

CASE NO.:
Appeal (civil) 5072 of 1998

PETITIONER:
Harihar Nath & Ors

RESPONDENT:
State Bank of India & Ors

DATE OF JUDGMENT: 04/04/2006

BENCH:
Arun Kumar & R. V. Raveendran

JUDGMENT:
J U D G M E N T

RAVEENDRAN, J.

This appeal directed against the order dated 1.9.1997 of the Patna High Court in LPA No.259/1996, relates to the applicability of Article 137 of Limitation Act, 1963 to a petition under Section 446(1) of the Companies Act, 1956, seeking leave of the Company Court to proceed with a pending suit.

2. Nalanda Ceramic & Industries Ltd. (second respondent herein, referred to as 'the Company') was a company incorporated under the Companies Act, 1956 (for short 'the Act'). Appellant Nos.1 to 3 were its Directors. The Company had obtained certain credit facilities from the State Bank of India (first respondent herein and referred to as 'the Bank'). The loans were secured by mortgage of the assets of the Company. The repayment of the amounts advanced to the Company was guaranteed by the appellants. On 28.11.1988, the Bank filed a suit (Title Mortgage Suit No.150/1988 on the file of the Special Subordinate Judge, Ranchi) against the Company (defendant No.1), the appellants (defendants 2 to 4), and four others namely, State of Bihar, Bihar State Financial Corporation, I.F.C.I. and IDBI (defendant Nos.5 to 8). In the said suit, the Bank sought a decree for Rs.5,95,98,258.31 against defendants 1 to 4 (the company and the appellants) with interest thereon and several ancillary and consequential reliefs.

3. Even prior to the said suit, other creditors had filed petitions for winding up of the Company, in Company Petition Nos.1/79, 2/79 and 4/79 on the file of the Patna High Court, alleging that it was unable to pay its debts. During the pendency of the said company petitions, a notification dated 16.4.1984 was issued under the Bihar Relief Undertakings (Special Provisions) Act, 1982, declaring the Company as a relief undertaking, thereby preventing further progress of the petitions for winding-up. As the company became sick, a reference was also made to the Board for Industrial & Financial Reconstruction which directed an inquiry under Section 16 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'SIC Act'). In view of the said reference, the first appellant (second defendant in the suit), filed an application on 16.9.1989 in the Bank's suit under Section 22 of the SIC Act, for stay of further proceedings in the suit.

4. The Bank resisted the said application, inter alia, on the ground that Section 22 of SIC Act had the effect of staying only proceedings in the nature of winding-up and execution and did not come in the way of progress of any suit for recovery of money due by the Company by enforcing the security.

5. When matters stood thus, an order for winding up the company was passed by the High Court on 24.10.1989. When the said order came to its knowledge, the Bank filed a further objection to the application under Section 22 of the SIC Act, contending that Section 22 of the SIC Act will not apply in view of the order for winding up. The Bank also submitted that having regard to Section 446(1) of the Act, it required the leave of the court only to proceed against the company, but there was no bar for proceeding against the other defendants. The Bank, therefore, prayed for dismissal of the application for stay (filed by appellant No.1 herein) and further prayed that while the proceedings as against the first defendant company may be kept in abeyance, the suit may be proceeded with against the other defendants.

6. The trial court disposed of the application by an order dated 9.3.1990. It rejected the application filed by second defendant (appellant No.1 herein) for staying the suit under Section 22 of the SIC Act. It, however, held that the suit against all the defendants will have to be stayed in view of the order of winding up. It was of the view that the liability to pay the amount due was on the principal-debtor, namely, the Company, and that the guarantors would be liable only if the Company defaulted; and that, therefore, if the proceedings against the Company had to be stayed, it had also to be kept in abeyance against all defendants till the Bank obtained an appropriate direction from the High Court. The Bank challenged the said order in CRP No.388/1990 before the High Court.

7. When the Company Court was informed that an inquiry under Section 16 of the SIC Act had been directed by the BIFR, it passed an order on 16.7.1990, staying the operation of the order of winding up dated 24.10.1989. The said stay order dated 16.7.1990 was vacated subsequently by the Company Court on 16.12.1994 and the winding up order was revived.

8. The Bank withdrew its revision petition (CRP No.388/1990) on 4.4.1995. Thereafter, on 11.8.1995, the Bank filed an application under Section 446(1) of the Act, seeking leave of the Company Court to proceed with its suit. The said application was resisted by the appellants herein, inter alia, on the ground that the application seeking leave was barred under Article 137 of the Limitation Act, 1963. The appellants contended that the application ought to have been filed within 3 years from the date of winding up, that is, on or before 24.10.1992 and the application filed on 11.8.1995 was barred by limitation.

