
(1969) 10 BOM CK 0017
In the Bombay High Court
Case No : O.C.J.I.C. No. 266 of 1958

Gill and Co. (P.) Ltd.

APPELLANT

Vs

Shri Madhav Mills Ltd.

RESPONDENT

Date of Decision : 21-10-1969

Acts Referred:

COMPANIES ACT, 1956 — Section 132, 2, 240, 343, 454
Constitution of India, 1950 — Article 20, 226
Evidence Act, 1872 — Section 132, 27, 73
Penal Code, 1860 (IPC) — Section 165A

Citation : (1970) 72 BOMLR 679

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vimadalal, J.—This matter has come up for public examination of (1) Hari das Mundhra, (2) Daulat Singhi, (8) Nandlal More, (4) Shivbux Mohatta and (5) Herbert Hill, directors of Shri Madhav Mills Ltd., which is in liquidation (hereinafter referred to as "the company"), u/s 478 of the Companies Act, 1956. The last-named director is abroad, but it was decided to proceed with the public examination of the other four directors who were present. Before the public examination of the said directors could be proceeded with, Mr. J.C. Bhatt who appeared on behalf of the said Mundhra (respondent No. 1 to the Mifefafance Summons) raised certain preliminary objections which were argued at great length, and the present Order relates to those preliminary objections. The facts necessary for the purpose of the present Order are that, on August 5, 1959, the company was ordered to be wound up. It may, at this stage, be mentioned that, according to the Official Liquidator, Haridas Mundhra was the director-in-charge of the said company till the date of the winding-up order. On December 20, 1960, the Official Liquidator made a preliminary report to the Court u/s 455(I) of the Companies Act. On April 26, 1962, an auditor by name Tandan was appointed by the Court to investigate into the affairs of the company. The

Statement of Affairs which, u/s 454(-3) of the Act, should have been filed within 21 days from the date of the winding-up order, was actually filed by the said Mundhra only on September 28, 1903. This delay in the filing of the Statement of Affairs has been sought to be explained on behalf of the said Mundhra on the ground that, from January 17, 1961 to June 1, 1963, the said Mundhra was undergoing a sentence of imprisonment in jail in connection with some other matter. The said auditor Tandon made his reports on January 22, 1964 and June 28, 1964. On July 15, 1964, on a report filed by the Official Liquidator of the company, my brother K. K. Desai directed him to take out a Misfeasance Summons against the directors of the company, but authorized the Official Liquidator to keep the proceedings therein pending till the private and/or public examination of the directors were concluded. Pursuant to that order, the Official Liquidator filed a Misfeasance Summons, supported by the necessary affidavit, on August 3, 1964, but the same has not yet been served on any of the directors. My brother Kantawala, by his Order dated December 2, 1904 made on another report filed by the Official Liquidator, directed him "to proceed to have the directors examined publicly" under the provisions of the Companies Act, and it is pursuant to that order that this matter has come up before me for public examination of the directors. On December 16, 1964, the requisite notice under Rule 250 of the Companies (Court) Rules, 1959, specifying the time and place when the public examination would be held, was issued. All the directors, except the said Haridas Mundhra, were served with that notice, but it is apparent from the facts on record that the said Mundhra evaded service of that notice and the Official Liquidator had ultimately to obtain on June 14, 1965 an order for substituted service of that notice on the said Mundhra by publication in the newspapers. Even thereafter, the said Mundhra failed to attend at the time and place appointed from time to time for holding the public examination. It so happened that Mundhra was required as a witness in a suit which was on my board, and after some drastic orders were made by me in regard to the same, his presence was secured to give evidence in that suit. The public examination in the present case was also on board on the same day, but after his evidence in the said suit was over, an application was made on behalf of Mundhra that the public examination should not be proceeded with till inspection of the voluminous record was taken by and on behalf of the said Mundhra. I granted that application, and thereafter further adjournments were taken from time to time, ostensibly also for the purpose of that inspection, on. an undertaking being given by the said Mundhra to be present at each date fixed for the public examination, and on his furnishing the bond of a Bombay resident to secure his presence. Mundhra, however, failed to attend, and it was only when another drastic order was made by me on September 10, 1969 directing the issue of a non-bailable warrant for the arrest of the said Mundhra under Rule 250 of the Companies (Court) Rules, 1959, and directing the head bailiff of the Sheriff of Bombay to go to Calcutta to execute that warrant, that the presence of the said Mundhra could be secured. Ultimately when the matter reached before me on October 13, 1969, Mr. Bhatt on his behalf raised certain preliminary objections. It may be

mentioned that those objections have nothing to do with inspection of the record for which adjournments were applied for by the said Mundhra from time to time. Since those preliminary objections have been raised by counsel on his behalf, I am, however, bound to deal with the same.

2. The preliminary objections raised by Mr. J. C. Bhatt on behalf of Mundhra were as follows :

(I) In view of the fact that a Mifeasance Summons has already been taken out and the opening address of the learned Counsel on behalf of the Official Liquidator in the present case showed that the public examination of the directors was intended to be principally in respect of the matters to which that Mifeasance Summons related, it was, according to Mr. Bhatt, clear that the Order for public examination had been secured from my brother Kantawala on December 2, 1964 for a collateral purpose viz., of fishing out evidence to support the Mifeasance Summons, and the said Order dated December 2, 1964 directing the public examination of the directors must, therefore, be vacated.

(II) The notice dated December 16, 1964, is void as being in violation of Article 20(3) of the Constitution in so far as it compelled the directors to be witnesses against themselves.

(III) The fact that a Mifeasance Summons has already been taken out on August 3, 1964 is a bar (a) to any incriminating question being put to the directors in the course of their public examination in view of Article 20(3) of the Constitution and (b) to any question being put in the course of public examination which related to matters covered by the Mifeasance Summons because such questions would be outside the scope of Section 478 of the Companies Act and would be vexatious.

(IV) If the directors concerned who are being publicly examined are compelled to answer any incriminating questions put to them, protection should be afforded to them under the proviso to Section 132 of the Indian Evidence Act.

