

SUPREME COURT OF INDIA

Ajay G. Podar

Vs.

Official Liquidator of J.S. & W.M.

C.A.No 4597 of 2008

(S.H. Kapadia and B. Sudershan Reddy JJ.)

22.07.2008

JUDGMENT

S.H. Kapadia, J.

1. Leave granted.
2. A short question which arises for determination in this civil appeal is : whether misfeasance proceedings filed by the Official Liquidator on 1.12.89 under Section 543(1) of the Companies Act stood barred by limitation provided for in Section 543(2) of the said Act.
3. The facts of this case lie in a very narrow compass.
4. On 2.12.83 order of winding up was passed by the High Court. Official Liquidator ("O.L.", for short) was appointed on that day. The period of five years referred to in Section 543(2) of the *Companies Act, 1956* ("companies Act", for short) expired on 1.12.1988. As stated above, misfeasance proceedings were filed by the O.L. on 1.12.89. Therefore, contention has been raised by the appellant that the said proceedings filed on 1.12.89 stood filed beyond limitation as prescribed under Section 543(2) of the said Act. Under the said section the period is five years from the date of the order for winding up or of the first appointment of the liquidator in the winding up.
5. Mr. Shyam Divan, learned senior counsel appearing on behalf of the appellant, submitted at the outset that since limitation is specifically provided for of five years under Section 543(2) of the said Act, it was not open to the O.L. to rely upon and take resort to general limitation provision contemplated by Section 458A of the said Act. He further contended that the non-obstante clause in Section 458A refers to laws other than the Companies Act and consequently Sections 543(1) and (2) constituted a separate Code by itself and, therefore, the said section was not required to be read with Section 458A. Alternatively, he contended that even if one is to read harmoniously Section 458A with Section 543(2), the former is enacted to override the provisions of the Limitation Act, 1963 (for short, "Limitation Act") and not the provision of the Companies Act, 1956. In this connection, learned counsel submitted that

since Section 543(2) of the Companies Act specifically provides for limitation of five years, it is not open to read the said section with Section 458A of the Companies Act so as to extend the period of limitation from five years to six years by adding one more year to the specific period of limitation of five years prescribed by Section 543(2). According to learned counsel Section 543 is a stand-alone provision as it contemplates a right to recover, a forum locus and computation of the period of and, therefore, the said section need not be read with Section 458A and even if it is to be read harmoniously learned counsel submitted that the two sections operate in different spheres, inasmuch as for all non- misfeasance proceedings Section 458A would apply whereas for misfeasance proceedings Section 543(2) alone would apply and if this dichotomy is kept in mind then the period of limitation under Section 543(2) will remain as five years which period cannot be extended by invoking Section 458A of the said Act. In Section 543 there is a reference to other proceedings but in this case we are concerned with the question of limitation and its computation qua only the misfeasance proceedings.

6. Learned senior counsel, next contended that Section 458A, in any event, is not applicable as misfeasance proceedings instituted by the O.L. cannot be said to be proceeding instituted in the name and on behalf of the company. In this connection, learned counsel submitted that the intention of the Parliament in enacting Section 458A is to keep out Section 543(2) from its ambit. That, the non- obstante clause in Section 458A refers to a potential conflict between the provisions of the Companies Act and the Limitation Act or to a potential conflict between Companies Act and any other law for the time being in force. In this connection, learned counsel invited our attention to Section 408(4) of the Companies Act in support of his contention that the words "notwithstanding anything contained in the Companies Act" which find place in the said sub-section do not find place in Section 458A which indicates the intention of the Parliament to treat Section 543(2) as a stand-alone provision applicable to only misfeasance proceedings whereas Section 458A in the matter of computation of limitation would apply to all other non-misfeasance proceedings. Therefore, according to learned counsel, the Parliament did not intend to override vide Section 458A any other provisions of the Companies Act. On the contrary, according to learned counsel, the Parliament vide Section 458A intended to override potential conflict between the Companies Act and the Limitation Act on one hand and any other law for the time being in force.

7. Mr. Puneet Jain, learned counsel appearing on behalf of the Official Liquidator, submitted that Section 458A of the Companies Act supplements Part III of the Limitation Act. He submitted that Section 458A does not extend the period of limitation of five years mentioned in Section 543(2). Learned counsel submitted that on the contrary Section 458A only provides for exclusion in the matter of computation of a period of five years limitation under Section 543(2). Learned counsel submitted as and by way of illustration that if a contributor moves an application in his own name and not in the name of the company and on behalf of the company then Section 458A is not applicable and in such a situation what would apply is Part III alone of the Limitation Act. Therefore, according to learned counsel, there is no merit in the argument advanced on behalf of the appellant that if Section 458A is read with Section 543(2) we are extending the period of limitation from five years to six years. In

support of his contention, mentioned hereinabove, learned counsel placed reliance on Sections 3 and 29(2) of the Limitation Act.

