

(1964) 05 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 225 of 1959
In Re: Lohar Valley Tea Co. Ltd.

Date of Decision : 04-05-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 151
Companies (Court) Rules, 1959 — Rule 137(2), 33, 6
Companies Act, 1956 — Section 478(1)

Citation : AIR 1965 Cal 372 : 68 CWN 938

Hon'ble Judges : B.C. Mitra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.C. Mitra, J.—This is an application by the Official Liquidator of this Court for an order recalling or setting aside the order made by this Court on March 4, 1964, and for rehearing of the application of the respondents which resulted in the order dated March 4, 1964, and for stay of operation of the said order.

2. On March 26, 1957, a special resolution was passed at an Extraordinary General Meeting of the company for voluntary winding up of the company. Sachindra Nath Chatterjee, one of the directors of the company was appointed its voluntary liquidator. On July 10, 1961, the Official Liquidator of this Court was appointed the Liquidator of the company. Thereafter the Official Liquidator made a report u/s 519(1) of the Companies Act of 1956 in which he stated that fraud had been committed in relation to the company by the respondents who were directors of the company.

3. On June 18, 1963, an order was made by this Court u/s 478(1) of the Act on the Report of the Official Liquidator for public examination of the respondents. This order was made ex parte.

4. On January 25, 1964, the respondents Nos. 1, 3, 5 and 6 took out a summons for an order that the order made on June 18, 1963, for public examination of the respondents, be discharged and that the respondents be exculpated from all charges made against them. This application came up for hearing before me on

March 4, 1963. At the hearing of this application it was contended that the respondents should be heard before any order was made for their public examination. This application was opposed by the Official Liquidator on whose behalf it was contended that under the scheme of the Companies Act of 1956 and the rules framed thereunder, there was no provision for giving notice and the order for public examination was made by the court ex parte on the report of the Official Liquidator. Upon hearing both parties this Court had made the following order:

"Order dated June 18, 1963, discharged. Liquidator to file further affidavit if so advised by 19-3-64; affidavit in opposition by the respondents to the main application by 15-4-64, affidavit in reply by liquidator by 22-4-84. Main application to appear in the list on 27-4-64. Costs of this application costs in the main application."

5. It is this order that is now sought to be set aside or recalled.

6. The grounds made out for review of the order, in the affidavit affirmed by Hirendra Kumar Ganguli on March 16, 1964, are that the statutory provisions, rules and authorities on the questions involved in the application were not placed before this court. Secondly, that the order dated March 4, 1964, would lead to serious complications and cause great hardship to the liquidator, for whom it would be extremely difficult, if not impossible, to carry out the said order. It is next alleged that no appeal lies from the said order and therefore the applicant would be left without a remedy and that the order dated March 4, 1964, would be taken as a precedent and in all cases where an order for public examination was asked for, the liquidator would have to give notice to the persons sought to be examined. It was contended that if notice was given the whole object and purpose of public examination would be frustrated.

7. Mr. M.M. Sen who appeared in support of this application argued that where an application was made for public examination u/s 519 of the Act, Sub-sections (2) to (11) of Section 478 of the Act would apply. The said Sub-sections relate to the procedure for public examination. He contended that u/s 478(6)(a) of the Act the person to be examined was to be furnished at his own cost with a copy of the liquidator's report. Mr. Sen argued that this Sub-section was entirely new and if notice was to be given of the hearing on the report of the liquidator, there would be a violation of this provision in the Act. He further urged that notice to the persons was contrary to the scheme of the Act and also of the rules.

8. Mr. S. Sen for the respondents contended that Rule 138 corresponds to Rule 61 of the English Companies Rules. Rule 61 is identical with the terms in Rule 138, yet a form of the summons, followed in practice, for appointment for consideration of report, (though not prescribed under the English Rules) has been accepted in English Practice. This is form No. 531 set out in Palmer's Precedents, 17th Edn. Part II, page 486. Under this summons all parties concerned are to attend the Judge in chambers. Therefore this is a summons to

all parties who are interested. Mr. S. Sen also referred to the note in Palmer that such an application may be made ex parte. There is a similar comment in Buckley 13th Edn. page 566, at which while dealing with Section 270 of the English Act which corresponds to Section 478 of the Companies Act of 1956, it is pointed out that an order for public examination may be made ex parte.

9. Mr. M.M. Sen referred to the decision in *Be: Great Kruger Gold Mining Co.*, (1892) 3 Ch. 307. In this case a report was made by the Official Receiver and on that report North, J., made an order on the application of the Official Receiver, made ex parte, that several persons were to be publicly examined. Thereafter one of the persons directed to be examined, took out a notice of motion for discharge of the order made by North, J. This application was heard by Vaughan Williams, J. Dealing with the question of the right of the persons to come and Intervene, the learned Judge held at page 314 of the report:

"It is plain that it is the right of everyone, the absolute right of every one--and a right so absolute that nothing, not even the legislature, could take it away--to come and say then is no jurisdiction to do the act which the court has purported to do here Again I do not mean by this decision to say that Mr. Barnard has not a right to come here and say that to make this order would be an abuse of the power which the Court has, or that to make this order would be oppressive. No one would have a right to come here and say that the court, in the exercise of its jurisdiction, had abused its powers or had done what was oppressive. But what everyone has a right to do is to come here and say to the court: "You have been set in motion here, you have been induced to act here without a full knowledge of the facts, or without having your attention called to the oppression that, would result from your act." I say that under these circumstances, again, everyone has a right to come and place such information before the Court. The right is as absolute almost as the right to come and say that there is no jurisdiction."