3. In support of the first preliminary objection which was in the nature of an application to vacate the order dated December 2, 1964 for public examination, Mr. Bhatt relied upon the decision of the Supreme Court in the case of Satish Churan Law Vs. H.K. Ganguly, which, it may be stated, related to an order for the private examination of directors of the company u/s 477 of the Companies Act. The facts of that case were somewhat complicated and it is unnecessary to refer to the same for the purpose of the present Order. Two of the questions which arose before the Supreme Court were (1) whether an ex parte order directing the examination of a person u/s 477 of the Companies Act was liable to be modified or vacated on the application of the person affected thereby; and (2) whether on the facts of the said case there was any ground for discharging or modifying that order. Dealing with the first question, the Supreme Court pointed out (para. 8) that under Rule 243 of the Companies (Court) Rules, 1959, an application for the private examination of directors could be made ex parte and

the Company Judge could make the order on such ex parte application if the preliminary test for making the same was satisfied, viz., it was just and beneficial to the business of the company. The Supreme Court, however, pointed out that the power conferred by Section 477 was a very wide power and the Court must guard itself being made an instrument of vexation or oppression and that the order which was made ex parte was not final but it was always open to the person concerned to apply for vacating or modifying the order "on the ground that it has been obtained without placing all the requisite material before the court or by mis-statement of facts or on other adequate grounds." Dealing with the same point, the Supreme Court further observed (para. 12) :

...The Court has made the order in exercise of the jurisdiction vested in it and in the absence of any material to show that the order was made for a collateral purpose or by misleading the Court, the appellant is not entitled to have the order vacated.

The Supreme Court then considered the facts of the case before it and came to the conclusion (paras, 11-12) that the appellant having been a director of the company during the period when it is alleged the affairs were mismanaged, was likely to be aware of the management and in possession of information conducive to the effective prosecution of the winding-up and if the Company Judge thought it fit to order the appellant to be examined, the order could not be regarded as either vexatious or oppressive or otherwise liable to be set aside. It is not necessary to deal with the point in regard to inspection which also arose in the said case. The appeal was, therefore, dismissed. From the observations of the Supreme Court quoted above, it is, therefore, clear that Mr. Bhatt is not entitled to have the order of my brother Kantawala dated December 2, 1964 set aside unless he can show that it was made for a collateral purpose or by misleading the Court. The said case related to the private examination of directors u/s 477 of the Act, and not to public examination u/s 478 thereof. In view, however, of the fact that the order for public examination in the present case has also been obtained ex parte, in my opinion, the principles laid down by the Supreme Court in Satish Churn's case in regard to the circumstances in which the such an ex parte order could be vacated would be equally applicable to the present case also.

4. Turning to the facts of the present case in the light of these principles enunciated by the Supreme Court, it is quite clear that no case whatsoever has been made out by Mr. Bhatt for vacating the said order dated December 2, 1964 for public examination of the directors. In this connection, it may be pointed out that u/s 543(2) of the Companies Act, an application for a misfeasance summons would be barred if it is made after five years from the date of the winding-up order or the appointment of the liquidator or the misapplication, misfeasance or breach of trust, whichever is longer. On the facts of the present case, the application for a misfeasance summons would have been barred on August 5, 1964. It was under those circumstances that the Liquidator had to apply to my brother K.K. Desai and obtain an order for taking out a misfeasance summons on

July 15, 1964, and to proceed to take out such Summons on August 3, 1964 just before it would have become time-barred. In the course of his arguments on the point, unwarranted allegations were made by Mr. Bhatt against the Official Liquidator, but it is not necessary for me to deal with them. Suffice it to say that the Official Liquidator could not apply for a misfeasance summons earlier by reason of the fact that Mundhra had not filed his Statement of Affairs till September 28, 1963, and it was only after scrutinising the same and satisfying himself that it appeared that the directors had misapplied the property of the company or had been guilty of misfeasance or breach of trust in relation to the same, that he could make the application for a misfeasance summons. No order had, however, yet been obtained for the private and/or public examination of the directors of the company. It was under those circumstances that my brother K.K. Desai by his Order dated July 15, 1964 directed the Official Liquidator to take out a misfeasance summons, but to keep the same pending till the private and/or public examination of the director which might thereafter be ordered, was concluded. The order for public examination of the directors was then obtained from my brother Kantawala on December 2, 1964. It is impossible on these facts to take the view that the said Order dated December 2, 1964 was obtained for a collateral purpose, or by misleading the Court in regard to any facts. As pointed out by Mr. Desai on behalf of the Official Liquidator, it was clearly present to my brother K. K. Desai when he made the Order dated July 15, 1964 that public examination of the directors might have to follow on the taking out of the misfeasance summons which he directed, as the Order itself shows on the face of it. It is also apparent from the said Order of my brother K. K. Desai that it was in view of the fact that the public examination might relate to certain matters to which the misfeasance summons would relate, and there might be a certain amount of overlapping, that he directed that the misfeasance summons should be kept pending till the conclusion of the public examination of the directors that might thereafter be ordered. It is true that Mr. Desai on behalf of the Official Liquidator in his opening address referred copiously to the several heads dealt with in the affidavit of his client in support of the Misfeasance Summons and that, in regard to some of those heads, the Official Liquidator had stated in the affidavit that either all the directors, or one or the other of them, or Mundhra, had been guilty of misapplication, misfeasance or breach of trust in respect of the company's property. Mr. Desai has, however, made it clear that he referred to the said affidavit, in his opening address as a convenient way of bringing certain facts to the notice of the Court, but the public examination of the directors would not be confined solely to the items covered by the Misfeasance Summons, even though there may be a certain amount of overlapping between the two proceedings. He has also rightly pointed out that any of the creditors or contributories, or even the Court, would be entitled to put questions to the directors concerned in the course of public examination, as Sub-sections (3) and (4) of Section 478 clearly show. There is, therefore, no reason whatsoever to come to the conclusion that the public examination in the present case is intended to be held solely for the purpose of fishing out material for supporting

