

(1960) 07 CAL CK 0043

In the Calcutta High Court

Case No : Company Application No's. 39, 44, 48 and 49 of 1960

In Re: Balygunge Real Property and Building Society Ltd.

Date of Decision : 15-07-1960

Acts Referred:

Companies (Court) Rules, 1959 — Rule 243, 243(1), 244, 360, 360(1)
Companies Act, 1956 — Section 477

Citation : AIR 1961 Cal 405

Hon'ble Judges : U.C. Law, J

Bench : Single Bench

Advocate : S.C. Roy, A.N. Banerjee and Bikas C. Sen, for the Appellant; S.C. Mukherji, for the Respondent

Final Decision : Dismissed

Judgement

U.C. Law, J.—In these four applications the two main questions that fall for my determination are (1) Whether the order made on 18th January 1960 can be recalled, vacated, set aside or modified by this Court and (2) whether the applicants are entitled to the inspection of the file of the proceedings of the liquidation and the statement of the Liquidator which accompanied the ex parte summons in form No. 109. These applications were heard and argued together and the learned counsel appearing for different applicants agreed that one judgment should cover them all. The questions arise in this way:--

2. On 9th January, 1960, the Official Liquidator of the above company took out a summons in form No. 109 as is required under Rule 243(2) of the Companies (Court) Rules 1959 hereinafter referred to as the Company Rules and applied ex parte under Rule 243(1) for private examination, inter alia, of the above named applicants u/s 477 of the Companies Act, 1950. The summons was in accordance with Rule 243, Sub-Rule (2) of the Company Rules accompanied by a statement signed by the Official Liquidator setting forth the facts upon which the application was based. It appears that on 3 8th January 1960 G.K. Mitter, J., who heard this ex parte summons upon hearing the Attorney of the Official Liquidator and upon reading the order of winding up of the company dated 8th January 1958 and the

statement of the Official Liquidator with the annexure thereto passed a order in form No. 110 of the Company Rules that the above applicants amongst others be summoned to attend Court on 22nd March 1960 at 10-30 a.m. for the purpose of being examined u/s 477 of the Companies Act concerning promotion, formation, trade, dealings, property, books, papers and affairs of the company and the said persons be required to bring with them books and papers as mentioned in the said order. The said order was duly drawn up and completed. Pursuant to the said order a summons in form No. III of the Companies Rules was issued on 8th March 1960 and was duly served on these applicants. Upon service of the summons as aforesaid on these applicants, they have respectively now applied inter alia for (1) setting aside or modifying or recalling or vacating the order dated 18 January 1960, and (2) for inspection of the file of the proceedings of the liquidation and the statement of the Official Liquidator.

3. With regard to the first prayer it is contended that even though the order of 18th January 1960 has been drawn up and completed, I have jurisdiction to set aside, modify, vacate or recall the order as a Judge presiding over the Company Court because on general principle if an ex parte order is passed against a person and the person is affected thereby he is entitled to come before the Court and have the order set aside; and further that no order should be made in favour of one party against and to the prejudice of another, unless the other had an opportunity of showing that it should not be made; and next it is contended that Rule 243, Sub-rule (1) of the Company Rules under which the Official Liquidator made the application is ultra vires Article 14 of the Constitution of India, in that it provides that the Official Liquidator may apply ex parte thus giving him an unfettered discretion to apply ex parte or upon notice without such discretion being in any way guided.

4. It is well settled that as a general rule except by way of appeal no Court, Judge or Master has power to re-hear, review, alter or vary any judgment or order after it has been entered or drawn up respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order. The object of this rule is to bring litigation to finality (See Halsbury Third Edition, Volume 22, page 785, Article 1665). This rule is subject to certain exceptions but as none of them is relied on in this application it is not necessary for me to discuss them here.

5. Our courts have also consistently held that once the order is completed the Jurisdiction of the Court comes to an end (Vide Sarupchand Hukumchand Vs. Madhoram Raghumall, per Buckland, J., and In the matter of the Steel Construction Co. Ltd., 39 Cal WN 1259 per McNair J.).

6. With regard to the contention, that if by an ex parte order the rights of a party are affected he can apply to have the order set aside and that no order should be made against and to the prejudice of another without giving opportunity to the other to object to it, it may be observed that (in my opinion) the order complained of did not adversely affect the rights of any of the applicants. The

order simply summoned the applicants to appear before the Court for the purpose of being examined u/s 477 of the Companies Act concerning the affairs of the company and to produce certain books. There is no charge, no complaint or allegation against the applicants who are not parties to the application u/s 477 of the Act, -- they are only required to furnish information with regard to the company, and secondly, this elementary principle is applicable only in the absence of any special legislative rule excusing notice (Woodroff S.M. Sudevi Devi Vs. Sovaram Agarwallah . Here however under Rule 243(1) of the Company Rules the Official Liquidator was entitled to move ex parte.

