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(1957) 03 CAL CK 0030

In the Calcutta High Court

Case No : Matter No. 3 of 1957

In Re: Calcutta City Bank Ltd.

Date of Decision : 05-03-1957

Acts Referred:
Banking Companies Act, 1949 — Section 45G, 45G(1)
Companies Act, 1913 — Section 195, 196
Companies Act, 1956 — Section 477, 478

Citation : AIR 1957 Cal 508 : 62 CWN 39

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Deputy Court Liquidator, for the Appellant;S. Sen, P.K. Sen and P.K. Bose, for the Respondent

Judgement

P.B. Mukharji, J.—This is an application by the Court Liquidator u/s 45G of the Banking Companies Act for public examination of five persons who are directors of the Calcutta City Bank Ltd. now in liquidation. Except one, all the four other directors have appeared through Counsel.

2. This bank was directed to be wound up by an order of the Court dated 25-4-1949. After the Court liquidator as Official Liquidator took over charge of this Bank in liquidation, he caused an investigation to be made from the available bocks and records by the Audit Investigating Officer attached to his office. From the report of the said officer, the liquidator has formed his opinion that loss has been caused to this banking company.

3. In support of his opinion he furnishes three major facts. One is that a firm named Finance and Facilities had an overdraft account with the bank. The address of the firm appeared to be the same as that of the bank itself. The liquidator suggests that it is apparent that the management of the bank was directly concerned with or interested in the said firm- From the Current Account Ledger it appears that on the date of the winding up order a sum of Rs. 26,414/13/- was outstanding in the name of the said account of that firm. Neither the said firm nor its assets are traceable. He, therefore, rightly concludes

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that loss has been caused to the bank to the extent of Rs. 26,414/13/- and he suggests that the loss was due to the acts or omission of the directors for the relevant period. The other fact is that there was another firm of the name cf Central Stores and Agency which also had an overdraft account with the bank. There again the address of the firm was given as the same as the head office of the bank itself. The liquidator, therefore thinks that the management of the bank was either directly concerned with or interested in the said firm. The amount which was outstanding on the date of the winding up order of the bank in the name of the said firm was Rs. 28,111/1/10. Here again neither the said firm nor its assets are traceable. The liquidator, therefore, rightly concludes that a loss to the extent of Rs. 28,111/1/10 has been caused to the bank and he suggests that the loss was due to the acts or emission of the directors for the relevant period. There is a third fact which is also placed by the Liquidator before this Court. It is this. The Bank is supposed to have granted a large number of leans and overdrafts without any security. The borrowers cannot be traced and in most cases no addresses are given in the books of the bank in respect cf these unsecured debts. The liquidator has found out that a total loss has been caused to the bank of a sum more than Rs. 7,88,070/13/6 and he is of the opinion that it is due to the acts or omission of the directors of the relevant period. He, therefore, new wants an order for public examination of the directors in accordance with the provisions of Section 45G of the Banking Companies Act.

4. On behalf of the appearing directors it has been contended that the report is not sufficient as it does not definitely state the names of the directors or any of them who is responsible for such loss. The separate affidavits of the directors, Bimal Charan Gupta, Suresh Chandra Das, Hemendra Chandra Pal and Rabindra Ku-mar Das are most peculiar. Bimal Charan Gupta admits that he was a director but says that he has no concern or connection with these firms and that he had no hand in any of the investments. His case is that he only became a director of the bank on the request of a friend of his called J. Moulik who was then the manager of the Calcutta branch of the bank at Raipur in the State of Madhya Pradesh where this director resides and practices the profession of a physician. Bimal Charan Gupta says that being away at Raipur he had to depend and rely on his co-directors for day to day administration and alleges that Hemendra Chandra Pal was the Managing Director cf the bank and was the real person in charge of affairs. Suresh Chandra Das, another director, says that he is the editor of an evening daily newspaper called Free Lance and the managing director of General Orders and Publishers Ltd. He also admits that he was a director but says that he is not responsible for any loss. He denies that he was in any way connected with the two firms mentioned above. The affidavit of the ether director, Hemendra Chandra Pal, makes the same case by saying that he was not interested in the said two firms. His case is that as the Liquidator has not come to any definite finding that the directors, in fact, were interested in the concerns, no order even for public examination should be made. That, in gist, is really the case of the directors.

