

Official Liquidator and Misfeasance Proceedings

Under s. 457 of the Companies Act, a liquidator has wide powers to ensure fair and equitable distribution of its assets. These powers are general in nature, and their scope and extent are well known. In addition, the Official Liquidator also has the power to compel a director or an officer to restore any wrongful benefit arising out of misfeasance in the course of winding up. Under s. 543, the Liquidator can exercise this power by making an application to the Tribunal. However, that application has to be made, according to s. 543(2), within five years from the date of the order of winding up, or of the first appointment of the liquidator, or of the misfeasance, whichever is the longest. The question that recently arose is whether the Official Liquidator can resort to certain exclusionary provisions in the Companies Act in order to mitigate the effect of s. 543(2) (*Ajay G. Podar v. Official Liquidator of J.S. and W.M.*, CA 4597 of 2008, decided on 22 July 2008).

It was argued before the Supreme Court that the benefit of the general exclusion provision in s. 458A of the Companies Act should not be considered available to an Official Liquidator. S. 458A provides that the period from the date of commencement of the winding to the date on which the winding up order is passed, and one year thereafter, shall be excluded in computing the limitation period. Two other aspects are significant. The provision applies only in respect of a “suit or application in the name of and on behalf of a company”, and applies “notwithstanding anything contained in the Limitation Act, 1963, or any other law for the time being in force”. It was argued that since s. 543(2) is a specific provision that prescribes a specific limitation period, it should not artificially be extended by resorting to s. 458A.

The Court rejected this contention, by distinguishing between ‘extension’ of a limitation period, and ‘exclusion’ of a certain period from its computation. The Court referred to analogous provisions in the Limitation Act permitting exclusion under certain circumstances, and concluded that those provisions do not have the legal effect of ‘extending’ the period of limitation applicable in the first place, but merely alter the period of computation. The Court also found that a misfeasance application filed by the Official Liquidator with the Court or the Tribunal counts as a “suit or application instituted in the name of and on behalf of the company”. An Official Liquidator is typically authorised by the company court’s winding up order to take steps to recover assets. The Court held that this power includes the power to institute misfeasance proceedings against a director or an officer. Consequently, exercising that power will be in the name and on behalf of the company. The Court also came to the conclusion that such an application was more in the nature of a ‘plaint’, making the exclusionary provision applicable. According to the Court, since the object of extending the limitation period is to enable the Official Liquidator to take charge of the affairs of the company, to examine records etc., and collect the assets, actually doing so is always on behalf of the company.

Interestingly, although the Court distinguished between ‘extension’ and ‘exclusion’, the effect of the decision for an Official Liquidator is that an application is maintainable even after five years have passed in fact, because a certain portion of that period is excluded for the purpose of computing the period of limitation. Whether this is the correct view or not is another question entirely, and arguments that it is not may point out that since the period of limitation prescribed in s. 543(2) is in any case the longest of three factual possibilities, there is no need to resort to the general provision. However, what is clear today is that the time period for instituting a misfeasance proceeding has substantially increased in fact, although its legal status has not changed.

Courtesy: <http://indiacorplaw.blogspot.com/2008/08/official-liquidator-and-misfeasance.html>