ALLAHABAD HIGH COURT

Benares Bank Ltd

Vs

Shri Sri Prakasha Bhagwan Das

(Braund,J.)

07.11.1945

JUDGMENT

Braund, J.

1. We are to decide an important preliminary issue bearing on a misfeasance application under Section 235, Companies Act, 1913, in the matter of the Benares Bank Ltd., in liquidation. For this purpose it is enough to say that the Official Liquidators have launched misfeasance proceedings under the section against a number of directors and officers, and former directors and officers, of the bank in respect of transactions which took place some years before the liquidation began, and it is material to the disposal of a number of these charges to enquire what period of limitation applies. The winding up petition was filed on 3rd August 1939. A provisional liquidator was appointed on 14th February 1940, and the compulsory winding up order, under which the Official Liquidators were appointed, was made on 1st March 1940. This misfeasance application was filed on 12th February 1943. It was, therefore, within three years from the date of the appointment of both the Provisional Liquidator and the Official Liquidators. Section 235(1), Companies Act, 1913, (as now amended) is the section under which the Official Liquidators moved. It runs: 235. (1) Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may he, whichever is longer, examine into the conduct of the promoter, director, manager, liquidator or officer, 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.
The words in italics are those which were introduced by the amending Act of 1986. Having

brought these proceedings, therefore, within three years from the date of the appointment of the Provisional Liquidator, they were clearly within the actual terms of the section as amended. It is said, however, that this is not enough. It is suggested that not only must the misfeasance proceedings themselves be launched within the period, prescribed by Section 235(1), but the act of misfeasance on which the claim is based must in this case at any rate, be such that a claim, on it was not already barred, at the date of the commencement of the proceedings, or alternatively at the date when the amendment took effect, by the ordinary law of limitation applicable to it. To explain this, it is necessary to set out some of the history of Section 235(1) of the Act as it now stands. Section 235, Companies Act, 1913, as it originally stood in the Act, was differently designed. Sub-section (1) of the original section, following the English Act, contained no express provision as to the time within which an Official Liquidator, a creditor or a contributory was to, or might, move under the section; but the section, unlike the English Act, contained an express sub-section - Sub-section (3) - which said that:

(3) The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit.

2. In 1936 the Act as a whole was substantially amended; and, among other amendments, Section 235(1) was enlarged by introducing into it a time limit of three years within which the Official Liquidators, a creditor or a contributory should, or might, launch misfeasance proceedings, while Sub-section (3), as it stood in the old section, was removed altogether. That is what has given rise to the issue we now have to decide, which is:

> Whether the amendment of the Companies Act in 1936 enables the Official Liquidators of the Bank to claim compensation for any wrongful act Of any respondent in any case in which the remedy under the said Section 235 had become barred before such amendment.

3. This question is not an easy one; but I think that it may become less difficult than at first sight it appears to be and may serve to avoid irrelevance if an attempt is made at the outset to see what it really is. In my view, it can be reduced, if not to simple, at least to short terms. The case for the respondents is twofold. They say first that the time limit of three years in the amended Section 235(1) is not an "enlarging" amendment, but is, on its true construction as it now stands, an amendment restricting the Official Liquidator's power by imposing on him a new condition, without depriving the objects of his suspicion of the benefit of the ordinary law of limitation. Alternatively, the respondents say that even if, as a matter of construction, that is not the meaning of the amendment, then in that case the amendment, which came into force on 15th January 1937, cannot on general principles have a retrospective operation so as to deprive them of any concluded period of limitation which at that date might have been available to them as a defence to the claim under the unamended Act.