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5. On behalf of the directors reliance has been placed on two decisions, one is the case of Ex-parte Barnes, decided by the House of Lords and reported in 1896 AC 146 (A) and the other is the case of Re: Civil, Naval and Military Outfitters Ltd. decided by the Court of Appeal and reported in (1893; 1 Ch D 215 (B). In the House of Lords decision, Lord Halsbury as Lord Chancellor observed as follows at 152 of the report :

"I confess I entertain not the smallest doubt that the meaning of this legislation is that in order to give the Court jurisdiction to make such an order, there must be a finding of fraud, and a finding of fraud against an individual who is thereby made subject to being summoned before the Court, and is compelled to answer, whether the answer incriminates him cr not, taut, being exculpated, receives his costs. I confess I am un-able, looking at the whole of the legislation on. this subject to entertain the least doubt that that was what the Legislature intended and I am a little surprised, I confess, that there should have been any doubt that fraud must be found; by which I do not mean that the particular word "fraud" must be used, but that such facts must be found by the official receiver as suggested fraud against the person incriminated; and that there must be an individual person incriminated; it is not enough that there is a general finding that fraud must have existed somewhere, which would mean nothing; but there must be an individual person pointed to and in respect of whom all these different provisions, for his protection as well as for his being made an example of, becomes perfectly reasonable. In the event of there being no fraud found, or in the event of there being no individual pointed out as being suggested to be guilty cf fraud, I entertain no doubt that the Court has no jurisdiction to make any such order for a public examination."

6. In the other case reliance was placed on the observations of Vaugham-Williams L. J. at page 239 of that report where the Lord Justice commenting on the House of Lords decision observed :

"This spirit cf that decision, to my mind, is that in dealing with this section you ought not only to consider the interests of the company, the shareholders and the public in obtaining all possible information in a case in which the facts show that some one has been guilty of gross fraud, but you ought also to take care not to subject any person to a public examination merely because you are satisfied, or because the official receiver is satisfied, that someone cr other has been guilty of fraud. The spirit of that decision is that you ought not to subject any one to a public examination unless you are satisfied on the report that the official receiver has come to the conclusion, and upon some substantial grounds, that a charge of fraud is disclosed by the facts against the person whom it is sought to examine such a charge that he may understand what it is from which he will have to exculpate himself, and with which it is sought to incriminate him." After having said all that, the learned Lord Justice made it clear that what he had said was not to be considered as a precedent for reports of that character by the Official Receiver.

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7. I am of the opinion that the principles decided in those two English cases do not apply to the present application before me. I shall state my reasons briefly.

8. These two cases were on Section 8 of the Companies Winding-up Act, 1890 of England on the lines of Section 177B of the old Indian Companies Act, 1913. The present application before me has to be decided on the construction of Section 45G of the Banking Companies Act which is a very different Statute than the one considered by the House of Lords and the English Court of Appeal. Secondly the remarks cf Lord Halsbury and Lord Justice Vaughan-Williams in those two cases were concerned with fraud. It is well settled law that no Court will entertain a charge of fraud unless some basic particulars are given including the nature of the fraud as well as the person who is charged with fraud. In this case the Banking Companies Act makes a very marked departure. Section 45G of the Banking Companies Act expressly says: "Whether or not a fraud has been committed by such act or omission," Thirdly I think it is undesirable to construe sections of a particular. Act in the light of decisions given on the interpretation of other Acts. These briefly are my reasons for not applying the doctrine laid down in the House of Lords and by the English Court of appeal in the two cases quoted above. I shall now explain these reasons.

