

(1965) 07 BOM CK 0012
In the Bombay High Court
Case No : O.C.J. I.C. No. 221 of 1958

In Re: Aruna Purshottam Sonawala and Colaba Land and Mills Co. Ltd.

Date of Decision : 07-07-1965

Acts Referred:

Companies Act, 1956 — Section 477

Citation : (1966) MhLj 850

Hon'ble Judges : V.D. Tuljapurkar, J

Bench : Single Bench

Advocate : Ajit Mehta instructed by Ramardal and Varjiwandas, for the Appellant; M.R. Mody instructed by Dikshit Maneklal and Co. for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

V.D. Tuljapurkar, J.—The facts giving rise to the present Judge's summons dated June 11, 1965, taken out by the applicant Pravin Sankalchand Shah for vacating the order passed by this Court on March 2, 1963, directing private examination of several persons in so far as it relates to the applicant himself u/s 477 of the Indian Companies Act, I of 1950, may be stated: The Colaba Land & Mills Co. Ltd. (hereinafter referred to as the company) was by an order dated October 7, 1959, directed to be wound up and the Official Liquidator was appointed the Liquidator of the company with all the powers. It appears that the company was ordered to be wound up, inasmuch as it was found that the affairs of the company had been mismanaged for a number of years, that the loss caused to the company as a result of such mismanagement ran into Lakhs of rupees and that further investigation was necessary in order to bring to light the acts of mismanagement and frauds perpetrated during such mismanagement. On February 21, 1963, a Judge's summons was taken out by the Official Liquidator applying for examination of several persons including the applicant (whose names were listed in a schedule to the summons) u/s 477 of the Indian Companies Act and that application was supported by a signed statement of the Official Liquidator dated February 8, 1963, under Rule 243 (1) of the Companies (Court) Rules, 1959. In the signed statement it was pointed out that at the

extraordinary general meeting of the share-holders held on March 14, 1949, the Managing Agency Agreement with M/s. W.H. Brady Ltd. (the former Managing Agents of the Company) was by a resolution terminated necessitating payment of large amounts to the said M/s. W. H. Brady Ltd. and it was further pointed out that the applicant was a Director of the company at the material time and also a signatory to the requisition calling the paid extraordinary general meeting on March 14, 1949, and further a liability to the tune of over Rs. 25 lakhs was shown against his name. The application was heard ex parte by Justice K. K. Desai and the learned Judge by his order dated March 2, 1963, directed that the examination of persons mentioned in the schedule concerning the trade, dealings, property, books, papers and affairs of the Company be held on April 22, 1963, and that each of them do bring with him and produce at the time all books, papers, deeds, writings and other documents in his custody or power relating to the company. Pursuant to the said order a summons under Rule 243 (2) was served upon the applicant and other persons requiring them to attend this Honourable Court before the Honourable Judge taking company matters in Court on April 22, 1963, bringing with them and producing at the same time such documents as were in their custody, possession and/or control in any way relating to or belonging to the company, but this private examination of Pravin S. Shah, the applicant and others stood adjourned to June 24, 1963, and the applicant and others were accordingly informed about it. It further appears that owing to exigency of pressure of work the matter of private examination could not be taken up and was required to be adjourned from time to time and last of such adjournments was on September 16, 1963, when the learned Judge was pleased to adjourn the matter until such date as he would be pleased to fix. However, on that day the learned Judge directed the Official Liquidator to take out a misfeasance summons, restricted to the principal charges of malfeasance, misfeasance, breach of trust, breach of duty etc., such as the Official Liquidator could gather from the investigation report of the Inspector appointed by the Central Government u/s 235 (a) of the Companies Act and the investigation report subsequently made by the Chartered Accountants appointed by the Official Liquidator himself for a further investigation in pursuance of the order made by the learned Judge in that behalf, and these directions for taking out misfeasance summons were given as the limitation period of five years was about to expire. Accordingly, on October 5, 1964, a misfeasance summons u/s 543 (1) of the Companies Act read with Rule 260 of the Companies (Court) Rules was taken out by the Official Liquidator and when the same came up for hearing before Mr. Justice Kantawala on January 8, 1965, the learned Judge gave directions under Rule 261 and further fixed the hearing of the summons for November 8, 1965. It may be stated that the applicant Pravin S. Shah, whose private examination u/s 477 has been ordered, is respondent No. 7 to the misfeasance summons and in respect of various dealings including the termination of Brady's Managing Agency a sum of Rs. 44 lakhs and odd is claimed against him in the said summons. The private examination of the applicant and others, which was adjourned from time to time, was finally fixed on