7. A witness summoned under this Section is in a position different from an ordinary witness and must be summoned by summons and not by sub-poena, for the Court has to be satisfied that the person summoned is capable of giving the information. Here the Court after due consideration of the statement of the Official Liquidator expressed its opinion that the applicants were proper persons to be examined u/s 477 of the Companies Act. The matter is essentially one for the discretion of the primary Judge and it has been held that the Appeal Court (knowing as it must much less of the affairs of the Company than the Judge who has the control of the winding up) will be slow except in extreme cases to interfere with his order.

8. As regards the question whether Rule 243(1) of the Company Rules is ultra vires Article 14 of the Constitution, I express no view as this is really a matter for the Court of Appeal.

9. So I hold that this Court has no jurisdiction to vary, alter or set aside an order after it has been drawn up and completed.

10. With regard to the second prayer, namely that the applicants are entitled to inspection of the file of proceedings of the liquidation and the statement of the Official Liquidator, it is contended that they are so entitled under Rule 360, Sub-rule (1) of the Company Rules; further they are also entitled to inspection on general principle that if an ex parte order is passed against a person and the person is thereby affected he can have the order set aside by the Court which passed the order; and if that right is there then he is entitled to look into the papers on the basis of which the ex parte order was obtained, otherwise that right cannot be properly exercised. He must know the basis of the complaint in order to get rid of the order, based On that complaint. Whether the order is obtained on misrepresentation or not cannot be ascertained if opportunity is not given to him to look into the allegation contained in the statement. It is further argued that the applicants are entitled to inspection because the rules enjoin that the summons shall be in form no. 109 the language whereof is "let all persons concerned etc.", thus clearly indicating that notice of petition was meant to be served upon the applicants. Rule 360 envisages that whatever record there be with regard to the proceedings of the liquidation, a director is entitled to inspection unless there is a specific prohibition to the contrary. Rule 248 of the Companies Rules provides protection for notes of the deposition taken in private

examination u/s 477 of the Companies Act but there is no other rule providing protection for the Liquidator's statement which accompanied the summons in form No. 109. The applicants are not in the position of an ordinary witness, they have a higher light than an ordinary witness, they have right to say (a) that the order has been harsh and oppressive, (b) that the order is of inquisitorial nature, (c) that the order is mala fide and unless the applicant is allowed to look into the Official Liquidator's statement he cannot take these points or, in other words, he is deprived of taking these points. This in substance is the entire argument on behalf of the applicants.

11. I do not think there is much substance in the counsel's argument -- the fallacy is obvious because the argument proceeds on the assumption that the applicants are parties and entitled to the notice of the application u/s 477 of the Companies Act and that their rights have been affected by the order of 18th January 1960; but it is not so, as I have already observed before, while dealing with the first question and I need not repeat again. Rule 243(1) of the Company Rules entitles the Official Liquidator to apply ex parte upon summon in Form 109.

12. Reading Section 477 of the Companies Act it appears to me that the enquiries are of a preliminary and private nature the primary object being to ascertain facts with regard to the company. This section enables the Court in charge of the liquidation proceedings to examine persons therein mentioned to ascertain, inter alia, their conduct with regard to the affairs and management of the company and also to find out its financial conditions and assets.

13. Section 477 makes it quite clear that the Court can in its discretion summon before it any, Officer of the Company or person known or suspected to have in his possession property, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers or affairs of the company. The powers of the Court are very wide and it is not at all necessary that the Court must first determine that the person called upon to furnish the information does actually possess that information. If the Court has reasons to think, or if even an allegation is made that a certain person is in possession of information which would be useful for the purposes of the winding up, the Court can call upon him to appear in Court and examine him. It has been held also that if the judge has made an order for an examination the Court of Appeal will not generally interfere with his discretion.

14. In re; Gold Co., (1879) 12 Ch. D. 77 at p. 82 Jessel M. R. made the following observation:

"The Liquidator according to the practice of the Court comes ex parte and, as a general rule, he makes no affidavit for a very good reason that it is not desirable for him to put anything Upon the files of the Court which can be inspected by the person against whom he intends to proceed, and which if so inspected, might afford information which would enable him to defeat any proceeding to be taken against him."

It has further been observed at p. 84 that:--

"In these matters the Court acts without legal evidence, the object being to keep the proceedings secret from the persons sought to be affected and the practice is and as far as I know always has been, that the Liquidator instead of making an affidavit, simply makes a written statement which he leaves with the Chief Clerk who thereupon issues an order and the written statement cannot be got at by anybody whereas an affidavit can,"

15. The above observation, it appears, have not been doubted by any court ever since. I respectfully adopt the reasonings of the learned Master of Rolls.