4. Both these contentions, when examined, resolve themselves to my mind into questions

involving nothing but the true construction of Section 235 as now amended, and I think that, if this is recognized, it may obviate the risk of arguing in a circle. As regards the former of these two contentions, I think it can, and should, be dealt with shortly. The point raised is that the amendment of 1936 has only introduced a new factor into the liquidator's procedure, namely, that without prejudice to any other term of limitation that may be available to the respondents, he has to make his application to the Court within three years of the date of the first appointment of the liquidator or of the misapplication, retainer, misfeasance or breach of trust, as the case may be. This argument seems to be founded on a view taken of the construction of the unamended Section 235(1) of the Act that it creates in favour of the liquidator no new right or cause of action which the Company itself did not possess, and accordingly that under the old Act the period of limitation, whatever it was, ran from the date of the misfeasance, and not from the date of the winding up. Of this view the most authoritative pronouncement, in this Court at any rate, is that of the late Sir Shah, Muhammad Sulaiman in our Full Bench case in Shiam *Lal Diwan v. Official Liquidator U.P. Oil Mills Co. Ltd*[1]. That view expressed in 1933 was the last word in this Court on the construction of the old Act, though it was not arrived at without dissent. We should, I think, be bound by the decision of this Full Bench case. But as I see the matter, it is not really necessary for us to consider those authorities which were decided on the construction of Section 235 as it stood before the amendment in 1936.

5. It may well be, though with deference, I should desire to reserve any concluded opinion on the point, that under the old Act the liquidator, when he was appointed, merely took up the position as he found it, and, when he made an application under Sub-section (1) of Section 235, Companies Act, did so merely in respect of a cause of action which had been available throughout to the Company and was accordingly governed by a period of limitation beginning at the moment that the misfeasance was committed. But it was obviously and expressly intended under the old Act that a period of limitation should apply, since otherwise no function could be assigned to Sub-section (3) of Section 235 and the only question was as from what moment that period of limitation should run. It is, nevertheless, worth noticing that even in the Full Bench case the late Sir Shah Muhammad Sulaiman went so far as to say at p. 296 of his reported judgment that, had there not been any express period of limitation contained in the old section, it would have been at least doubtful whether any period of limitation at all would have applied and whether, in that case, the Court, in exercising its jurisdiction under the section, would not be thrown back merely on its discretion. That may be a material observation in view of the circumstance that, as we have seen, the express period of limitation was deliberately removed from the section in 1937.

6. In the view I take the first part of the argument addressed to us is sufficiently answered by the fact that the Legislature, when it made the amendment of 1936 which took effect in 1937, went out of its way to remove Sub-section (3) from the old section altogether. If the Legislature in doing that did not intend in the case of those liquidations to which the amendment was to apply, to remove from the liquidator's path all obstacles of limitation other than those which were

expressly contained in the amended section itself, then I cannot understand what object the Legislature could have had in doing away with the old Sub-section (3). Nor is it, to my mind, in the least unreasonable or illogical that it should have taken the view that it was anomalous and contrary to the public interest that directors at least, and probably other officers of the company, should be protected by a period of limitation running prior to the liquidation during a period when they themselves were in control of the company and had both the opportunity and incentive to conceal their own misdeeds. There seem to me to be no such general reasons applicable to Section 235 as led the Board in *Hansraj Gupta v. Dehra Dun Mussoorie Tramway Co. Ltd*[2]. to say that in England it was difficult to conceive a case in which, so far as limitation was concerned, the section (i.e., Section 186, Companies Act) 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.