June 14, 1965, but in the meanwhile he has taken out the present Judge's summons on June 11, 1965, for vacating the order passed on March 2, 1963, in so far as it relates to his private examination u/s 477 of the Companies Act.

2. The summons for vacating the order directing the applicant's private examination was pressed by Mr. Mehta on three or four grounds. In the first place, it was contended that beyond mentioning that the applicant was a signatory to the requisition calling the extraordinary general meeting on March 14, 1949 (at which the resolution terminating M/s. W.H. Brady's Managing Agency had been passed), and that he was a director of the company, the Official Liquidator had not indicated in his signed statement dated February 8, 1963, how and in what manner the applicant was expected to furnish any information or materials for effective prosecution of the liquidation and unless a person was capable of furnishing such information concerning dealings or property or affairs of the company his examination u/s 477 could not be ordered. Secondly, it was contended that the order dated March 2, 1963, obtained ex parte by the Official Liquidator had been obtained by suppressing certain material facts or rather without placing all the material and relevant facts before the Court and in this behalf it was pointed out that two material facts were not placed before the Court, viz. (1) that prior to the extraordinary general meeting that was held on March 14, 1949, where the resolution sanctioning the termination of the managing agency was passed by a majority, a meeting of the Board of Directors had been held and at that meeting it had been stated that opinion of an eminent counsel had been obtained and (2) both at the meeting of the Board of Directors as well as at the extraordinary general meeting of the share-holders held on that day certain facts had been mentioned viz. that a share-holder by name Padamsi Morarji had already filed a suit in the High Court against the company and the directors and that the said share-holder had taken out a Notice of Motion for an injunction restraining the Directors and the Company from holding the said extraordinary general meeting and that the said Notice of Motion had been dismissed by the Court of March 11, 1949, after considering the various affidavits used in the said Notice of Motion. Mr. Mehta urged that had these facts been placed by the Official Liquidator before the learned Judge, probably the order directing private examination of the applicant may not have been passed and in view of these facts, which are now being put forward the order directing private examination of the applicant should be vacated. Thirdly, Mr. Mehta urged that since the passing of the order dated March 2, 1963, directing the private examination of the applicant and others u/s 477, a supervening event had happened viz. the Official Liquidator had taken out a misfeasance summons on October 5, 1964, and an order from this Court fixing November 8, 1965, as the date of the hearing of that summons, had been obtained and what was urged was that the private examination u/s 477 of the applicant, against whom a misfeasance summons on substantially the same facts has been taken out and is pending, would be oppressive and vexatious, inasmuch as he would be called upon to furnish information and materials in his private examination, which