8. Before dealing with the arguments advanced on both sides it would be necessary for us to quote hereinbelow the relevant provisions of the Companies Act, 1956 as it stood at the relevant time which reads as under:

"Powers of liquidator

457. (1) The liquidator in a winding up by the Court shall have power, with the sanction of the Court, --

(a) To institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) To (d) xxx xxx xxx

(e) To do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Exclusion of certain time in computing periods of limitation

458A. 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.

Power of Court to assess damages against delinquent directors, etc.

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, of the liquidator, or of any creditor or contributory, made within the time specified in that behalf in subsection (2), examine into the conduct of the person, director, managing agent,

secretaries and treasurers, manager, liquidator or officer aforesaid, 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 assets 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."

9. On reading the provisions of Section 458A and Section 543(2) of the Limitation Act, we find that there is a clear dichotomy between the concept of the "period of limitation" on one hand and the concept of "computation of that period". Section 543(2) limits the time after which misfeasance or breach of trust proceedings, retainer proceedings and misapplication proceedings becomes time barred. This dichotomy finds place not only in the above provisions of the Companies Act but also under the provisions of Limitation Act. Under Section 2(f) of the Limitation Act, the period of limitation is required to be computed in accordance with the provisions of that Act. Further, the Limitation Act not only prescribes the period of limitation for different types of suits and applications but it also further provides for computation. If any period of limitation is to be excluded from the prescribed period of limitation the party has to satisfy any of the appropriate provisions in Sections 4 to 24 of the Limitation Act. The law of limitation is a procedural law. It is addressed to the commencement of a proceeding.

10. In the case of *Kosana Ranganayakamma vs. Pasupulati Subbamma* - AIR 1967 AP 208, it has been held that though the schedule to the Limitation Act did not prescribe any period of limitation for an application under Section 417(3) Cr.P.C. 1898 and even though Section 417(4) of that Code prescribed a different limitation within the meaning of Section 29(2) of the Limitation Act still by virtue of Section 3, the other Sections 4 to 24 of the Limitation Act applied to all applications under Section 417(3) of the 1898 Code.

11. Coming to the provisions of the Companies Act, we find that although Section 543(1) & (2) provides for locus and forum, there is no provision for computation of the period of limitation. We are proceeding on the basis that Section 543(2) provides for a different limitation than the limitation prescribed under Article 137 of the Limitation Act. However, Section 543(2) does not rule out the applicability of Sections 12 to 24 in Part III of the Limitation Act. Part II of the Limitation Act deals with limitation of suits, appeals and applications whereas Part III deals with the computation of period of limitation. Similarly, in our view Section 543(2) deals with limitation for applications/claims mentioned in Section 543(1) which includes misfeasance proceedings whereas the computation of the period of five years is contemplated by Section 458A of the Companies Act.

12. In our view, there is no merit in the contention advanced on behalf of the appellant that by virtue of Section 458A the period of limitation is extended by one year. Part III of the

Limitation Act excludes certain circumstances mentioned in Sections 12 to 24 for computation of the period of limitation. Similarly, Section 458A provides for an additional circumstance which is not there in the Limitation Act which is required to be taken into account as an item of exclusion in the matter of computation of the period of Limitation of five years prescribed by Section 543(2). That circumstance is a period spent between the date of commencement of winding up of the company and the date on which the winding up order is passed plus one year therefrom. If this period of limitation is to stand excluded it is only by virtue of Section 458A which circumstance is not contemplated by Sections 12 to 24 of the Limitation Act. Just as a different period of limitation is prescribed for misfeasance proceedings vide Section 543(2) so also vide Section 458A a special circumstance is indicated as an item of exclusion of certain time in computing the period of limitation. Therefore, there is no conflict between Section 458A and Section 543(2) of the Companies Act. If so read, there is no extension of the period of limitation of five years as contended on behalf of the appellant. In our view, Section 458A excludes the period between the date of commencement of winding up of the company and the date on which the winding up order is passed plus one year therefrom. Therefore, it is a case of exclusion and not extension of the period of limitation of five years prescribed under Section 543(2) of the Companies Act.

13. Learned counsel for the appellant placed heavy reliance on the judgment of the Karnataka High Court in the case of *Kabini Papers Ltd. vs. M.D. Shivananjappa and others*¹ in which it has been held that the period of five years, prescribed under Section 543(2) of the Companies Act for initiation of proceedings by O.L., cannot be extended by adding periods mentioned in Section 458A. In our view, the judgment of the Karnataka High Court, with respect, is not correct. It has failed to take into account the dichotomy between the two concepts, namely, "the period of limitation" and "its computation". Moreover, as stated above, Section 458A provides for exclusion of the period between the commencement of winding up proceedings and the date when the winding up order is passed plus one year therefrom. This is the circumstance of exclusion. Therefore, as stated above, there is no question of extension of the period of limitation of five years as prescribed by Section 543(2).

14. In the case of *Fabrimats (Madras) P. Ltd. (In Liquidation), In re./Official Liquidator vs. Best and Crompton Engineering Ltd.*² it has been held by the Madras High Court that Section 458A of the Companies Act is of universal application and does not contemplate any qualification or exception to the calculation indicated therein regarding exclusion of the aggregate of two periods mentioned therein, namely, the period from the date of commencement of winding up proceedings to the date of the order of winding up and one year immediately following such date of order of winding up. We are in agreement with the view expressed by the Madras High Court in the said judgment.