7. The case of a claim against a debtor-contributory seems to me to provide no parallel in this respect to a claim for misfeasance against a delinquent director or officer. Moreover, the decision in *Hansraj Gupta v. Dehra Dun Mussoorie Tramway Co. Ltd*[3]. turned largely on the meaning of the words "money due." I do not overlook that, in the construction also of Section 276 of the English Act of 1929, of which Sub-section (1) of Section 235 of the Indian Act, before amendment was an exact copy, it has been held that no new cause of action accrued to a liquidator on his appointment. But, in construing the effect of the amendment of 1936 in the Indian Act, that does not, in my opinion, overcome the significant circumstance that the Legislature in India has expressly removed one period of limitation in favour of another. Having regard to the language of the Indian section and to the amendment of 1936, it appears to me to be impossible to say that the Legislature in doing what it did should have intended to preserve the old position under which Sub-section (3) would in effect continue to exist with only a superadded requirement that the liquidator should move within a specified time after his appointment. If that were so, I cannot see why Sub-section (3) should have been removed. As I have already said, I think that the question before us is one to be decided on the construction of the Indian section as it now stands and that neither authorities on the unamended Section 235 of the Indian Act, nor on Section 276 of the English Act, are of any real assistance to us. For these reasons, in my view, on the true construction of Section 235(1), Indian Companies Act, 1913, asit now stands, the only period of limitation to be applied, in cases governed by the amended section, is that contained in Sub-section (1) itself. That of course, does not mean that the section has ceased to be a discretionary section. The jurisdiction of the Court remains discretionary. And it may be that in a proper case, the Court might still view lapse of time as a sufficient reason for refusing to exercise its discretion in the liquidator's favour. But that is not the question now before us, and nothing I have said above is intended to prejudice any discretion the Court might be free to exercise on any ground in any proceedings under section 235.

8. The second of the two questions is more difficult. Assuming that the amended Section 235(1), Companies Act, 1913, removes from the liquidator's path all obstacles of positive limitation (as

opposed to the Court's discretion) in respect of his inquiries and claims as to misfeasance against directors and other officers except the conditions of the sub-section itself, it remains to be considered whether, in the circumstances in which the old Section 235 has been amended in India, it has had the effect of throwing open to the Court's scrutiny, at the instance of the liquidator, a creditor or contributory, a claim which had already become time barred either at the date when the amendment took effect or when the winding up order was made. Again, I think that, in the final analysis, the question reduces itself strictly to one of the meaning of the amendments of Section 235 made in 1936 by the Indian Legislature, construed in the light of the general leaning of the Courts against the retrospective intendment of a statute to the prejudice of the subject. This is important because there has been a great temptation, as has been illustrated in this case, to refer to innumerable authorities in which Courts have refused to apply a retrospective construction to particular amendments in particular cases and from these to argue that the amendment of Section 235, Companies Act, cannot possibly have a retrospective operation to the prejudice of a delinquent director or officer. In my view this reasoning is dangerous. Nobody doubts that any statute, or an amendment of a statute can affect the subject in respect of past transactions to his prejudice. It may, and often does, go so far as actually to say so, in which case there is no possible doubt. Or it may, as a matter of pure construction be so evident that it intends to do so, that there is equally no doubt. The real question in all cases is whether, in any particular case, the Legislature has, on a proper construction, expressed or sufficiently implied its intention of giving a retrospective force to its act. It is not to be doubted, however, that, in considering what is a proper construction of any particular act of the Legislature, it is an accepted principle that in the case of an alteration of a substantive law as opposed to a mere law of procedure, an intention adversely to affect the subject, in the sense of depriving him of some accrued right or interest is not to be deduced, unless that intention is either express or plainly to be inferred.

9. We have spent much time during the hearing of this case in arguing whether, because other particular amendments of other particular statutes have been held not to have had a retrospective operation, the same effect ought to follow in the case of the amendment of Section 235, Companies Act, in 1936. I accept, as I must, in their entirety the principles laid down in innumerable cases, in this and other Courts that the effect of an amendment of a statute is not to take away accrued rights, immunities and privileges, unless an intention to do so is clearly found in the amending Act. But, beyond establishing that, I doubt if these cases have been helpful to us. They may have rather served to draw our attention away from the fact that the solution of the question before us is to be found within the amended Section 235 itself, with the assistance perhaps of a consideration of the circumstances in which the amendment was enacted.