would be used against him later on in the misfeasance summons. Mr. Mehta in fact urged that the applicant's private examination would serve no other purpose but afford the Official Liquidator an opportunity to secure incriminating information against the applicant in order to proceed effectively with the misfeasance summons against him and therefore, such private examination of the applicant should be regarded as oppressive and vexatious. Lastly, it was contended that the applicant would be, so to say, compelled to give incriminating answers to questions touching the items or topics which are the subject-matter of the misfeasance summons and these answers would be used against him in the misfeasance proceedings and that it opposed to all principles of natural justice and equity. In support of his contentions Mr. Mehta relied upon the decision of the Supreme Court in the case of Satish Churan Law Vs. H.K. Ganguly, and certain observations made by Mr. Justice J. C. Shah therein. On the other hand, Mr. Mody appearing on behalf of the Liquidator, though he fairly conceded that it was open to the applicant to take out his Judge's summons for the purpose of vacating the order dated March 2, 1963, which had been passed ex parte, contended that no case had been made out by the applicant for vacating the said order. He contended that since the applicant Pravin S. Shah was admittedly a director of the company at the most material period in the history of the company, especially at the time when the extraordinary general meeting was held at which the resolution terminating the managing agency of M/s. Brady & Co. was passed, it could not be said that he could not furnish information concerning the trade, dealings, property or the affairs of the company. He, therefore, urged that the applicant could be regarded as a person capable of giving information u/s 477 and as such the order directing his private examination should not be vacated. Mr. Mody further contended that the mere fact that a misfeasance summons had been taken out and that the same was pending against the applicant, could not be pressed into service for the purpose of drawing an inference that the private examination of the applicant would be oppressive or vexatious. He contended that the purpose or object of section 477 under which private examination is directed is entirely different from the purpose or object of section 543 (1) under which the misfeasance summons is taken out. He pointed out that since the applicant was a director of the company at the material time, information would be sought at his private examination not only on items or topics which are the subject-matter of the misfeasance summons but on other points concerning trade, dealings, property, books, papers and affairs of the company. Regarding the contention that the private examination would be oppressive and vexatious on the ground that the applicant might be compelled to give answers which might incriminate him or be detrimental to his interest and that his answers might be used against him in the misfeasance summons, Mr. Mody pointed out that in such a private examination u/s 477 it was open to the applicant to claim protection from the Court against such incriminating questions and the Court was always there to afford the necessary protection to him. He further urged that such a stage would only arise after the applicant's private examination is conducted for some time and at the proper time, if any

incriminating questions were put to him, he could always seek protection of the Court. But simply because some incriminating questions might be asked to the applicant in his private examination, that is no ground for vacating the order directing his private examination. He, therefore, urged that no case had been made out by the applicant for coming to the conclusion that his private examination u/s 477 should be regarded as oppressive or vexatious and therefore, the summons taken out by him was liable to be dismissed.

3. In order to deal with the first two contentions of Mr. Mehta, it will be necessary to consider the provisions of section 477 of the Companies Act and its scope and object. The relevant provision is contained in sub-section (1) thereof which runs as follows :

477. Power to summon persons suspected of having property of company, etc.-
(1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property or books or papers, of the company, or known or suspected to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, property, books or paper, or affairs of the company.

Sub-section (2) provides for such examination being taken on oath either by word of mouth or on written interrogatories and requires such person so examined to sign his answers if these are reduced to writing; sub-section (3) provides that the Court may require such officer or person so summoned to produce any books and papers in his custody or power relating to the company; sub-section (4) provides that if the officer or person so summoned after being paid or tendered his expenses fails to appear at the appointed time, the Court may cause him to be apprehended and brought before it for such examination. Under subsections (5) and (6) it has been provided that if the officer or person so summoned admits that he is indebted to the company or that he has with him any property of the company, the Court may order him to pay the amount or deliver the property to the Liquidator and such orders are made executable as if they are decrees under CPC under sub-section (7). From these provisions, it will be clear that the section has been enacted with the object of enabling the Court in charge of liquidation proceedings to examine the persons mentioned therein to ascertain, among other things, their conduct with regard to the management of the company and to find out the financial condition and the assets of the company. If the provisions of sub-section (1) are carefully scrutinised it will be clear that the Court thereunder is authorised to summon before it four classes of persons for their examination viz. (a) any officer of the company, or (b) any person known or suspected to have in his possession any property or books or papers of the company, or (c) any person known or suspected to be indebted to the company, or (d) any person whom the Court deems capable of giving information concerning promotion, formation, trade, dealings, property, books or