15. One of the contentions advanced on behalf of the appellant is that Section 458A is not applicable to misfeasance proceedings instituted by the O.L. as such proceedings are not in the name and on behalf of a company which is being wound up by the Court. In this connection, reliance is placed on Section 458A which prescribes the mode of computation of

the period of limitation for any suit or an application in the name and on behalf of a company which is being wound up by the Court. Therefore, it is sought to be argued that misfeasance proceedings instituted by the O.L. is neither a suit nor an application in the name and on behalf of a company which is being wound up by the Court. We find no merit in this argument. If book-debt is assigned by the company to a bank which fails to file a suit for recovery of money within the time prescribed under the Limitation Act, it would not be open to O.L. to institute the suit under Section 458A because in that event the O.L. is said to have filed a suit not on behalf of the company but on behalf of the bank. It is to such cases that Section 458A will not apply. In the present case, the O.L. was authorized to take steps to recover assets both financial and other assets by the company court under the winding up order. It is pursuant to that authority that the O.L. has instituted the misfeasance proceedings for recovery on 1.12.89. The said proceedings have been initiated in the name of the company and on behalf of the company to be wound up. The name of the applicant, indicated at page no.27 of the appeal paper book, shows that the O.L. has filed misfeasance proceedings in the name of the company and on behalf of the company. Therefore, in our view, Section 458A is squarely applicable to misfeasance proceedings instituted by the O.L. in the name of the company and on behalf of the company in liquidation. Once an application is made in the name and on behalf of the company, Section 458A would become applicable. On this aspect more provision needs to be mentioned. Section 457 deals with powers of liquidator. Under Section 457(1) the liquidator, in a winding up by the Court, has the power with the sanction of the Court to institute any suit prosecution or legal proceedings in the name and on behalf of the company. In the present case the winding up order indicates that the company court had granted such a sanction and the misfeasance proceedings have been instituted by the O.L. in terms of Section 457(1)(a) of the Limitation Act. The claim on behalf of a company (in liquidation) filed by the O.L. is in the form of application though it is really a plaint and hence it cannot be stated that the misfeasance proceedings are proceedings instituted by the O.L. in his own independent right. Once it is held that the said application is in the nature of a plaint then Section 457 of the Companies Act would apply. Section 458A of the Companies Act is intended to extend the limitation period for the benefit of the company (in liquidation) and the O.L. appointed to carry on its winding up process by collecting the assets and distributing the same among those entitled to the same. The underlying object in extending the limitation is to enable the O.L. to take charge of the affairs of the company, to examine the records, account books, to study the annual statements and accordingly proceed to recover and collect the assets. He has also to find resources for conducting the proceedings. The proceedings initiated by him by way of judge's summons or suit for enforcement of the recoveries, cannot but be on behalf of the company having regard to his source of authority, viz., the provisions of the Companies Act and the statutory obligation in discharge of which he has to act in this behalf. The said Act does not contemplate his acting in the matter of recoveries excepting as O.L. and excepting on behalf of the company.

16. Before concluding, we may state that learned counsel for the appellant placed reliance on the judgment of the Orissa High Court in the case of *B. Pattnaik Mines (Pvt.) Ltd. vs. Bijoyananda Pattnaik and others*³, in which it has been held that when the liquidator or a creditor or a contributory makes an application under Section 543 he does not do so as

representing the company but in his own independent right. As against this judgment, learned counsel for the respondents (O.L.) cited before us the judgment of the Bombay High Court in the case of *Gleiltargor (India) P. Ltd. and H.S. Kamlani, Official Liquidator vs. Mazagaon Dock Ltd. and others*⁴ which has taken the view that the proceedings initiated by the O.L. for recovery cannot but be on behalf of the company and that the Companies Act does not contemplate his acting in the matter of recoveries excepting as O.L. and excepting on behalf of the company. In our view, in the light of what is stated above we approve the judgment of the Bombay High Court in the case of *Gleiltargor (India) P. Ltd.* (supra) and we further hold that the judgment of the Orissa High Court in the case of *B. Pattnaik Mines (Pvt.) Ltd.* (supra) is not correct. We may further state that the view taken by the Bombay High Court also finds support in the case of *Official Liquidator vs. T.J. Swamy and others*⁵ in which the Andhra Pradesh High Court has held that misfeasance proceedings are proceedings initiated by the O.L. in the name of and on behalf of the company (in liquidation).

17. Therefore, in our view, Section 458A of the Companies Act, dealing with computation of the period of limitation, has to be read with Section 543(2) of that Act.

18. For the aforesaid reasons, we find no merit in this civil appeal and the same is accordingly dismissed with no order as to costs.

¹1999 (98) *CompCas* 675

²1982 (52) *CompCas* 501

³1994 (80) *CompCas* 237

⁴1985 (57) *CompCas* 742

⁵1992 (73) *CompCas* 583