the Misfeasance Summons, as Mr. Bhatt has contended. Reference may be made in this connection to a decision of my brother Tulzapurkar in the case of *In re. Aruna Purshottam* (1965) 68 Bom. L.R. 421 in which an identical objection was raised before the learned Judge, though the same was raised in regard to a, private examination which had been ordered u/s 477 of the Act. It was argued before him that once a misfeasance summons was taken out by the Official Liquidator, he should be taken to have crystallised all the allegations against the applicant, and a private examination u/s 477, which was inquisitorial in character and resorted to for the purpose of collecting information and material, should not be allowed to be held, and that the private examination of the applicant against whom a misfeasance summons on substantially the same facts was taken out and was pending, would be oppressive and vexatious in so far as he would be called upon to furnish information and materials which would be used against him later on in the misfeasance summons. In dealing with that contention, the learned Judge pointed out (at p. 428) that, whereas the step or proceeding contemplated u/s 477 was of exploratory nature, that is to say, it was a proceeding in the nature of inquiry and investigation for the purpose of collecting information on the subjects mentioned therein, the proceeding u/s 543 was a further step in ascertaining and assessing the amount that may be due or accountable by a delinquent director or officer of the company, and that there was nothing in either of the said sections or in any other provision of the Companies Act to warrant an inference that once a misfeasance summons was taken out u/s 543, private examination u/s 477 cannot take place. The learned Judge then referred to the observations of the Supreme Court in *Satish Churn's* case already cited above, and stated that in his opinion the Supreme Court did not want to lay down in that case as a proposition of law that once a liquidator had taken action against an officer of the company, he should not obtain an order for the private examination of such officer/ In the opinion of the learned Judge (at pp. 420-430), for the purpose of having an order for private examination set aside, what had to be shown by a person who was affected by the order directing his public examination was that not only was an action at the instance of liquidator pending against him, but that his private examination was sought "solely" for the purpose of facilitating the progress of that action against him, or for the purpose of harassing him. The learned Judge, therefore, declined to vacate the order for private examination. The case before my brother Tulzapurkar no doubt related to a private examination as *Satish Churn's* case before the Supreme Court did, but as already stated above, I do not think there would be any difference in regard to the principles which must be applied when an application is made to the Court for vacating an order for the private or public examination of directors or officers of the company. Mr. Bhatt has sought to rely on the observations of my brother Tulzapurkar which have been referred to above, but I am afraid there is nothing before me to hold that the public examination of the directors in the present case is being sought "solely" for the purpose of securing material for the Misfeasance Summons, though that may be one of the results of the public examination. On the principles laid down by the

Supreme Court in Satish Churn's case which have been applied by my brother Tulzapurkar in Aurna Purshottam's case, I have therefore no hesitation in rejecting the application of Mr. Bhatt for vacating the order for public examination dated December 2, 1964.

5. In view of the fact that I have come to the conclusion, for the reasons stated above, that the application of Mr. Bhatt for vacating the order dated December 2, 1964 must be rejected on merits, it is not really necessary for me to deal with the objection that was sought to be raised by Mr. Desai to Mr. Bhatt's application on the ground of delay in making the same. As, however, in my opinion, Mr. Desai's contention on the ground of delay has substance in it, I will proceed to deal with the same also. In support of his contention, Mr. Desai has relied on the statement in Buckley on the Companies Act (18th edn.), p. 566 where it is stated that an order for public examination may be made ex parte, leaving the person against whom it is made to discharge it, if made without jurisdiction. It is further stated there that the Motion to discharge must, however, be made with reasonable diligence and that two months' time has been held to be too much. In support of that contention, Mr. Desai has also relied upon the decision in the English case of Civil, Naval and Military Outfitters, Limited, In re [1899] 1 Ch. 215 in which it has been observed (at pp. 224-225) that a motion to rescind the order for public examination cannot be held over until the eve of the examination, so as to defeat the very objects for which the examination was to be held, and that persons who want to discharge orders of that kind must come within a reasonably short time. It is further observed in the judgment in that case that it might be that they ought to come within fourteen days, but that was a matter for consideration of the Court. Mr. Bhatt's answer to this objection on the ground of delay is that it was only when Mr. Desai on behalf of the Official Liquidator in the course of his opening address before me relied upon the various statements made in the affidavit in support of the Misfeasance Summons that the cause of action for applying for vacating the order for public examination arose, as till then he did not know that the public examination was to be directed principally to matters covered by the Misfeasance Summons. What Mr. Bhatt really intended to state was that the facts relied upon by him explained the delay in the making of the present application. In my opinion, however, there is not the slightest substance in the same. I have no hesitation in holding that the directors knew, as well as the Official Liquidator did, that the public examination would relate to certain matters covered by the Misfeasance Summons, and there was nothing in the opening address of Mr. Desai which the directors or the learned Counsel on their behalf did not know or anticipate. The delay in the present case is a delay of a little less than five years which, in my opinion, is too gross a delay to be excused by the Court, particularly when there is no plausible explanation in regard to the same. I have therefore come to the conclusion that the application of Mr. Bhatt for the vacating of the order dated December 2, 1964 for public examination must be rejected on the ground of gross delay also.

6. Before I deal with the next preliminary objection raised by Mr. Bhatt, I may

record that the learned Counsel on both sides were agreed before me that it was not necessary for Mr. Bhatt to make a separate application for vacating the order for stay and that the same could be argued as being in the nature of a preliminary objection to the holding of the public examination before me.

7. The next preliminary objection of Mr. Bhatt with which I must proceed to deal is that the notice for public examination dated December 16, 1964 is void as being in violation of Article 20(3) of the Constitution, in so far as it compelled the directors concerned to be witnesses against themselves. Mr. Bhatt has contended that the Misfeasance Summons, and the affidavit in support thereof, specifically accused one or the other or all of the directors concerned, of offences of a criminal nature and there is, therefore, a formal accusation of offences against them and the notice for public examination issued subsequent thereto must be held to come within the mischief of Article 20(3) of the Constitution. In this connection, Mr. Bhatt has taken me through the Misfeasance Summons which, it may be stated, is in consonance with statutory forms Nos. 120 and 121 of the Companies (Court) Rules, 1959, as well as the affidavit in support thereof, and has contended that the same contain accusations of offences u/s 630, or of offences for which action could be taken u/s 545 of the Companies Act, Article 20(3) states that no person accused of any offence shall be compelled to be a witness against himself. Mr. Desai has, on the other hand, contended that all that the Official Liquidator has done in the affidavit in support of the Misfeasance Summons is to state that he is "informed", or to point out facts from which it "appears", that certain offences have been committed by the directors of the company, so as to bring the case within Section 543 of the Companies Act, but the same did not contain any formal accusations against the directors, or against a particular director as such.