papers or affairs of the company. It will be pertinent to note that whereas in regard to the last three classes of persons there are qualifying words, in regard to the first class of persons viz. any officer of the company, there are no qualifying words used. In other words, if a person to be summoned for examination u/s 477 belongs to the last three classes of persons, such person must be known or suspected to have in his possession any property or books or papers of the company or known or suspected to be indebted to the company or must be one whom the Court deems capable of giving information pertaining to the subjects mentioned therein, but an officer of the company could be summoned irrespective of whether he has in his possession any property, books or papers of the company or not, whether he is indebted to the company or not or whether or not the Court deems him capable of giving information. In the present case, since the applicant was admittedly a director of the company and therefore, an officer of the company within the meaning of section 2 (30) of the Companies Act, he would fall under the first category of persons mentioned in sub-section (1) of section 477 and as such could be summoned by the Court for his examination under the section at any stage of the Liquidation proceedings. It is, therefore, not possible to accept Mr. Mehta's contention that the order directing the applicant's private examination should be vacated because the Official Liquidator in his signed statement dated February 8, 1963, had not indicated how and in what manner the applicant was expected to furnish any information or materials for effective prosecution of the liquidation. The scheme of section 477 clearly indicates that an officer of the company shall, unless contrary was established, be always deemed to be a person, who will be in a position to furnish information inter alia about his conduct with regard to the management of the company and concerning the trade, dealings, property, books or affairs of the company. Apart from this, it is an admitted position on record that the applicant was a director of the company from May 13, 1948, to April 30, 1949, that is to say for a period of about 1 year and it was during this period viz. on March 14, 1949, that the extraordinary general meeting of the company was held at which the resolution sanctioning the termination of the managing agency of M/s. W. H. Brady & Co. Ltd. was passed and it is an admitted fact further that the applicant was one of the signatories to the requisition calling the said extraordinary general meeting on March 14, 1949. Further, it is not disputed that such termination of the managing agency of M/s. Brady & Co. Ltd gave rise to disputes between the company on the one hand and M/s. Brady & Co. Ltd. on the other and that the said disputes were referred to arbitration and as a result of the award that was made large amounts were required to be paid by the company to M/s. Brady & Co. The question whether the applicant is accountable therefore or not is a different matter. In view of these facts there could be no doubt that the applicant, who at the most material time was the director of the company would be a person who could be having in his possession information concerning the dealings and affairs of the company and as such his examination u/s 477 could be ordered.

4. Similarly, there is no substance in the contention of Mr, Mehta that the Official Liquidator had obtained the order dated March 2, 1963, ex parte without placing two most material facts (referred to by me in the earlier part of the judgment) before the Court or that the Court would not have passed the order directing the applicant's private examination if those facts had been placed before it. In the first place, on my construction of section 477 as indicated above, there was no necessity on the part of the Official Liquidator to place before the Court any other facts except the fact that the applicant was a director and therefore, an officer of the company in order to obtain the order in question. Secondly, though it is true that these two facts had not been mentioned by the Official Liquidator in his statement dated February 8, 1963, it cannot be said that simply because these facts were not mentioned by him to the learned Judge, the Official Liquidator had deliberately suppressed those facts from the Court. Further, even after considering these material facts which have been put forward by the applicant at this stage, I am unable to persuade myself to take the view that no useful information-useful from the point of view of furthering the liquidation proceedings-would be forthcoming from the applicant concerning the trade, dealings, property, books or papers or affairs of the company. In fact, the disclosure of these facts-on which the applicant is strongly relying in exculpation of himself or by way of extenuation-renders his private examination u/s 477 all the more necessary, for it would help the Official Liquidator to ascertain and appreciate all the facts correctly.