9. It is well-known that the Banking Companies Act was introduced into the Statute Book in India to deal with a very serious banking situation in this country. A surprisingly large number of Banks conducted the affairs of such Banks in such a manner that there was a crash in the banking world leading to the liquidation of the Banks. In terms of tragedy and human misery the banking crash was a calamity. The problems that arose out of that calamitous situation were intended to be met by the Banking Companies Act. Extensive powers were given for investigation and report, and special provisions were made for speedy disposal of winding up proceedings which under the ordinary Company Law took an inordinately long time. The provisions for speedy disposal of winding up are contained in part III-A of the Banking Companies Act containing the group of sections from 45A tc 45X of that Act. Special provisions were made for assessing damages against delinquent directors & special duty was imposed on directors & the officers of Banks to assist in realisation of property and special provisions for punishing offences in relation to Banking Companies in liquidation were provided for. Those provisions also included power to inspect and power to call for returns and information. One such provision was public examination of directors and auditors in Section 45G of the Banking Companies Act. It is under that section that this application has been made. I, therefore, think, that it will defeat the whole object of this legislation to say that such public examination under the special provisions of Section 45G of the Banking Companies Act was intended to be nothing more than the ordinary public examination provided for u/s 196 of the old Companies Act, 1913 or the corresponding Section 478 of the new Companies Act, 1956. If that were so then there was no need for making a special provision in Section 45-G of the Banking Companies Act. In my opinion because the ordinary provisions for private and public examinations under

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Sections 195 and 196 of the old Companies Act, 1913 (corresponding to Sections 477 and 478 of the new Companies Act, 1956) were not considered sufficient to deal with this situation that the special Statute of the Banking Companies Act made this special provision.

10. The two English decisions relate only to what was called the "further report" of the Official Receiver under the particular Statute which those decisions considered. That Statute provides that the Official Receiver submits a preliminary report first to the Court in which the Official Receiver could state whether in his opinion further enquiry was desirable on any matter relating to promotion, formation or failure of the Company or the conduct of the business. It was then provided in that English Statute that the Official Receiver could also, if he thought fit, make a further report stating the manner in which the company was formed and whether in his opinion any fraud had been committed by any person in the promotion or formation of the company or by any director cr any other officer of the company in relation to it since its formation and any other matters which in his opinion it was desirable to bring to the notice of the Court. This was Sub-section (2) of Section 8 of the English Companies Winding-up Act, 1890, which was confined only to the case of fraud.

11. In our case Section 45G cf the Banking Companies Act does not provide for these two different types of reports by the Official Receiver. All that is said here in Sub-section (1) of that section is :

"Where an order has been made for the winding up of a banking company, the official liquidator shall submit a report whether in his opinion any loss has been caused to the banking company since its formation by any act or omission (whether or not a fraud has been committed by such act or omission) of any person in the promotion or formation of the banking company or of any director or auditor of the banking company." That is the only report that the official liquidator makes u/s 45G. It shows clearly that this is not a case which is confined, merely to instances of fraud alone. In fact it says expressly that all that the official liquidator has to state in his report is his opinion that a loss has been caused to the banking company by any act cr omission of any person in the promotion or formation of the banking company or of any director or auditor of such company. The term "loss" in Section 45G of the Banking Companies Act is a much wider expression than fraud with which the English decisions had to deal.

12. Now here in his report the official liquidator says that large amounts of money were advanced to two particular firms by name which cannot be traced, but whose address is given at a place which is the address of the Bank itself. The directors in their affidavit attempt to disclaim all knowledge of these two firms and yet the books of the Bank show that these loans and overdrafts were granted to such firms. As these loans and overdrafts could not have appeared by magic in the ledger account of the Bank it is therefore only right and fair that the directors should be examined publicly to find cut how did it come about that those large loans were advanced to the firms which were supposed to have the

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same office as the office of the Bank and yet the directors knew nothing about them. This is not an application to hold these directors guilty immediately at this stage, but it is only an application for a public examination of the directors of the relevant period to find out facts in relation to the loss which has admittedly occurred.