9. The Company Court by order dated 17.9.1996 granted leave to proceed with the suit. The Company Court was of the view that though Article 137 of the Limitation Act was applicable to an application under Section 446(1) of the Act, the provision relating to limitation should be construed liberally and the period could be extended in exercise of judicial discretion even suo moto. It condoned the delay in filing the application for leave, being satisfied that there were sufficient causes for the delay, first being the stay of winding up between 16.7.1990 and 16.12.1994 (in view of the inquiry under Section 16 of the SIC Act) and the second being the prosecution of the

revision petition (CRP No.388/1990) from 1990 till its withdrawal on 4.4.1995. The grant of leave was, however, made subject to the condition that even if a decree was granted in the suit, jointly and severally against various defendants, the Bank should proceed to get the decree satisfied from other defendants, and if the decree was not fully satisfied, then the matter may be brought to its notice for proceeding against the Company for realization of residuary decretal dues. Feeling aggrieved by the said order granting leave, the appellants herein filed LPA No.259 of 1996. A Division Bench of the High Court dismissed the appeal by order dated 1.9.1997. The said order is challenged in this appeal by special leave.

10. Learned counsel for the appellants urged the following contentions :

(i) An application for grant of leave under Section 446(1) of the Act was governed by Article 137 of the Limitation Act, 1963. Therefore, the application by the Bank seeking leave to proceed with the suit ought to have been filed within 3 years from the date when the right to apply accrued. The right to apply accrued on 24.10.1989 when the order of winding up was passed. Therefore, the last date for filing an application seeking leave was 24.10.1992 and the application filed on 11.8.1995 was barred by limitation.

The Company Court erred in condoning the delay by exercising power under Section 5 of the Limitation Act, 1963 suo moto, in the absence of an application seeking condonation of delay.

(ii) Even if leave was to be granted, there was no justification for directing that the decretal amount should be recovered from the guarantors and only if there was any deficit, it should be recovered from the company.

Contention (i) :

11. Sub-section (1) of Section 446 as it stood to the relevant point of time provided that when a winding up order has been made (or the Official Liquidator has been appointed as provisional liquidator), no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose. Sub-section (2) of the said section provided that the court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of - (a) any suit or proceeding by or against the company; (b) any claim made by or against the company; (c) any application made under Section 391 by or in respect of the company; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company. The claims against a company made directly to the winding up Court under Section 446(2)(b) of the Act, present no difficulty. Section 3(2)(a)(iii) of Limitation Act, 1963 provides that in the case of a claim against a company which is being wound up, for the purposes of the Limitation Act, a suit is instituted when the claimant first sends in his claim to the official liquidator. The period of limitation would be, of course, as prescribed in the Schedule for the appropriate suit or proceedings.

12. Sub-section (1) of section 446 of the Act contemplated two categories of applications for leave being filed before the Company Court. They are :

(i) Applications seeking leave to file a suit or commence a legal proceeding against the company, after an order for its winding up has been made.

(ii) Applications seeking leave to proceed with a pending suit or legal proceeding against a company, filed or initiated before the order for winding up of such company.

Neither the Companies Act, 1956 nor the rules thereunder prescribe any period of limitation for applications under Section 446(1) of the Act. Article 137 of Limitation Act, 1963, prescribes a three year period of limitation in regard to any application for which no period of limitation is provided. The issue whether Article 137 will apply only to application filed under the Code of Civil Procedure or to applications filed under any Act, was settled in Kerala State Electricity Board vs. T. P. Kunhaliumma [AIR 1977 SC 282]. This Court held :

"Any other application" under Article 137 would be a petition or any application under any Act. But it has to be an application to a court. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two Judge Bench of this Court in Athani Municipal Council case (AIR 1969 SC 1335) and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure."

The said view was reiterated in Additional Special Land Acquisition Officer v. Thakoredas (AIR 1994 SC 2227). But the question is whether Article 137 would apply to an application under section 446(1) of the Act.