5. The next contention of Mr. Mehta has been that since the passing of the order directing private examination of the applicant and others u/s 477 a supervening event has happened viz., a misfeasance summons has been taken out by the Official Liquidator against the applicant and the same is pending in this Court and therefore, the order directing private examination of the applicant should be vacated. The circumstance about the pendency of the misfeasance summons taken out by the Official Liquidator against the applicant was relied upon by Mr. Mehta for presenting a two-fold argument. In the first place, he urged that once a misfeasance summons is taken out by the Official Liquidator u/s 543 of the Companies Act the Official Liquidator should be taken to have crystallized all the allegations against the applicant as a delinquent director and should be taken to have crystallized specific items of claims to be put forward against him as such delinquent director and that, therefore, a private examination u/s 477, which is inquisitorial in character and resorted to for the purpose of collecting information and materials should not be allowed to be held. Secondly, he urged that the private examination of the applicant, against whom a misfeasance summons on substantially the same facts has been taken out and is pending, would be oppressive and vexatious, inasmuch as he would be called upon to furnish information and materials in his private examination, which would be used against him later on in the misfeasance summons. According to Mr. Mehta, the private examination of the applicant in the present case, would only afford the Official Liquidator an opportunity to secure incriminating materials against the

applicant and would facilitate the prosecution of the misfeasance summons against him. In order to deal with these contentions of Mr. Mehta, it will be necessary to consider side by side the provisions of sections 477 and 543 of the Companies Act as also the objects underlying these two sections. In the earlier part of my judgment I have already referred to the provisions of section 477 and I have also indicated the object with which that section appears to have been enacted. Now section 543 runs as follows :

543. Power of Court to assess damages against delinquent directors, etc.-

(1) If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of (he company-

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company; the Court may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

(2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter in one for which the person concerned may be criminally liable.

Reading the section as a whole, it will appear clear that the principal object of the section is to enable the Court, upon an application being made to it by the Official Liquidator in that behalf, to assess the damages or the exact amount for which a delinquent director or officer of the company could be held liable or accountable to the company in respect of the acts of misfeasance or breach of trust or any property or money which has been misapplied or retained by him. In other words, the provisions of these two sections are materially different in their object. Reading sections 477 and 543 of the Companies Act side by side, it will at once become clear that though both are procedural sections, the nature of machinery provided by each is different and the purpose for which such machinery is provided is also different. Whereas the step or proceeding

contemplated u/s 477 is of exploratory nature, that is to say, it is a proceeding in the nature of inquiry and investigation for the purpose of collecting information on subjects mentioned therein, the proceeding u/s 543 is a further step for ascertaining and assessing the amount that may be due or accountable by a delinquent director or officer to the company. Further it is also clear that there is nothing in either of these two sections or any other provisions of the Companies Act to warrant an inference that once a misfeasance summons is taken out u/s 543, private examination u/s 477, that is to say, a proceeding by way of an inquiry or investigation for the purpose of getting information on subjects mentioned in that section should cease. In fact the opening words of section 477 clearly indicate that the examination thereunder could be applied for and directed "at any time after the appointment of a provisional liquidator or the making of a winding up order." The test for making the order under the section, as has been held in many "English cases and in the Supreme Court decision in *Satish Churan Law Vs. H.K. Ganguly*, , is whether it is just and beneficial for the purposes of the winding up of the company, It is well settled that mere pendency of an action against an officer of the company is not sufficient to justify him in refusing to submit himself to the examination under the section. In *Re: Metro (Brush) Elec. Light & Power Co. Lim.: Ex Parte Leaver* (1884) L. T. 817 it has been held that the liquidator may properly apply for examination u/s 115 of the English Companies Act, 1902 (similar to section 477 of our Act) for the purpose of ascertaining whether the proceedings should be continued against an officer of the company. So also in *Heiron's case* (1880) 15 Ch. D. 139 it has been held that it is open to the liquidator to apply for such examination either before or even after he has brought an action against an officer of the company. It is, therefore, not possible to accept Mr. Mehta's contention that once a misfeasance summons is taken out by the Official Liquidator u/s 543, a private examination u/s 477 could not or should not be held.