10. The 1936 amendment of Section 235, Companies Act, is not in one sense retrospective at all as regards any liquidation (such as that of the Benares Bank Ltd., in this case) which came into being after its introduction. The amended Companies Act after 15th July 1937, constituted, so far as winding up was concerned, the Code to be applied by a liquidator. When the Bank's liquidator

was appointed it was the amended Section 235 that contained the procedure which governed him ill respect of his inquiries into misfeasance. There was in that sense nothing retrospective about the amendment as regards his liquidation. The question really is not whether the procedure itself as prescribed by Section 235 is retrospective, but whether what it says, on its true construction, permits a liquidator to ask the Court to make inquiries and to compel compensation in respect of acts of misfeasance which had become time barred under the law as it stood prior to 15th July 1937. Section 235(1) of the Act as it now stands is silent on the question. It obviously contemplates the investigation of past transactions, because it specifically refers to past directors. And, in terms, it assigns no limit to the Court's scrutiny of the past. Moreover, the fact that what Court makes is an 'examination,' and on the result of that examination is given a discretion to compel the object of its examination to pay what it 'thinks just,' points to the jurisdiction under the sub-section being more in the nature, if I may use the expression, of an equitable jurisdiction than a jurisdiction circumscribed by any hard and fast rule of law of limitation. Take the case of the 'retention' of money by a past director, which is one of the matters specifically mentioned in the section. It could hardly be doubted, on the wording of the amended section, that it was open to the Court to hold it to be 'just' that the director should refund what he had retained, however long he had retained it. Could a Court of Appeal reverse such an exercise of discretion merely on the ground that some statute of limitation had been infringed, without regard to whether the decision was the 'just' one in the particular circumstances of the case or not? I think not. It seems to me, therefore, that the Legislature, in construing the amended Sub-section (1) of Section 235 of the Act, very deliberately, entrusted everything to the Court's discretion in the sense that the test was to be what was 'just', and not what was legally recoverable at any particular time. And that it has been its special object to bring defences of limitation within the ambit of the Court's discretion is, I think, underlined by the very deliberate removal of the period of limitation formerly contained in Sub-section (3)

11. But this, of course, does not prevent anyone from saying that, even if this is now the law, it is insufficient to deprive a delinquent director or officer of any protection already secured to him. There are, I think, three general propositions which are supported by too great a weight of authority now to be contradicted. The first is that the whole of the process prescribed by Section 235 Companies Act, to be followed by a liquidator in respect of the investigation of misfeasance in a winding up is itself a matter of "procedure," secondly, that a law of limitation fixing a period within which a particular remedy is to be enforced, if at all, by a suit is itself a matter of "procedure;" and, thirdly, that the general principle that statutes are not to be held to act retrospectively unless an express intention to that effect is manifested applies only where the matter in question is one affecting an existing right in the sense of a substantive right, and not where it affects a mere matter of procedure only. High authority for the first of these propositions is to be found in In re City Equitable Fire Insurance Co. (1925) 1 Ch. 407 at p. 527 in the words of Sargant L.J. in which he says:

...As to this the decision in Coventry and Dixon's case (1880) 14 Ch. D. 660 and *Covendish*

Bentinck v. Fenn[4] conclusively established that Section 215, Companies (Consolidation) Act, 1908, which corresponds in almost precise words with the old Section 165 of the Act of 1862...and is the equivalent of Section 276, Consolidation Act of 1929...is a procedure section only, and merely provides a summary remedy for enforcing in the liquidation of a Company such liabilities as might have been enforced by the Company itself, or by its liquidator, by means of an ordinary action....

12. Section 235, Companies Act, 1913, is, therefore, itself a procedure section. To the same effect is what is said by Lord Eussell of Killowen on appeal from this Court in *Hansraj Gupta v. Dehra Dun Mussoorie Tramway Co. Ltd. ('33) 20 A.I.R. 1933 P.C. 63*(SUPRA)at p. 1078 in which he is dealing with Section 186, Companies Act. He says:

> ... It is, therefore, a section with an ancestral history. Three features of this section call for notice.
>
> (2) It is a section which creates a special procedure for obtaining payment of monies....