8. Before I deal with the facts, I must proceed to consider in chronological order the authorities which were cited before me in order to find out what is the precise nature of the accusation that must have been made in order to bring a case within the mischief of Article 20(3). The first decision which arises for consideration in that connection is the decision of the Supreme Court in the case of *Maqbool Hussain v. State of Bombay* (1953) 56 Bom. L.R. 13.. The facts of that case were that the Customs Authorities had, u/s 167 (8) of the Sea Customs Act, 1878, confiscated gold which the accused had brought with him to India in contravention of law. Subsequently, the accused was prosecuted in the Court of a Presidency Magistrate u/s 23 of the Foreign Exchange Regulation Act, 1947, read with the relevant Government notification. The act of the accused which constituted an offence under the Sea Customs Act as also an offence under the Foreign Exchange Regulation Act was the same viz., that of importing gold in contravention of the Government notification. The question which arose was whether by reason of confiscation proceedings taken by the Sea Customs Authorities the accused could be said to have been prosecuted and punished for the same offence for which he was charged in the Court of the Presidency Magistrate so as to bring the case within the mischief of the plea of "autrefois

convict" or "double jeopardy" embodied in Article 20(3) of the Constitution. It was held by the Supreme Court that when the Customs Authorities confiscated the gold in question, the proceedings before them did not constitute a prosecution of the accused and the order of confiscation did not constitute punishment inflicted by a Court or a judicial tribunal on the accused and the plea under Article 20(3) of the Constitution was, therefore, negated by the Supreme Court. In so holding, Bhagwati J. who delivered the judgment of the Court, however, considered the ambit of Article 20(3) as a whole, and not merely that of sub-art. (2) of Article 20. The judgment of Bhagwati J. in Maqbool Hussain's case has been so construed by the Supreme Court itself in the later decision in Narayanlal Bansilal v. M.P. Mistry (1960) 63 Bom. L.R. 251. which will hereafter be discussed. After considering the terms of the different clauses of Article 20, Bhagwati J. laid down as follows (p. 19):

... The very wording of Article 20 and the words used therein :- "convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "prosecuted and punished", "accused of any offence", would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal, and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

This was followed by another decision of the Supreme Court in the case of M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, but the question which arose in that case only was in regard to the meaning of the words "to be a witness" in Article 20(3). The question as to whether there was a formal accusation relating to the commission of an offence did not require to be considered in that case in view of the fact that First Information Reports had admittedly been filed. That is how the decision in Sharma's case has been construed by the Supreme Court itself in the later decision in Narayanlal's case (at pp. 260-261) already referred to above. It is, therefore, not necessary for me to discuss the judgment of the Supreme Court in Sharma's case. Mukherji J. delivering the judgment of the Court in the case of S.A. Venkataraman Vs. The Union of India (UOI) and Another, discussed the earlier judgment of the Supreme Court in Maqbool Hussain's case and observed as follows (para. 6) :

It has also been held by this court in Maqbool Hussain's case, that the language of Article 20 and the words actually used in it afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of criminal proceedings, ...

It was held in the said case that an enquiry under the Public Servants (Enquiries) Act of 1850 was not of that nature and the plea that Article 20(2) was violated was, therefore, rejected by the Supreme Court and the petition before it dismissed. In the case of Mohd. Dastagir v. State of Madras AIR [1960] S.C. 756

the question in regard to a formal accusation did, however, arise for the consideration of the Supreme Court. The facts of the case were that the appellant attempted to bribe a Deputy Superintendent of Police by offering him some money contained in an envelope with a request that he might drop a case registered against the appellant. The police officer threw the envelope at the appellant and the appellant picked it up from the floor. Whilst the appellant was still in the bungalow of the police officer, he was asked by the police officer to produce the envelope and the appellant took out of his pocket some currency notes and placed them on the table without the envelope. The appellant had been convicted of the offence u/s 165A of the Indian Penal Code by the High Court in appeal. The notes were seized by the police officer and his office rubber stamp seal was placed upon them. On further appeal to the Supreme Court, one of the questions which arose before that Court was whether there had been a violation of the provisions of Article 20(3) of the Constitution which vitiated the conviction. The Supreme Court held (para. 9) that the said Article was not violated and observed that the police officer concerned had clearly stated that he was not doing any investigation, and that he had not even accused the appellant of having committed any offence and there had, therefore, been no formal accusation against the appellant relating to the commission of an offence. The Supreme Court further held that since it was open to the appellant to refuse to comply with the request of the police officer to produce the money which he had on his person, it could not be said that the appellant had been compelled to produce the same so as to attract the applicability of Article 20(3) of the Constitution. I must now deal with the decision of the Supreme Court in the case of *Narayanlal Bansilal v. M. P. Mistry* in which the question of the interpretation of Article 20(3) did arise on facts which were somewhat similar to the facts of the present case. The respondent before the Supreme Court, who was a chartered accountant, was appointed inspector under the Companies Act to investigate into the affairs of the company from the date of its incorporation. In exercise of the powers conferred upon him, the respondent served upon the appellant notices calling upon the appellant to attend his office on the date and at the time specified for the purpose of being examined on oath in relation to the affairs of the company, and to produce before him all the books of account and papers relating to the company which were mentioned in the said notices. The appellant was told in the said notices that, in default of compliance with the requisitions contained therein, necessary legal steps would be taken against the appellant without further reference to him. The appellant thereupon filed a petition under Article 226 of the Constitution in this Court to quash the said notices and the proposed examination of the appellant. One of the grounds urged in that petition was that Section 240 of the Companies Act under which the power in question was sought to be exercised by the respondent offended the constitutional guarantee provided by Article 20(3) of the Constitution. The petition was dismissed by the trial Judge, and that decision was confirmed on appeal by a Division Bench of this Court. On further appeal to the Supreme Court, that decision was once again confirmed. Gajendragadkar J. who delivered the

judgment of the Court laid down (at pp. 261-262) that, in determining the complexion and reach of the respective sub-clauses of Article 20, the general scheme thereof "as a whole" must be considered, and the effect of the interaction of the relevant words used in them had to be properly appreciated. He then stated that for invoking the constitutional right against testimonial compulsion guaranteed under Article 20(3) "it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution". The learned Judge then proceeded to discuss the scope and nature of the relevant provisions of the Companies Act and stated as follows (p. 262):-

...The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a genera] allegation that the affairs arc irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20(3) of the Constitution.

