prescribed period of limitation.

4. The application of the liquidators must therefore be treated as an "application made" under section 3; and the next inquiry must be whether any period of limitation is "prescribed therefore by Schedule 1," Lim. Act. It is common ground that the only Article in that schedule which could apply to such an application is Article 181 : but a series of authorities commencing with *Bai Manekbai v. Manekji Kavasji (1883) 7 Bom 213* has taken the view that Article 181 only relates to applications under the Code of Civil Procedure, in which case no period of limitation has been prescribed for the application. But even if Article 181 does apply to it, the period of limitation prescribed by that Article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding up order, 26th March 1926. The application of the liquidator was made on 26th March 1928, well within the three years. The result is that from either point of view the application by liquidators, if otherwise properly made under and within the provisions of Section 186 Companies Act, is not one which must be dismissed by reason of Section 3 Lim. Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed. The case may be a *casus omissus*. If it be so, then it is for others than their Lordships to remedy the defect.

5. There is however another aspect of the case in which the last mentioned Act plays a most important part, and that is in considering whether the three sums which the liquidators seek by their application to recover from the appellants were at the date of that application "money due" within the meaning of section 186. If they were not, then

the section had no application and the Court would have had no power to make the order which it made. From this point of view it is necessary to treat the three items separately, for the purpose of seeing whether if on 26th March 1928, the liquidators acting under the powers conferred upon them by Section 179(a), Companies Act, had in the name of the company instituted a suit against the testator's executors for the recovery of any of those items, that suit would of necessity have been dismissed by reason of Limitation Act.

6. As regards the Rs. 35,000, this sum, whether paid under a void agreement with the company, or paid without the company's knowledge or authority was (subject to a point to be mentioned later) immediately after payment, recoverable by the company as money had and received. In other words, it was repayable on 13th September 1922. The period within which a suit by the company to recover the amount would have to be instituted is, under Article 62, Schedule 1. three years. The debt was accordingly time-barred both before the date of the winding-up order (26th March 1926) and before 26th March 1928. In regard to the item Rs. 27,000, the company could have recovered this by a suit instituted before the expiry of the period of three years named in Article 51, in Schedule 1, a period which in their Lordships' view began to run on 1st July 1923, when the second shipment of goods fell to be delivered under the relevant contract. This debt was accordingly not time-barred by suit at the date of the winding up order but was so time-barred when the liquidators made their application under section 186.

7. In regard to the item Rs. 7,703-13-10, balance of account, a suit by the company to recover it would fall within Article 85, Schedule 1 and would have to be dismissed if not instituted within three years of 31st March 1924, being the end of the last accounting year on which the last item admitted or proved was entered in the account. This item is in the same situation for the matter now under consideration as is the second item. The important feature for this purpose is the fact that all three items were statute-barred by suit when the liquidators made their application under section 186. If on 26th March 1928, the liquidators, instead of proceeding in their own name as applicants under section 186, had in pursuance of their powers under Section 179(a), already referred to, instituted a suit in the name of the company by the presentation of a plaint, the Court must of necessity have dismissed that suit under the Limitation Act.

8. Now, in considering the meaning and effect of Section 186 it is impossible to overlook the fact that it is verbatim identical with the corresponding section in the legislation of this country, a section which dates back some 70 years to 1862, and

which has appeared in our company legislation ever since. It is therefore a section with an ancestral history. Three features of the section call for notice : (1)It is concerned only with moneys due from a contributory, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it. Moneys due from him are recoverable only by suit in the Company's name; (2)it is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights; (3)the power of the Court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys.

9. The old Section 101 of the English Act of 1862 has ever since 1866 been judicially interpreted and administered in accordance with the views expressed in Stringer's case viz., that the section is one which provides summary proceedings against debtor-contributories to avoid proceedings in different Courts and to permit a single proceeding in the winding-up Courtbut :

"In those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed : Stringer's case at p. 484."

10. In this country it is difficult to conceive, a case in which, so far as limitation is concerned, the section should so operate as to deprive a man of a defence to a claim made by the liquidator which would have been effective against the same claim if brought against him by an action in the company's name. Whether, in view of the particular terms of the Limitation Act already referred to, such a case could happen in India depends upon the meaning to be attributed to the words in the section "any money due from him or from the estate of the person whom he represents to the Company."And their Lordships are satisfied that the position in this respect is, in India, the same as in this country, for the reason that in view of the place and context in which these words are found, they must be confined in their Lordships' judgment to money due and recoverable in a suit by the company, and they do not include any moneys which at the date of the application under the section could not have been so recovered.

11. Their Lordships are glad to find that this view has already prevailed in India. In

the case of *Sri Nurain v. Liquidator, Union Bank of India* it was held that a debt time-barred (and therefore unenforceable in a suit) could not be enforced by a summary order under section 186, on the ground that the section does not create new liabilities or confer new rights, but merely creates a summary procedure for enforcing existing liabilities. It is true that so far as can be gathered from the report it would seem probable that the debt there in question had become time-barred before the liquidation began, but the decision is not based upon that fact, but upon a view of the section coinciding with the views expressed long ago in Stringer's case. The learned Judges, in the present case, took the erroneous view that once the winding up commenced there could be no further application of the rule of limitation in regard to any debt due to the company and not then already time-barred. Their Lordships know of no justification for this view. In this respect there is no analogy between the position of a debtor to, and a creditor of, a company in liquidation.

12. The learned Judges also considered that the Lahore case was in conflict with a decision in the Allahabad Court in *Jagganath Prasad v. United Provinces Flour and Oil Mills Co. Ltd.* This however is a misconception. The last-mentioned case had no relation to section 186. It was a case relating to money due on shares in the company which was in liquidation, the liability for which on a winding up became a statutory liability under section 156, Companies Act, 1913. In their Lordships' opinion the case of *Sri Narain v. Liquidator, Union Bank of India* was rightly decided and accordingly there was no power in the Court under Section 186 to order payment to the liquidators of any of the three items in question.

13. The liquidators made a new submission upon the occasion of the re-argument in regard to the sum of Rs. 35,000. They claimed that under section 65, Contract Act (9 of 1872), they only became entitled to recover the Rs. 35,000 when the agreement under which it was paid was discovered to be void, and that this discovery was not made until the litigation which culminated in the judgment of 14th May 1929, so that this right never became time-barred. Their Lordships cannot accede to this contention. In the absence of special circumstances (and none exist here) the time at which an agreement is discovered to be void within the meaning of Section 65 is the date of the agreement, viz., 13th September 1922 : see *Annada Mohan Roy v. Gour Mohan Mullick* Their Lordships are of opinion that this appeal should be allowed and that the decree of 14th May 1929 should be set aside and that in lieu thereof a decree should be made dismissing the application of the liquidators with costs; and they will humbly advise His Majesty accordingly. The respondents must pay the appellants' costs of this

appeal.

Appeal allowed.

Cases Referred.

AIR 1932 PC 240=139 IC 552 (PC).

(1869) 4 Ch 475=20 LT 502=17 WR 654,

AIR 1924 Lahore 53=4 Lah 109=74 IC 600

(1916) 38 All 347=35 IC 159.

AIR 1924 Lahore 53=4 Lah 109=74 IC 600

AIR 1923 PC 189=50 IA 239=50 Cal 929=74 IC 499 (PC).