13. Insofar as the first category of applications under Section 446(1) of the Act, there is no question of any period of limitation. The period of limitation is to be calculated, not with regard to the application seeking leave to file a suit or proceeding, but in regard to the suit/proceeding itself. An illustration may clarify. If the proposed suit is to enforce payment of money secured by a mortgage by the company, the period of limitation for such suit is 12 years. Surely an application seeking leave to file such suit, cannot be rejected by applying Article 137 on the ground three years have elapsed from the date of the order of winding up, even though the 12 years period for filing the suit has not expired. So long as the suit is within time as on the date of filing the application for leave, the application will be entertained. While computing the period of limitation for the suit/proceeding, the time spent in obtaining leave to file the suit/proceeding will have to be excluded by applying the principle underlying Section 15(2) of Limitation Act, 1963. Section 15(2) of Limitation Act provides that in computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case maybe, the time required for obtaining such consent or sanction shall be excluded. We may note that the Company Court may not

examine the question of limitation for the suit or proceeding, leaving it to be dealt with by the court where such suit/proceeding is to be initiated.

14. This Court in *Bansidhar Sankarlal vs. Md. Ibrahim* [AIR 1971 SC 1292] indirectly affirmed the position that the limitation is to be considered only with reference to the suit or proceedings, while considering the position of suit/proceeding initiated after an order of winding up, without obtaining leave of the Company Court. This Court held thus :

"\005\005..we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained, proceeding will be deemed to be instituted on the date of granting leave."
(emphasis supplied)

15. When there is no period of limitation for an application under the first category of cases under Section 446(1) of the Act, it is inconceivable and illogical to apply the period of limitation prescribed under Article 137, to an application seeking leave falling under the second category.

16. The object of Section 446 of the Act is not to cancel, nullify or abate any claim against the company. Its object is to save the company which has been ordered to be wound up, from unnecessary litigation and from multiplicity of proceedings and protect the assets for equitable distribution among its creditors and shareholders. This object is achieved by compelling the creditors and others to come to the court which is winding up the company and prove their claims in the winding up. For this purpose, all suits and proceedings pending against the company are also stayed subject to the discretion of the winding up court to allow such suits and proceedings to proceed. When a winding up order is passed, the effect is that all the affairs pertaining to the company in liquidation, including all suits/proceedings by or against the company, come within the control and supervision of the winding up court. The winding up court has to decide whether it will let the suit/proceeding to continue in the court where it is pending, or it will itself adjudicate the suit/proceeding. Thus, under Section 446(1), the winding up court only decides about the forum where the suit has to be tried and disposed of. The Limitation Act which prescribes the periods within which a party can approach a court seeking remedies for various causes of action, is not attracted to such applications under Section 446(1) of the Act. However, as elaborate arguments were advanced on this issue, we will deal with it in some more detail.

17. An application seeking leave to proceed, in respect of a pending suit or proceeding (filed before the order of winding up) is not an application for enforcement of any claim or right. It does not seek any 'relief' or 'remedy' with reference to any claim or right or obligation or liability. It is an application which is interlocutory in nature. An interlocutory application is not subject to any period of limitation, unless otherwise specifically provided by law. We are conscious of the fact that an application under Section 446(1) seeking leave to proceed with the suit/proceeding, is not filed as an 'interlocutory application' in the suit/proceeding before the court where such

suit/proceeding is pending. But an interlocutory application is nothing but an application in the course of an action. It is a request made to a court, for its interference, in a matter arising in the progress of a proceeding. Therefore, in a broad sense, the application under section 446(1) filed before the company court seeking leave to proceed with a pending suit or proceeding, is an 'interlocutory application' with reference to the pending suit/proceeding. Article 137 is intended to apply to applications for enforcement of a claim or adjudication of a right or liability in a court. An application for leave to proceed with a pending suit or proceeding not being such an application for any relief, will not attract Article 137.

18. It is now well settled that if any winding up order is passed, during the pendency of a suit against the company, and if the suit is continued without obtaining leave, in spite of that bar contained in section 446(1), the decree passed is only voidable at the instance of the liquidator, and not void ab initio. In fact, where such decree has been passed against the company and others, the only person who can avoid the decree on the ground of non-compliance with section 446(1) of the Act, is the official liquidator of the company and not the other defendants. A suit/proceeding filed against a company, prior to the order of its winding up, does not come to an end on the passing of an order of winding up. The order of winding up merely stays further proceedings in the suit/proceeding. The suit/proceeding becomes dormant. Various alternatives are possible when a suit gets so stayed. The plaintiff in the suit can move an application under section 446(1) of the Act, and when leave is granted, proceed with the suit. If the leave is refused, the suit may be transferred to the company court for being tried and disposed of under section 446 (2) (a) of the Act. The plaintiff may also file an application for transfer of the suit to the Company Court for disposal under Section 446(2)(a). Alternatively, the plaintiff may get the suit dismissed with liberty to make a claim under section 446(2)(b) of the Act. Even if the suit is proceeded with, without obtaining leave of the Company Court, either not being aware of the order of winding up or ignoring the provisions of section 446(1), the resultant decree will not be void, but only be voidable at the instance and option of the official liquidator of the company. It is also possible that the court passing the winding up order may at any time, on the application either of the liquidator or of any creditor or contributory, make an order staying the winding up either altogether or for a limited time on such terms and conditions as the court deems fit, under section 466 of the Act. When the winding up is so stayed, a suit against the company (filed before the winding up order) which stood stayed under section 446(1) could be proceeded with, even though leave had not been obtained to proceed with the suit. We have referred to these alternative possibilities to show that having regard to the nature of an application under Section 446(1) of the Act, it does not attract Article 137.