Another decision of the Supreme Court to which I must refer is that in the case of *State of Bombay v. Kaihi Kalu* (1901) 64 Bom. L.R. 240. The question which arose in that case was whether Article 20(3) of the Constitution was infringed by compelling an accused person to give his specimen handwriting or signature or thumb impression to the investigating officer, or under orders of a Court for the purpose of comparison u/s 73 of the Indian Evidence Act, and whether the provisions of Section 27 of the Evidence Act in regard to discovery also infringed Article 20(3). After discussing the decisions in *Sharma's* case and in *Mohd. Dastagir's* case already discussed above, the Supreme Court stated (at p. 248) that there was no conflict; between the said decisions, and that the law was laid down correctly in *Mohd. Dastagir's* case. The Supreme Court in formulating its conclusion laid down (at p. 240) that to bring a statement within the prohibition of Article 20(3), the person accused must have stood in the character of accused at the time he made the statement, and that it was not enough that he should become an accused any time after the statement had been made. The Supreme Court, however, held that specimen handwritings or signatures or thumb impressions are no testimony at all within the mischief of Article 20(3). It further hold that if self-incriminatory information was given by an accused person without any threat there would be no violation of Article 20(3) of the Constitution, and Section 27 of the Evidence Act was not bad on that account.

9. There are two more decisions of the Supreme Court on the point which were cited before me by Mr. Desai. The first of them is the decision of the Supreme Court in the case of K. Joseph Augusthi and Others Vs. M.A. Narayanan, Official Liquidator, Palai Central Bank Ltd., in which Section 45G of the Banking Companies Act, 1949, was held to be not violative of Article 20(3) of the Constitution. The said section corresponds substantially to Section 478 of the Companies Act with which I am dealing in the present case. The Supreme Court took the view (para. 7) that there was no difficulty in holding that a person examined publicly under the said Section 45G might in some cases be compelled to be a witness against himself, but it further held (paras. 8-9) that such a person could not be said to be accused of any offence and the challenge to the vires of Section 45G on the ground of Article 20(8) was therefore repelled by the Supreme Court. In so holding, the Supreme Court laid down that unless it was shown that the person ordered to be publicly examined u/s 45G was, before or at the time when the order for examining him publicly was passed, an accused person, Article 20(3) would not apply, and that if a person who was not accused of any offence was compelled to give evidence" and that evidence ultimately led to an accusation against him, that would not be a case that would attract the provisions of Article 20(3). A similar question arose before the Supreme Court again in the case of Official Liquidator, Popular Bank Ltd. Vs. Madhava Naik and Others, . The question was whether the order for public examination which, it may be stated, was applied for in that case both u/s 45G of the Banking Companies Act, 1949, as well as u/s 478 of the Companies Act, was void as being violative of Article 20(3) of the Constitution. It may be mentioned that the application made by the liquidator stated that it had also been made in respect of offences under various other sections of the Companies Act, including Section 545J, and u/s 45J of the Banking Companies Act. The Supreme Court referred to its own earlier decision in K. Joseph's case just discussed by me, and held (para. 5) that even though the application in the said case contained allegations of the commission of offence under various sections of the Companies Act, that would not amount to an accusation within the meaning of Article 20(3) of the Constitution, It further observed (para. (i) that for the purpose of deciding whether an accusation was made or not, Section 45G of the Banking Companies Act, 1949, was "indistinguishable" from Section 478 of the Companies Act. It was also held by the Supreme Court (para. 8) that public examination u/s 478 of the Companies Act and Section 45G of the Banking Companies Act had no concern with proceedings u/s 545 of the Companies Act and Section 45J of the Banking Companies Act, and a prayer for action under the latter two sections could not amount to an accusation under Article 20(3) for the purpose of orders for public examination under the said Section 478 or 45G. The decision of the Calcutta High Court in the Central Calcutta Bank Ltd., In re (1957) 28 Comp. Cas. 305 in which the vires of Section 45G of the Banking Companies Act, 1949, was upheld, was also cited by Mr. Desai, but in view of the Supreme Court decisions discussed above, I do not think it necessary to deal with the same. Mr. Bhatt has, however, rightly contended that the decisions of the Supreme Court in K. Joseph's case

and in Madhav Naik's case, as well as the decision of the Calcutta, High Court in Central Calcutta Bank Ltd.'s case are of no assistance in the present case because he has neither impugned the validity of any statutory provision on the ground of Article 20(3), nor has he contended that any formal accusation is contained in the order for public examination, but has contended that it is contained in the Misfeasance Summons which was filed in the present case. The decision of the Punjab High Court in the case of Sushil Kumar v. R. R. Kini A.I.R. [1967] P&H 45 was cited before me, but the applicability of Article 20(3) appears to have been assumed in that case and it is, therefore, of no assistance for the purpose of the present case.

10. There is, however, one decision of a Division Bench of this Court in the case of State v. Devsi Dosa (1959) 62 Bom. L.R. 316 in which, though in a totally different context the ratio, inter alia of Maqbool Hussain's case, has been laid down in the following terms (p. 320) :

To say the least, therefore, in order that the protection of this Article should be available to a person, he must be accused of an offence, which would mean that an information is laid against him before an officer or a Court entitled to take cognizance of the offence and proceed upon the information to investigate into it.

In my opinion, the passage just quoted by me correctly sums up the ratio of the several decisions discussed by me above. I hold that, in order to attract the applicability of Article 20(3) of the Constitution, a formal accusation against the persons concerned, must have been made either to the appropriate police officer who could in the normal course take action, or to the Court which is competent to entertain and try the same. Such Court, in the context, of the facts of the present case, would be the appropriate Court indicated u/s 2(11) of the Companies Act.