6. Turning to the second branch of Mr. Mehta's argument that the private examination of the applicant, against whom a misfeasance summons on substantially same facts has been taken out and is pending, would be oppressive and vexatious, it is not possible to accept that argument either. It may be that in the private examination of the applicant items or topics which are the subject-matter of the misfeasance summons might crop up and questions on those topics might be put to him, but that by itself is no reason why his private examination should not be held, for the object with which his private examination has been directed u/s 477 is to enable the Official Liquidator to obtain information concerning the trade, dealings, property, books, papers and affairs of the company. Since the applicant was a director of the company for about one year which was the most material period in the history of the company, he was unquestionably concerned with guiding the affairs of the company during that period and therefore, *prima facie* a person who would be able to give information likely to promote the purpose of winding up and as such it cannot be said that his private examination would only serve the purpose of facilitating the

prosecution of the misfeasance summons against him, as is contended by Mr. Mehta. There is a possibility that items or topics which are the subject-matter of the misfeasance summons might crop up in his private examination, but such mere possibility cannot be a ground for holding that his private examination would be oppressive or vexatious. Mr. Mehta relied upon certain observations of his Lordship Mr. Justice J. C. Shah in the case of *Satish Churan Law Vs. H.K. Ganguly*, and the relevant observations which occur in para. 10 of the judgment run as follows:

The jurisdiction to vacate or modify an ex parte order under Rule 243 being granted, the question which falls to be determined is whether the order parsed by Mr. Justice Mitter was oppressive or vexatious or otherwise liable to be vacated or modified for adequate grounds. In our view, there is no ground for holding that the order is liable to be vacated or modified. It was never even suggested in the High Court that the order for examination was per se oppressive or vexatious. This is not a case in which the order is sought to facilitate the progress of an action filed by the official liquidator against the appellant, nor is there reason to hold that the order is sought in aid of some collateral purpose—a purpose other than effective progress of the winding up in the interest of the company.

Relying upon these observations Mr. Mehta urged that if the order for private examination was going to facilitate the progress of an action filed by the Official Liquidator against the Director or officer of the company, such order is liable to be vacated and according to Mr. Mehta, in the present case since the misfeasance summons has already been taken out by the Official Liquidator against the applicant, his private examination u/s 477 would facilitate the progress of the action taken against him. It is not possible to accept the interpretation which Mr. Mehta is seeking to put upon the observations quoted above for more than one reason.

7. Apart from the fact that the observations themselves do not warrant the interpretation that is sought to be put thereon, it is obvious that these observations will have to be understood in the context of the facts of that case and the questions which arose for determination in that case. Principally, two questions arose for determination in that case; the first, whether an ex parte order directing examination of a person u/s 477 was liable to be modified or vacated on an application by the person affected thereby and secondly, whether there was any ground for discharging or modifying the order that had been made u/s 477. On the first question, the Supreme Court has taken the view that since the order u/s 477 is usually obtained ex parte it is liable to be modified or vacated on an application by a person affected thereby. On the second question their Lordships had to consider whether on facts the appellant had brought out facts and circumstances on the basis of which the order directing his private examination could be vacated or discharged and while considering this aspect of the matter their Lordships pointed out that it was not a case in which it could be

said that the order for private examination was sought to facilitate the progress of any action filed by the Official Liquidator against the appellant, for there was no action pending against the appellant at the instance of the Official Liquidator in that case and therefore, all that their Lordships were concerned in pointing out was that since there was no such action pending against the appellant concerned, there could be no question of the private examination being sought for the purpose of facilitating the progress of any such action. It is in this context that these observations relied upon by Mr. Mehta will have to be understood. I do not think that the Supreme Court wanted to lay down as a proposition of law that once a liquidator had taken action against the officer of the company the liquidator could not obtain an order for a private examination of such officer of the company. In my view, what must be shown by a person who is affected by the order directing his private examination is that not only an action at the instance of the liquidator is pending against him but that his private examination is sought solely for the purpose of facilitating the progress of that action against him or that his private examination is sought for the purpose of harassing him. In the present case no materials have been brought on record by the applicant to show that his private examination was sought by the Official Liquidator either for harassing him or solely for the purpose of facilitating the progress of the misfeasance summons taken out against him. In fact, it may be pointed out that the order for private examination of several persons including the applicant was obtained by the Official Liquidator on March 2, 1963, while the misfeasance summons was taken out against the several persons, including the applicant on October 5, 1964. That the Supreme Court did not want to lay down such a proposition of law as is contended for by Mr. Mehta, will be clear from the further fact that the English decision reported in *Heiron's case* (1880) 15 Ch. D. 139 where it has been held that it is open to a liquidator to apply for such private examination either before or even after he has brought an action against an officer of the company, was cited and has been approved of by the Supreme Court. In that case [*Heiron's case* (1)] a liquidator, who had already brought an action on behalf of the company against an officer, had exhibited interrogatories, which had been fully answered by the defendant u/s 115 of the Companies Act, 1862 (similar to section 477 of our Companies Act) and it was held that the action of the liquidator was vexatious. The observations of Lord Justice Bramwell, which appear at page 142 of the report are very material and they run as follows:

I am of the same opinion. It is unjust to say that this summons is a matter of right, for, when the sections to which we have been referred are considered, the Court is to grant it if it appear to be just and beneficial. Now this liquidator was clearly entitled to come to the Court for this examination before he brought the action, and he was also entitled to apply to the Court after action brought; but the question now is, what are his rights after he has examined the Defendant on interrogatories which have been sufficiently answered? I am of opinion he ought to have made this application earlier. He has harassed and vexed this Defendant with one set of interrogatories, and now, upon a surmise that he may learn

something more on another examination, he wants to do so again. I am of opinion that in order to obtain this order the liquidator ought to come to the Court with such materials as to show that, plus the interrogatories already exhibited, he has a case which entitles him to have a further examination of the Defendant. Here no such case is made out. It is much better, therefore, that liquidators should understand that if they wish to exercise this inquisitorial power they ought to do so in the first instance, and not wait until after they have tried their hand at one attempt, which may not perhaps have turned out quite so successful as they anticipated.

From these observations two positions become very clear. In the first place, the liquidator is entitled to an order for private examination of an officer of the company either before he institutes any action against that officer or even after he has instituted action against that officer and secondly, if the liquidator has already made an attempt to get the necessary information from the officer concerned by exhibiting interrogatories to him any other attempt in the same direction by resorting to the provisions of the Companies Act which entitle the liquidator to obtain private examination of the officer, would amount to harassment of the officer and in those circumstances private examination should not be ordered. In other words, it will appear clear that the liquidator's application seeking private examination of the officer concerned was held vexatious not because he had already filed an action against that officer, but because he had prior to his application, exhibited interrogatories to that officer and that officer had fully answered them. In the present case no such harassment nor any other kind of harassment has been shown. In my view, therefore, the mere fact that a misfeasance summons has been taken out against the applicant and that the same is pending and a further possibility that items or topics which are subject-matter of the misfeasance summons might crop up in his private examination, are no grounds for holding that the applicant's private examination would be oppressive or vexatious.

8. As regards the last contention that the applicant would be called upon to give answers to questions which might be incriminatory in nature or would be detrimental to his interest either in the misfeasance summons or in any criminal proceeding that may be launched against him, I do not think that the apprehension entertained by him is in any manner justifiable. It is a well-known proposition that at such private examination it is open to the examinee to refuse to answer questions on matters in which he might incriminate himself or on matters involving professional confidence. If need be, I may refer to two passages, one from Buckley on the Companies Acts and the other in Halsbury's Laws of England. The relevant passage in Buckley appears at page 562 (13th Ed.) and it runs as follows:

The only matters as to which the witness can refuse to answer are matters in which he may incriminate himself, and matters involving professional confidence.

In Halsbury, 3rd Edn., Vol. 6, para. 1218 (relevant portion) runs as follows:

The witness may, it seems, refuse to answer matters in which he may incriminate himself, and matters involving professional confidence.

The aforesaid passages, if I may state, are based upon an English decision reported in Whitworth's case (1881) 19 Ch. D. 118. The applicant can always invoke Court's protection in such matters.

9. In the result, I feel that no case has been made out by the applicant for vacating or modifying the order dated March 2, 1963. The Judge's summons is, therefore, dismissed with costs. Costs to be taxed.