13. Sir Shah Muhammad Sulaiman in his judgment in Shiam Lal Diwan v. Official Liquidator U.P. Oil Mills Co. Ltd. ('33) 20 A.I.R. 1933 All. 789 observes, this time in reference to Section 179, Companies Act, 1913, that wherever the liquidator files a suit or takes legal proceedings, civil or criminal, he must take or file them "in the name and on behalf of the company" and that he does not do so in his personal capacity. That, no doubt, was true. And it is equally true that, where a liquidator puts into motion in a winding up the machinery for investigating misfeasance, he is investigating a cause of action which it was before its liquidation open to the company itself to have proceeded on. Neither of these two propositions are open to dispute. But neither of them has, as I see it, the slightest bearing on the view that Section 235, Companies Act, 1913, is itself & purely procedural section. It is by over looking this that the difficulty has arisen. The liquidator is not bringing a suit. On the contrary he is employing the special procedure prescribed for him; and, notwithstanding that he seeks to have investigated soma cause of action which the company itself might, but for the liquidation, have en-forced, it is a confusion of thought to say that the special statutory procedure prescribed for the liquidator, must necessarily be limited by all those rules of law which would be applicable if the company itself had brought the suit. It is the preservation of the Court's discretion which takes the place of the rules of law. Nor can I see anything in any way shocking in the general principle that, in relation to misfeasance proceedings in a winding up, a special procedure should apply in favour of the liquidator and against a malfeasant director. There seems to me, therefore, no doubt that Section 285 itself is a procedural section. Nor can it be doubted that a law of limitation is itself a law regulating procedure. It is adjective and not subjective law. The late Sir Shah Sulaiman and Mr. Justice Mukerji were in the fullest agreement on this, since the latter in the case in *Jaunpur Sugar Factory Ltd. v. Behari & Co*[6]. at p. 951 said: The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of the acquisition of title to

immovable property by prescription. Thus where the recovery of a debt is barred by lapse of time, the right to the debt is not extinguished....
And Sir Shah Sulaiman himself at p. 919 of his judgment in *Shiam Lal Diwan v. Official Liquidator U.P. Oil Mills Co. Ltd*[6]. expresses himself as in full agreement with that. Nor could it be otherwise. Section 235, therefore, is itself a section of procedure containing a rule of limitation which, together with the rule of limitation contained in the old unamended section, was "adjective" and not "substantive" law. The same view was accepted by two other Judges of this Court in *Tej Bahadur v. Radha Kishan-Gopi Kishe*[n7] who, having been referred to numerous authorities for the proposition that a statute of limitation was a law of procedure and that ordinarily it was retrospective in its operation, declined to discuss the matter further inasmuch as they "unhesitatingly accepted this proposition of law." The third of the propositions which I regard as established is as the proposition itself that, in the case of a law of mere procedure, a Court is not bound before applying it so as to act retrospectively, if it believes that to be its proper construction, to find express words or a necessary intendment to that effect. That was established once and for all by the Judicial Committee of the Privy Council in *Colonial Sugar Refining Co. Ltd. v. Irving*[8] - a case which has repeatedly been used since by the Board itself.

14. Applying these three principles, we can reach a comparatively simple solution to this question. The procedure prescribed to be followed in the winding up prior to 1936 by a liquidator in relation to misfeasance was that of the unamended Section 235, Companies Act, 1913, which included an express period of limitation. Both before the date of the commencement of the winding up of the Bank in this case and before the filing of the misfeasance proceedings with which we are now concerned, the Legislature had provided a new procedure by which it expressly removed one procedural rule of limitation and substituted another. When, therefore, the Bank's Official Liquidators were appointed in 1940 and when they started their misfeasance proceedings under Section 235, they were governed by the latter procedure and by nothing else. They could lawfully have applied none other. And the sole question which we now have to decide is whether the law contained in the amended Section 235, Companies Act, 1913, enables them to obtain the reopening of a question relating to misfeasance which may have become barred under the old law. In construing the amended Section 235 for this purpose we are, on the authority of Colonial Sugar Refining Co. Ltd. v. Irving (1905) 1905 A.C. 369, not bound to presume that the amendment cannot have a retrospective effect unless an express, or some virtually express, declaration or indication of intention is to be found in it. We are free to construe the Act as we find it in the light, both of the language and of the circumstances in which the amendment wa8 made : Ex parte Raison (1891) 60 L.J.Q.B. 206. It is as clear as anything can be that the 1936 amendment of Section 235, Companies Act, 1913, was intended to affect the position of delinquent directors, and to affect it adversely. No other conclusion can be drawn from the removal from the section of Sub-section (3). But a great deal more than that is to be inferred from this alteration made in the law of procedure. It is clear that the Legislature deliberately swept away the protection of Sub-section (8) of the old Act and substituted a new and limited protection for it. It went out of its way to do this. The Legislature put no words, either