13. If at this stage before there is any public examination the liquidator has to satisfy the Court that a particular director has by his particular act or omission caused this less then there would be no point in holding further misfeasance proceedings as provided in the Companies Act and under the Banking Companies Act. Public examination at this stage is only a machinery of discovery. It compels discovery. It is not to be confused with the ultimate object cf holding who are the persons who are guilty and responsible for the loss. I think there is a prima facie case here for a public examination and that is all that is necessary to make cut at this stage, u/s 45G of the Banking Companies Act. It is not necessary in my view of this section to make out a prima facie case of fraud. The loss is obvious from the Bank''s ledger in this case. There is, therefore, a prima facie loss. Where there is such a prima facie loss, I consider that creates a prima facie case for public examination of the directors who were responsible for the management at the relevant time. After all the directors are the persons responsible for the management. The office cf the director is a position of great responsibility and trust. An order for public examination of the directors does by no means mean that directors are being held guilty of these losses. In the public examination they can certainly show that they are net at all responsible for the loss which the Bank has suffered, and disclose and state the reasons why they claim exemption from responsibilities.

14. The language of Sub-section (2) of Section 45G, Banking Companies Act, is also material quite apart from the language of Sub-section (1) thereof. Now Sub-section (2) uses this language:

"If, on consideration cf the report submitted under Sub-section (1), the High Court is of opinion that any person who has taken part in the promotion or formation of the banking company or has been a director or an auditor of the banking company should be publicly examined, it shall hold a public sitting on a date to be appointed for that purpose and direct that such person, director or auditor shall attend thereat and shall be publicly examined as to the promotion or formation or the conduct of the business of the banking company, or as to his conduct and dealings, in so far as they relate to the affairs of the banking company :

Provided that no such person shall be publicly examined unless he has been given an opportunity to show cause why he should not be so examined."

15. An examination cf these provisions makes it clear that if the High Court is of opinion that any person who has been a director of the banking company should be publicly examined it shall direct such public examination. In this case the

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persons who are intended to be examined are all the directors of the banking company. Not one of these directors has said in his affidavit that he was not a director at the relevant time when there loans which occasioned loss to the bank were granted or shown any reason whatever why they should know nothing about the firms and persons to whom the Bank was lending large sums of its money and funds. In that context, I am satisfied, in my opinion, that there should be a public examination of these directors. An opportunity to the directors was given in this case to show cause why they should not be so examined. In showing cause in their affidavits, these directors have not said that they were not directors at all at the-relevant periods when these loans were granted. Nor have they shown why as directors they failed to exercise even the ordinary control which business prudence would demand. Some of the directors, as I have already said stated in their affidavits that they left the management to their co-directors. Surely, prima facie, that is a case of "omission" within the meaning of that express word used in Section 45G(1) of the Act.

16. It seems to me clear that u/s 45G it is not even necessary to make a charge. Even the "suggestion" of a charge is enough. In the proviso to Sub-section (7) of Section 45G, it is expressly said that if the person in the opinion of the High Court is exculpated from any charges made "or suggested against him", the High Court may allow such costs to the person in its discretion as it may deem fit.

17. I am, therefore, satisfied with the special statute in this case and the special provisions made in this particular Section 45G of the Banking Companies Act, that it would be wrong to apply the doctrine of fraud and the prima facie proof of fraud and the particulars suggested in the two English decisions of the House of Lords and the English Court of Appeal. In my opinion, to do so would be to defeat the whole purpose of the special legislation in India on this particular point by the Banking Companies Act.

18. For these reasons, I order that a public examination of the directors named in paragraph 5 of the Court Liquidator''s report u/s 45G of the Banking Companies Act be held in accordance with prayer (b) of the report on Monday, the 6th day of May 1957. There will also be a further order giving leave to the Court Liquidator to have legal assistance in terms of prayer (g) of the report. The liquidator will, in the first instance, retain the cost of and incidental to this application out of the assets in his hands unless the Court holds otherwise upon the conclusion of the public examination of the directors that they or any of them should pay such costs in which event the Court Liquidator will ask for necessary directions in that respect at the conclusion of such public examination. There will be the usual further directions for advertisements and their costs as prayed for by the Liquidator.

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