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(1978) 80 BOMLR 685

Bombay High Court

Case No: Company Application No. 28 of 1978 and Company Petition No. 441 of 1976

Ch. S. Rao	APPELLANT
Vs	
Prabhudas S. Budhwani	RESPONDENT

Date of Decision: July 24, 1978

Acts Referred:

- COMPANIES ACT, 1956 - Section 446, 458A

Citation: (1978) 80 BOMLR 685

Hon'ble Judges: Sujata Manohar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Sujata Manohar, J.
This application has been made by the official liquidator of Uma Investments P. Ltd. (in liquidation) to recover a sum of Rs. 4,000 with interest at the rate of 12 per cent. per annum from the respondents. The respondent No. 1 is a participant in chit fund scheme which was being run by the company prior to liquidation. The respondent No. 2 is a guarantor of respondent No. 1. It is an admitted position that on August 20, 1973 the respondent No. 1 received from the company a sum of Rs. 5,020 in respect of an auction conducted by the company of the twenty-seventh instalment. After deduction of various amounts as provided under the scheme in accordance with the rules of the scheme in which respondent No. 1 was a participant, the respondents executed a promissory note in favour of the company for Rs. 4,600 repayable with interest at the rate of 12 per cent. per annum. This promissory note was executed on the same day i.e. August 20, 1973. The respondent No. 1 made a part payment of Rs. 600 to the company in respect of the amount payable by him under this promissory note. The balance amount now due and payable by him is Rs. 4,000 with interest. Hence the official liquidator has made this present application.

2. The respondent No. 1 has not disputed the validity of this promissory note or his liability to pay to the company Rs. 4,000 with interest. The respondent No. 2, who is the guarantor, has raised a preliminary objection. According to him, the claim of the official liquidator is barred by the law of limitation. In this connection the relevant dates are as follows : The promissory note was executed on August 20, 1973, the petition for winding up was presented on April 5, 1976 and the winding up order was made on July 23, 1976. The present application has been made by the official liquidator u/s 446(2)(d) of the Companies Act, 1956 on, January 13, 1978. According to respondent No. 2, the period of limitation begins to run from August 20, 1973. Even after excluding the period from the date of presentation of the petition till the winding up order and one year thereafter u/s 458A of the Companies Act the present application has been made by the official liquidator more than three years after the execution of the promissory note and hence this application is time-barred. According to respondent No. 2, the official liquidator cannot get a higher right than the company in liquidation. Hence, if the claim by the company is barred by limitation on the date of the application, then, the claim of the official liquidator would also be time-barred.

3. I do not find any substance in this contention of respondent No. 2. At the date when the winding up order was made the claim under the promissory note was not barred by the law of limitation. Hence it was a subsisting liability of the respondents, to the company which is now sought to be realised by the official liquidator. It has been held in In re General Rolling Stock Company (1872) L.R. 7 Ch. A. 646 that as far as claims by and against the company are concerned, the relevant date for consideration is the date of winding up order. All claims by and against the company, which are subsisting at the date of winding up order, can be recovered since thereafter the statute of limitations cease to run against the company.

4. As far as the official liquidator is concerned, he gets a right to apply u/s 446(2)(b) of the Companies Act to recover a claim by the company for the first time when the winding up order is made. Any application made by him for this purpose would be governed by Article 137 of the Limitation Act. Under this Article the period of limitation is three years for applications not otherwise provided for from the date when the right to apply accrues. In the present case, such a right accrues on July 23, 1976 when the winding up order is made. Hence he would be entitled to make an application within three years from the winding up order. This view finds support from a Full Bench judgment of Delhi High Court in Faridabad Cold Storage and Allied Industry Vs. The Official Liquidator of Ammonia Supplies Corporation (P.) Ltd., . In this judgment Yogeshwar Dayal J. states as follows (p. 161):

The next question which arises is as to the date on which it is to be whether the claim was enforceable at law or not. The right to avail of the remedy by filing a claim petition, as against the suit, conferred by Clause (b) of Section 446(2) can be availed of only in a Court which is winding up the company and, therefore, it goes without saying that the right to avail of the remedy provided by the aforesaid Clause (b) will arise only after the

passing of the winding up order. So long as the winding up order is not passed, no claim can be preferred under Clause (b) of Section 446(2). u/s 458-A, which we have already reproduced above, apart from the period between the date of the commencement of the winding up of the company and the date on which the winding up order (is made), a period of one year immediately following the winding up order is also excluded for purposes of computing the limitation. As the right to avail of the remedy provided by Clause (b) of Section 446(2) of the Act arises only after the passing of the winding up order, the appropriate date to be seen for purposes of determining whether the claim was enforceable at law or not is the date of the winding up order. Of course, the claimant will be entitled to the full benefit of Section 458-A of the Act.

A similar view has been taken by the Kerala High Court in the case of Official Liquidator v. Kadar [1977] K.L.T. 39. Hence the present application u/s 446(2) of the Companies Act is still within the time prescribed under Article 137 of the Limitation Act. The official liquidator would also be entitled to the benefit of Section 458A of the Companies Act which excludes the period specified therein from the period of limitation. In the present case, the application has been made within less than two years of the winding up order and is well within time.

5. Mr. Angal has argued that Article 137 of the Limitation Act does not apply to the present application. According to him, the application is solely covered by Section 458A of the Companies Act. This section, however, does not prescribe any period of limitation within which an application u/s 446(2)(b) will have to be made. It merely provides for exclusion of certain time from the period prescribed under the Limitation Act. Hence, there is no substance in this contention of Mr. Angal.

6. On merits, according to respondent No. 2, the promissory note is without consideration, because respondent No. 1 had subscribed an amount to the tune of Rs. 4,600 to the Fund. He was also entitled to Rs. 1,500 as dividend. Hence a sum of Rs. 6,100 was already paid by him to the company but in return he received only Rs. 5,020. Therefore, according to respondent No. 2, the promissory note for Rs. 4,600 is without consideration. It should be noted that the subscriber of this Fund viz. the respondent No. 1 has not raised any such contention. Secondly, it is not in dispute that the amount which was received by respondent No. 1 was the correct amount as provided under the rules of Uma Investments Pvt. Ltd. It is in consideration of receiving this lump sum payment under the rules that the respondent No. 1 and his guarantors were required to execute the promissory note. The amount payable under the promissory note is also calculated as per the rules of this Fund and the respondents were required under the rules to repay the same to the company. Under the circumstances, it cannot be said that the promissory note is without consideration. The subscriber has also admitted his liability to pay this amount to the company.

7. I, therefore, make the Judge''s Summons absolute in terms of prayers (a) and (b) thereof.

8. On July 17, 1978 when this application was called out the learned advocate for the official liquidator had stated that the official liquidator was: unable to serve respondent No. 3 and had therefore applied for dismissal of the Judge"s Summons against respondent No. 3. Accordingly I had made an order dismissing the Judge"s Summons against respondent No. 3. But it is now found that Mr. Angal has filed his appearance on behalf of all the three respondents and has argued the present Judge"s Summons accordingly. Hence I set aside the order of dismissal passed against the respondent No. 3 and pass an order against all the three respondents as aforesaid.

9. Costs of the Judge"s Summons quantified at Rs. 300.