11. Turning to the facts of the present case in the light of the above principles, the question that arises is whether it could be said that formal accusations of a criminal nature have been made in the present case to a Court which is competent to entertain and try the same. In my opinion, there can be no doubt that the answer to that question must be in the negative, since neither the Company Judge, nor this Court, is competent to entertain and try the offences in question. The affidavit in support of the Misfeasance Summons contains allegations of offences which are of a criminal nature, but does not, in my opinion, contain formal accusations in respect of the same which can only be made to the appropriate officer or the competent Court. Mr. Desai has further contended that no formal accusations could be said to have been made in the Misfeasance Summons or the affidavit in support thereof since the same have not yet been served on any of the directors. To accept that contention would be to take too technical a view of the matter. I do not think there is any substance in that contention, because once the Misfeasance Summons as well as the affidavit in support thereof are on record, the directors concerned can take inspection and have knowledge of the same. As observed in K. Joseph's case

already cited above, the mere fact that the material elicited in public examination may ultimately lead to accusations against the directors in the present case would not attract the provisions of Article 20(3) of the Constitution. It cannot be said that the accusations contained in the Misfeasance Summons or the affidavit in support thereof in the present case relate to the commission of offences which would in the normal course result in prosecution, as laid down in Narayanlal's case which has already been discussed above, nor can it be said that the same are in the nature of criminal proceedings as laid down in Maqbool Hussain's case as construed in Venkatraman's case which have also been discussed above. Mr. Bhatt's contention that the notice for public examination is void as being violative of Article 20(3) of the Constitution must, therefore, be rejected.

12. That brings me to a consideration of the third preliminary objection of Mr. Bhatt which is in two parts. The first part is that the fact that the Misfeasance Summons has already been taken out on August 3, 1964 is a bar to any incriminating questions being put to the directors in the course of their public examination in view of the provisions of Article 20(3) of the Constitution. In view of the conclusion at which I have arrived to the effect that the statements made in the Misfeasance Summons and the affidavit in support thereof are not in the nature of formal accusations before the appropriate police officer or before a Court competent to try the offences in question, Article 20(3) is not attracted and this part of Mr. Bhatt's contention must be rejected. I must hold that Article 20(3) of the Constitution does not bar any such questions being put to the directors in the course of their public examination before me.

13. That, however, leaves for my consideration the second part of the preliminary objection of Mr. Bhatt which is to the effect that the Misfeasance Summons having already been taken out on August 8, 1964, I should not allow any questions to be put in the course of public examination which relate to matters covered by that Misfeasance Summons or the affidavit in support thereof, as the same would be outside the scope of Section 478 and would be vexatious. It is the contention of Mr. Bhatt that a perusal of the Misfeasance Summons and the affidavit in support of it shows that the Official Liquidator is not groping in the dark, for there are clear accusations made therein against one or the other or all the directors. It is the contention of Mr. Bhatt that the order for public examination was obtained after the Misfeasance Summons was taken out for purposes de hors Section 478, and that to allow any questions to be put in the course of that public examination which were covered by the Misfeasance Summons would be vexatious. According to Mr. Bhatt the collateral purposes de hors Section 478 for which the order for public examination has been obtained are to get evidence in advance in the Misfeasance Summons already filed and to obtain answers which would incriminate the directors concerned. In answer to the contentions of Mr. Bhatt, Mr. Desai has rightly pointed out that the order for public examination: was in contemplation of the Court when the order for taking out the Misfeasance Summons was obtained from my brother K. K. Desai and that, therefore, it was not as if, having obtained an order for Misfeasance

Summons, the Official Liquidator manoeuvred to obtain the order for public examination with a view to support it. Mr. Desai has also pointed out that the fact that the Misfeasance Summons and the affidavit in support thereof, though filed have not yet been served upon the directors, shows that the intention of the Official Liquidator was that after the public examination of the directors was over the Official Liquidator could decide which charges to press, and against whom the same should be pressed and which charges to give up. In fact, the answers given by the directors who are being examined might be, and very often are, those of complete exoneration of themselves. Mr. Desai has further argued that Section 543 itself requires that, in order to sustain an application for a Misfeasance Summons, the Official Liquidator must show that there is material from which it "appears" that the directors had misapplied the funds or the property of the company, or had been guilty of misfeasance or breach of trust, and the Misfeasance Summons in the present case is merely in accordance with the statutory forms, being forms Nos. 120 and 121 appended to the Companies (Court) Rules, 1949. In my opinion, these contentions of Mr. Desai are clearly right. In this connection it is pertinent to note that the vires of Section 478 as being violative of Article 20(3) has not been challenged by Mr. Bhatt.

14. That brings me to the question as to what is the nature and scope of public examination u/s 478. The terms of Section 478 themselves indicate the purpose as being to investigate into any fraud in the promotion or formation of the company or the conduct of the business of the company, or into the conduct and dealings of the officers in question. In Gore-Browne's Handbook on Joint Stock Companies, (41st Edn.), p. 721, it is stated that a public examination is "a roving inquiry," not confined to a pre-determined issue, so long as it relates to the promotion or formation or to the conduct and dealings of the person examined as an officer thereof. In Pennington's Company Law, (2nd Edn.), p. 673, it is stated that the purpose of a public examination, unlike a private one, is to extract evidence from a delinquent director or promoter which may later be used against him in civil or criminal proceedings, and that it is, therefore, not surprising to find that the examination is of a far more rigorous character than a private examination. This passage makes it clear that the mere fact that the evidence obtained from the directors in the course of public examination is intended to be used against him in a misfeasance summons cannot vitiate any question put in the course of that public examination as being intended for a collateral purpose, as Mr. Bhatt has contended, since that is one of the purposes of a public examination. In the case of *K. Joseph v. Narayanan*, which has already been cited above in another context, the Supreme Court has laid down in respect of Section 45G of the Banking Companies Act, 1949, (para. 9) that the whole object of a public examination is to collect evidence and decide whether any acts or omissions caused loss to the company. It is further observed in the judgment in that case that it might be that as a result of the enquiry the Court might reach the conclusion that the alleged acts or omissions did not cause any loss, and in such a case, nothing further had to be done. The Supreme Court went on to