16. According to our new Rules 243(1) and 243(2) the Official Liquidator also applies ex parte on summons in Form 109 which is accompanied by a statement signed by him setting forth the facts on which the application is based.

17. So it appears that the new Rules 243(1) and 243(2) of the Company (Court) Rules 1959 have laid down and adopted the same procedure as referred to by the learned Master of the Rolls in (1879) 12 Ch D 77 at p. 82 and it further appears to me that the framers of these new rules also intended that the same practice should be followed here. I say this because I find the procedure laid down in Rules 243(1) and 243(2) as entirely different from old Rule 195 under the Indian Companies Act 1913, now superseded. The old Rule 195 provided that

"An application for examination of a person or persons u/s 195 of the Act shall be made ex parte to the Judge by petition verified by the Official Liquidator stating facts upon which the application is based."

But now under the new Rule 243(2) where the application is by the Official Liquidator the summons shall be accompanied by a statement signed by him setting forth facts on which the application is based. So, where the application is by the Official Liquidator, no legal evidence is required and the court acts on the signed statement of the Official Liquidator, the obvious object being to keep the proceedings secret from the persons sought to be examined, because, the statement of the Official Liquidator could not be got at by the persons summoned whereas a petition could. This practice has this advantage that it prevents the person summoned from obtaining information which would enable him to defeat any proceedings that may be taken in the matter or against him. The framers of these Rules appear to have appreciated this otherwise there would be no point in altering the old practice of Rule 195 under the Companies Act 1913. Further in my opinion it inspection were made available to persons summoned the very object of Section 477 of the Companies Act, 1956 would be defeated. But then it is said that Rule 360(1) of the Company Rules entitles a Director or Officer of the company to inspect the file of proceedings of the liquidation and to take copies or extracts from any document therein. I have been told that in this Court there is no such thing as the file of the proceedings of the liquidation but we have what is called Liquidation Register wherein are entered company-wise, under separate heading for each company ordered to be wound up, briefly and in chronological

order, all proceedings in winding up until conclusion or the winding up. In cases such as these, I have in the past held and also now hold that examination u/s 477 of the Act cannot be held to be a proceeding of the liquidation as contemplated by Rule 360(1) of the Company (Court) Rules 1959, These are proceedings no doubt, but are proceedings for the purpose of assisting the winding up. The statement of the Official Liquidator which accompanies the summons in Form 109 is not on oath Or affirmation and as such cannot be legal evidence to form part of the proceedings of the liquidation. Rule 360(1) of the Company Rules, in my opinion, cannot include such statement of the Official Liquidator which merely contains certain confidential informations for the Court's consideration. It is a matter entirely between the court and its officer. The applicant may well say to the Judge that he had strong ground for suspecting that certain transactions were fraudulent and if proved would bring large sum of money and it was worth while spending some money for examination ot certain witnesses to ascertain the facts. In such a case the Court will exercise a discretion In (1879) 12 Ch D. 77 at p. 85 Jessel M. R. said:

"In fact the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy which was established in order to enable assignees, who are now called trustees in bankruptcy to find out facts before they brought an action so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might by examining a witness or two, have discovered at a trifling expense that an action could not succeed."

I respectfully adopt these reasonings of the learned Master and hold that the applicants are not entitled to inspection as prayed,

18. In this view of the matter the other argument of the learned counsel do not arise and need not be specifically dealt with by me.

19. As regards the question of production of books the applicants can at the time of hearing take such objections as they are advised to take. Therefore it is not necessary for me to deal with it separately particularly as I have held that I have no power to vary or set aside the completed order.

20. This disposes of the applications but before I conclude I would like to add a few words as it is desirable that this new practice and procedure in cases such as these should be made known.

21. Applications for examination u/s 477 of the Companies Act, 1956 are made under Rule 243 of the Companies (Court) Rules 1959 which lays down its own procedure. Under Rule 243(2) all applications shall be by summons in Form No. 109 and where the application is by the Official Liquidator shall be accompanied by a statement signed by him setting forth the facts on which the application is based and he may apply ex parte under Rule 243(1). But where the application is made by any person other thaw the Official Liquidator the notice of the application shall be given to the Official Liquidator and the summons in Form No. 109 shall be supported by an affidavit of the applicant setting forth the matters

in respect of which the examination is sought and the grounds relied on in support of the summons.

22. In the light of what I have stated above these applications are bound to fail and I make the following order:

Company Application No. 49 of 1960 -- applicant Pulin Krishna Roy, is dismissed with costs:

Company Application No. 44 of 1960 -- applicant Satish Churn Law, is dismissed with costs:

Company Application No. 39 of 1960 -- applicant Sudhir Chandra Nawn, is dismissed with costs; and

Company Application No. 48 of 1960 -- applicant Salendra Nath Sinha, is dismissed with costs.

23. In all these applications I certify for counsel.