19. We may next examine the position by even assuming that Article 137 applied to an application under section 446(1) for leave to proceed with a pending suit. Article 137 is a residuary provision applicable to all applications and petitions filed in a court, for which no period of limitation is prescribed. It prescribes a limitation of three years and the period of limitation begins to run when the "right to apply accrues". To understand the meaning of the words "right to apply accrues", we may refer to the wording of Article 137 and a few other Articles in the Schedule to the Limitation Act :

Article
No.
Description of suit
Period of
Limitation
Time from which
period begins to
run

137

Any other application for which no
period of limitation is provided
elsewhere in this division.

3 years
When the right to
apply accrues.

113

Any suit for which no period of
limitation is provided elsewhere in
this Schedule.

3 years
When the right to
sue accrues.

58

To obtain any other declaration.

3 years
When the right to
sue first accrues.

104

To establish a periodically recurring
right.

3 years
When the plaintiff
is first refused the
enjoyment of the
right.

Article 58 provides that the time will begin to run when the "right to sue first accrues". Article 104 provides that time will begin to run when 'the plaintiff is first refused' the enjoyment of the right. On the other hand, Article 137 uses the words when the "right to apply accrues" and is similar to Article 113. A suit, which is filed prior to the order of winding up and pending on the date of winding up, gets stayed when an order of winding up is passed. An order of winding up does not create any 'right' to file an application under Section 446(1) of the Act. Nor does any right 'accrue' to a plaintiff/petitioner in a suit/proceeding to file an application under Section 446(1), when an order of winding up is passed. On the other hand, passing of an order of winding up casts a duty or obligation on the person who has sued the company to obtain the leave of the court to proceed with his suit for proceeding. The right to apply for leave accrues, not because of the order of winding up, but because the suit/proceeding is stayed. The right to apply for grant of leave under Section 446 (1) accrues every moment the suit remains stayed. Consequently, it follows that as long as the suit/proceeding (filed before the order of winding up) remains stayed, an application for leave can be filed. Therefore, the application filed on 11.8.1995 was in time and not barred by limitation, even if Article 137 is applied.

Re : Contention (ii)

20. Learned counsel for the appellant submitted that there was no justification for the court to direct that the decretal amount should be recovered from the guarantors first and only if there was any deficit, it should be recovered from the company in liquidation. Learned counsel for the Bank and the Official Liquidator fairly conceded that there was no reason or justification for imposing such a condition, having regard to the legal position that the liability of the principal-debtor and guarantors is joint or several. There is no question of directing the amount to be first recovered from the guarantors. The creditor has the option of recovering the amount in the manner he deems fit. Though the company court has the power while granting leave, to impose conditions, such conditions can be imposed only for good and valid reasons. The terms imposed cannot affect the rights of third parties nor impose an obligation contrary to law. Therefore, the condition imposed while granting leave is deleted.

Conclusion :

21. In the present case, the suit was against the company as well as its Directors being guarantors in their personal capacity. The suit could have in any case proceeded against the guarantors. It was stayed by the trial court apparently under Section 446(1) even though there was no such prayer to that effect. The only prayer before the Court at the instance of first defendant in the suit for stay of suit under Section 22 of SIC Act which was not granted. The object of appellants in filing an application for stay was to drag on the suit. They have succeeded in their effort to stall the suit for more than 16 years on a virtually non-existent ground. The trial court will, therefore, have to proceed with the suit with all expedition.

22. In view of the above, subject to the deletion of the condition imposed by company court while granting leave, this appeal is dismissed upholding the grant of leave. Parties to bear their respective costs.