observe that, on the other hand, it was likely that the opinion formed by the liquidator that loss had been caused to the company by the acts or omissions of the officers concerned might be vindicated and the Court might come to the conclusion that some or all of those acts did cause loss to the company, and in that case, some further action might conceivably be taken against the persons examined. In the later case of *Popular Bank Ltd. (In Liquidation) v. Madhava Nails* also cited above by me in another context, the Supreme Court has stated (paras. 6-7) that, for all material purposes, there was no difference between Section 45G of the Banking Companies Act and Section 478 of the Companies Act, and that public examination under either of those sections had no concern with the prosecution of the delinquent officers u/s 545 of the Companies Act. The observations of my brother Tulzapurkar in the case of *In re Aruna Purshottam* (sA pp. 429-430) which has also been cited by me above in another context, relate to the object of private examination under the Companies Act which, though somewhat analogous to the object of public examination under the same Act, has this vital difference that any of the creditors or contributories can also take part in the latter. My brother Tulzapurkar has observed that what must be shown by a person affected by the order directing his private examination for the purpose of impugning the order directing the same is that the private examination was sought "solely" for the purpose of facilitating the progress of the action already taken against him, or for the purpose of harassing him, It would, therefore, follow that the mere fact that it could be so used would not vitiate the order directing the private examination. The passages from the standard English works quoted above in regard to the nature and scope of public examination as well as the observations of the Supreme Court which I have referred to show that a public examination is a roving enquiry to discover facts in regard to the fraud alleged in the promotion or formation or the conduct of the business of the company, or in regard to the conduct and dealings of the officers who are so examined. Those facts may or may not be covered by the misfeasance summons, but a certain amount of overlapping between the facts elicited in the course of public examination and the facts relied upon for the purpose of the misfeasance summons u/s 343 of the Companies Act is inevitable. The phrase "fishing inquiry" used by Mr. Bhatt for the purpose of impugning the public examination in the present case has, generally speaking no doubt, an obnoxious connotation in law. It is, however, a perfectly proper term to apply to a public examination, so long as the public examination is not being used for a purpose collateral to Section 478. In my opinion, the use of the phrase "fishing inquiry" is as germane to proceedings by way of public examination as it would be in proceedings in a fishing village. As stated by the Supreme Court in *K. Joseph's* case, the result of the enquiry may be that the director concerned is found innocent, or it may be, as Mr. Desai has contended, that another director or officer, or even a third party with whom the company has dealt might be found improperly in possession of the property or funds of the company, as a result of that public examination. Moreover, unlike a private examination, in a public examination, by reason of the provisions of sub Sections (3) and (4) of Section

478, any creditor or contributory, as well as the Court, is entitled to take part and ask questions. The affidavit filed by the Official Liquidator in support of the Mifeasance Summons uses the terms "informed" and "appears", and the statements so made would therefore be only in the nature of allegations and not clear-cut charges or accusations against the directors, or one or the other of them. The public examination that has been directed in the present case is necessary for the purpose of ascertaining the correct state of affairs with regard to those allegations, though that is not the only purpose thereof, as already indicated above. Having regard to this position, I am unable to accept Mr. Bhatt's contention that questions relating to matters covered by the Mifeasance Summons would be questions put for a collateral purpose which is outside the scope of Section 478, or that the same should be held to be vexatious, and disallowed and as such, I reject this preliminary objection of Mr. Bhatt also.

15. Mr. Bhatt has advanced another contention in the nature of a preliminary objection, and that is, that in view of the provisions of Section 182 of the Indian Evidence Act, if his client is compelled to answer questions which tend directly or indirectly to incriminate him, he should be afforded the protection that is envisaged by the proviso to that section. Ordinarily, the applicability of Section 182 has to be considered in reference to particular questions that might be put to a witness and I was, at first, disinclined to give a general ruling in regard to the same. On further consideration I am, however, of opinion that in the view which I take viz., that as far as public examination u/s 478 of the Companies Act is concerned, the provisions of Sub-section (5) thereof override the provisions of Section 132 of the Evidence Act, a general ruling should be given, since such a ruling would be applicable to all incriminating questions that might be put to the directors under examination. Turning first to the terms of Sub-section (5) of Section 478, it enacts that the person who being examined "shall answer all such questions as the court may put, or allow to be put, to him". These are words of the widest amplitude, and the only limitation on the Court's powers under that sub-section would be that, it has to exercise its discretion judicially, and not arbitrarily or capriciously. In exercising those powers, all that the Court would be required to consider would, therefore, be whether the questions put or allowed to be put are such as to subserve the purpose of Section 478, and not a purpose collateral to it. In my opinion, the Legislature has advisedly conferred these very wide powers on the Court by Sub-section (5) of Section 478 because the very nature of liquidation proceedings would require incriminating questions to be put and answered without any reservation in regard to their future use in proceedings, civil or criminal. This view which I have taken is supported by the fact that in the corresponding Section 106(1) of the Indian Companies Act, 1913, the word "in civil proceedings" occurred which permitted the use of the answers given by the delinquent officer in the course of public examination only in civil proceedings, but those words have been omitted from Sub-section (5) of s. 478 of the present Act. The omission of those words, in my opinion, clearly indicates that the use of answers given by the delinquent officer in the course of public