general or special, in the amending enactment for the purpose of, preserving the protection of the old law of procedure in favour of delinquent directors and others whose misdeeds had not yet been discovered. It might very well have done so; but it did not. The Legislature, therefore, accepted the position, as it seems to me, that the procedure of the amended Section 285 should apply to every misfeasance that was thereafter discovered or discoverable. Nor, to my mind, is there anything in the slightest unreasonable about this.

15. It cannot be contended that the benefit of some particular procedure was a "legal" or "vested" or "substantive" right or interest to which every director or officer of a Company was entitled. He had no vested interest in the maintenance of any particular law of procedure. And there is little or nothing to be said against the justice of the Legislature's view that, no matter when a director of a company or an officer of a company commits an act of misfeasance, he shall, subject to the discretion of the Court, be answerable for it at any distance of time, And finally, perhaps the strongest point in the whole argument is the fact that Section 235, Companies Act, 1913, is still a discretionary section. There is nothing whatever to prevent the winding up Court from taking the view in any particular case - even applying the analogy of a statute of limitation - that it would be unjust in that particular case to hold a director or officer liable for some act of misfeasance which took place long ago. That alone seems to be a sufficient answer to those arguments which seek to clothe the respondents in this case with some prescriptive immunity by applying the principles of equity on which the doctrine against the retrospective effect of statutes or amendments ultimately depends. In none of the many cases to which we have been referred, in which Courts have refused to give a retrospective effect to such statutes or amendments has the circumstance been present that, even if you deprive the respondent of the benefit of the positive law of limitation, he is still deliberately protected by the discretion of the Court. And conversely, the public interest may be manifestly benefited by the amendment.

16. I need not deal at length with the argument based on Section 6, General Clauses Act, except to say that with respect I entirely agree with the late Sir Shah Muhammad Sulaiman that it does not apply to cases in which there has been a repeal followed by fresh legislation : *Danmal Parshottam Das v. Babu Ram Chhotey Lal ('36) 23 A.I.R. 1936(Supra)* All. 3 at p. 504. In this case there has not, in form at least, been even a repeal. For these reasons, in my judgment, the issue before us now ought to be answered by saying that, notwithstanding the amendment of Section 235, Companies Act, 1913, effected in 1936, the Official Liquidators of the Benares Bank are entitled to have the conduct of any promoter, director, manager or officer of the Bank examined under that section and to claim compensation for the wrongful act of any such person, discovered and proved as a result of such inquiry, notwithstanding that a cause of action on the act would in a suit by the company itself have been barred by the law of limitation in force prior to the coming into operation of the amendment, provided nevertheless that the express provisions as to limitation of the amended Section 235(1), Companies Act, 1913, are themselves observed.

Wali Ullah J.

17. I agree and have nothing to add.

Cases Referred.

1('33) 20 A.I.R. 1933 All. 789
2('33) 20 A.I.R. 1933 P.C. 63 at p. 1079
3('33) 20 A.I.R. 1933 P.C. 63
4(1887) 12 A.C. 652
5('33) 55 All. 947 (F.N.)
6('33) 20 A.I.R. 1933 All. 789
7('36) 23 A.I.R. 1936 All. 858 at pp. 1375-6
8(1905) 1905 A.C. 369 at pp. 372-78