examination is to be permitted against him, not only in civil proceedings, but in criminal proceedings also. Moreover, but for the intention of the Legislature that Section 478(J) should override Section 182 in regard to public examinations under the Companies Act, it is difficult to conceive why it was necessary to state in Section 478(5) that the person who is being examined "shall answer all such questions as may be put to him or allowed to be put to him, since the obligation to answer the same, subject to the protection afforded by the proviso was already contained in the substantive part of Section 182 of the Evidence Act. It can hardly be disputed that in view of the wide terms of Section 478(5) the strict application of the provisions of the Evidence Act relating to relevancy is excluded, so long as questions have been asked for the purpose for which public; examination has been directed u/s 478 and are relevant in that sense. If that be so, there is no reason why the Legislature should have intended that Section 182 of the Evidence Act should be applicable to public examinations u/s 478. Mr Bhatt has sought to contend that the terms of Section 478(5) are restrictive of the substantive part of Section 132 which is applicable to public examinations, but I am not prepared to accept that contention of Mr. Bhatt in view of the fact that Sub-section (5) of Section 478 requires the officer who is being examined to answer "till" questions put to him or permitted to be put, and not "only" such questions as are put to him or permitted to be put to him. This view which I have taken is fully supported by the corresponding provisions of English law and the decisions of English Courts on which Section 478(5) appears to have been based. Buckley on the Companies Acts, (13th Edn.), p. 506 states in unmistakable terms that the person who is being publicly examined cannot refuse to answer questions on the ground that by doing so he might incriminate himself, and to the same effect are the observations in Gore-Browne's Handbook on Joint Stock Companies (41st Edn.), p. 720 and Pennington's Company Law (2nd Edn.), p. (574. For that statement of the law, those standard English works rely upon the decision in the case of Paget, In re. Official Receiver, Ex parte [1927] 2 Ch. 85 which, it may be stated, was a case not of liquidation proceedings under the Companies Act, but of bankruptcy proceeding. It is stated in the judgment in the said case (at pp. 88-80) that the section relating to the public examination of the bankrupt made it plain that the duty of the Official Receiver was a wide one and was to be exercised in the interests of the public and that the debtor was not entitled to refuse to answer the questions put to him on the ground that the answers thereto might incriminate him, because the purpose of the Act was to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public, and not merely in the interests of those who are the creditors of debtors. To the same effect are the observations in the earlier English case of Atherton In re [1912] 2 K.B. 251 which was relied upon in Pages case, and the decision in the later English case of Jawett, In re. [1929] 1 Ch. 108 Mr. Bhatt has sought to distinguish the decisions in these three English cases on two grounds (1) that there was no statutory provision in England similar to Section 132 of the Indian Evidence Act; and (2) that the judgments in the said cases took the view that incriminating questions would have to be answered in

the public interest because a report has to be made by the Official Receiver in bankruptcy as to whether a discharge should be granted to the bankrupt so as to allow him to be "thrown back" upon the commercial world. I am afraid, there is no substance whatsoever in these contentions of Mr. Bhatt, first and foremost, for the simple reason that inspite of the distinction which Mr. Bhatt has sought to draw, these cases have been considered by standard English works like, Buckley, Gore-Browne and Pennington to be authorities for the same proposition in regard to a public examination under the Companies Act. Moreover, the fact that there is no statutory provision in English law corresponding to Section 132 makes no difference, for a large part of English law is judge-made law and, so long as the rule of evidence that a witness is not bound to answer incriminating questions exists in England, as is shown from the statement of the law in Phipson on Evidence (10th Edn.) para. 611, it does not make the slightest difference that the same does not exist in a codified form. There is also no substance in Mr. Bhatt's contention that the fact that in the case of liquidation proceedings under the Companies Act there is no question of discharge as in insolvency law, makes these decisions inapplicable to the former. The granting of discharge is not the only matter in regard to which the question of protection of the public interests comes in, in insolvency law, but is merely one of the questions in regard to the same. The protection of public interests is a matter which is common to bankruptcy law as well as to liquidation proceedings in all other respects, and merely because no question of granting discharge arises in liquidation proceedings, I am not prepared to hold that the principle laid down in the English decisions to which I have referred has no application to public examination under the Companies Act. I must, therefore, reject the distinctions which Mr. Bhatt has sought to draw and, in my opinion, the conclusion at which I have arrived that an officer under public examination cannot refuse to answer incriminating questions, or claim protection in regard to the same, and that Section 478(5) of the Companies Act overrides Section 132 of the Indian Evidence Act is fully supported by English law on which it is founded. Reference may be made in that connection to a decision of a single Judge of the Lahore High Court in the case of *Mam Chand Gurvala v. King-Emperor* AIR [1926] Lah. 385. That was a criminal case decided at a time when the Indian Companies Act, 1913, was in force. It was in view of the fact that Section 196(1) of that Act provided in express terms that the answers given in public examination could be used against the person so examined only in civil proceedings, that the Court came to the conclusion that, in regard to criminal proceedings, Section 132 of the Evidence Act was applicable ands. 190 of the Indian Companies Act, 1913, was not intended to override the same. Having regard to the omission of the phrase "in civil proceedings" from the corresponding provision in Section 478(5) of the present Companies Act, the decision in *Ram Chand's* case would no longer be applicable to public examinations under the present Act. The view taken by my brother Tulzapurker in *In re Aruna Purshottam's* case was also relied upon by Mr. Bhatt, Relying on English authorities, the learned Judge has in that case no doubt held that Section 132 of the Companies Act would be applicable, but he was concerned in the said

case with a private examination u/s 477, and the English authorities on which he has relied in support of his view are also in respect of a private examination and not in respect of a public examination under the Companies Act. In this connection, it is most significant that Section 477 of the Companies Act which deals with private examinations does not contain any provision similar to Sub-section (5) of Section 478 which relates to public examinations under that Act, with the result that there is no provision in Section 477 which can be said to override the provisions of Section 132 of the Evidence Act. The decision of my brother Tulzapurkar in *In re Aruna Purshottam*, is, therefore, of no avail whatsoever to Mr. Bhatt in the present case. I hold that the provisions of Section 478(5) of the Companies Act override the provisions of Section 132 of the Evidence Act and that answers given by the officer who is being so examined which might tend to incriminate him can be used in criminal as well as civil proceedings that might ensue. In my opinion, no question of granting him protection under the proviso to Section 132 of the Indian Evidence Act arises at all in regard to such answers, even though he may be compelled to give the same by reason of the provisions of Section 478(5). In that view of the matter, it is not necessary for me to decide the wider proposition that was sought to be canvassed by Mr. Desai on behalf of the Official Liquidator viz. that the Indian Evidence Act does not apply at all to proceedings by way of public examination u/s 478 of the Companies Act. That would be a question of a far-reaching importance which should not, in my opinion, be decided unless it becomes necessary to do so.

16. In the result, all the preliminary objections of Mr. Bhatt stand rejected and I direct that the public examination must proceed.