10. The learned Judge did not discharge the order but directed the Official Receiver to make a supplemental report. This decision went up in appeal.

11. Before proceeding any further I should set out Rule 71 of the English Company Rules of 1890; (which is almost identical with the terms of Rule 138 of the Companies (Court) Rules, 1959):

"The consideration of the report shall be before the Judge of the Court personally in chambers, and the Official Receiver shall personally, or by counsel or solicitor, attend the consideration of the report, and give the court any further information or explanation with reference to the matters stated in the report which the court may require."

12. Upon a consideration of these Rules Lindley, L. J., held that the examination in public was a very serious matter and that it was so even though it might be said that It did not hurt the man to be examined. Thereafter it was held that this order could be made ex parte. Lopes, L. J., agreed with Lindley, L. J. on the

question that such applications might be made ex parte. Smith, L. J. however reserved his views on the matter as to whether such applications could be made ex parte. I cannot but observe that in spite of the English Rules being what they were, the majority view of the court of appeal was that an order on the report of the Official Receiver could be made ex parte. That in my view is far from saying that such applications must be made or should be made ex parte. That is what was contended by Mr. M.M. Sen on behalf of the Official Liquidator, namely, that the procedure laid down in the Rules enjoined that such applications should be made and must be made ex parte. I shall deal with our Rules later in this judgment.

13. Mr. M.M. Sen also referred to another decision of Vaughan Williams, J., in *In Re: Trust and Investment Corporation of South Africa* (1892) 3 Ch 332. The same question came up for consideration before the learned Judge who refused to direct an examination, and thereupon the matter again went up to the Court of appeal. Lindley, L. J., held that it was convenient that the order should be made ex parte and there was no injustice if the order was made ex parte. Lopes, L. J., held that the application may be made ex parte and Smith, L. J., agreed with that view. It will thus be seen that the majority view of the English Court of appeal was that an application on a report by the Official Receiver might be made ex parte and that is the view which has been expressed in Buckley, 18th Ed. page 566, in which the matter has been put as follows:

"An order for public examination may be made ex parte, leaving the person against whom it is made to move to discharge it if made without Jurisdiction."

14. The same view has been adopted in Palmer's Precedents, Vol. II, page 486 and also in Halsbury, 3rd Ed. Vol. VI, page 570, Article 1111.

15. The decisions mentioned above make it quite clear that on interpretation of the English Rules, the court of appeal in England twice came to the conclusion that the order for public examination may be made on the ex parte application of the Official Receiver. It has not been said that such applications must be made ex parte or that notice of the application should not be given to the parties to be examined.

16. But it seems to me that the petitioner has misconceived the scope and effect of the Companies (Court) Rules 1959. Under Rule 137(2) the Registrar is to fix a date for consideration of the report by the Judge and he is to notify the date on the notice board of the court and to the Official Liquidator. This Rule clearly contemplates notice being given to the public at large, which undoubtedly includes the respondents. The scheme of the Rule is entirely different from what has been contended for, on behalf of the Official Liquidator. There is in Rule 137(2) a clear direction for notice being given on the notice board. In this respect there is a departure in the new Rules from the previous Companies Rule 200 which required such applications to be made ex parte by petition verified by the Official Liquidator. There was no provision under Rule 200 for giving notice,

by notifying the date on the notice Board of the court or by any other method. The present Rules therefore clearly contemplate notice of the hearing on the report being given to the public, That being the position, if the court gives an opportunity to the respondents to be heard, it cannot be said that such an order is contrary to the provisions of the Act or the Rules.

17. Then again it is to be noted that in the order as it stands, there is no direction for notice being given by the liquidator to the respondents. Nor is there any order directing the liquidator to file an affidavit. All that has been done is that the liquidator has been given the liberty to file an affidavit, if he is so advised. There is, therefore, no substance in the contentions on behalf of the Official Liquidator that the order made is contrary to the Act or the Rules or that such an order will create difficulties for the Liquidator. Rule 137(2) clearly provides for notice being given on the notice board. If on such notice the respondents came to court and applied for leave to file an affidavit and the court grants such leave, it cannot be said that the court has acted beyond its power under the Act or the Rules. Rule 137(2) is as follows:

"Where the Official Liquidator makes a further report under Sub-section (2) of Section 455 the Registrar shall fix a date for the consideration thereof by the Judge and notify the date on the notice board of the Court and to the Official Liquidator."

18. This Rule is quite specific on the question of the notice to the public about the date of the consideration of the report by this Court. Keeping in mind the observations of Vaughan Williams, J., quoted above, that a person who is to be affected by the order to be made has a right to come to this Court and say that the order would be an abuse of the power this Court has or that the order would be oppressive, can it be said that the order on the report of the Official Receiver must always be made without notice to the persons who are going to be affected by the order? It cannot be overlooked that there was no Rule in the English Company Rules, corresponding to Rule 137(2) of the Companies (Court) Rules 1959. To my mind the intent and purpose of notifying the date of consideration of the report is quite clear. It is to bring to the notice of the persons interested in the matter, that this court on a particular date, is going to consider the report of the Official liquidator. Mr. M.M. Sen submitted that although the Rule is there nobody has a right to be heard, but that such person might come to court and watch the proceedings. I cannot accept this contention. The Rule being what it is, I cannot say persons who are going to be affected by the order and who have been given notice of the day of the consideration of the report, but even after getting such notice, are permitted only to walk into this court like Robots, watch the proceedings of the court, see what is done, hear what is said and then walk out of this court without being permitted to say what they have to say. That in my view cannot be the purpose and object of the Rule. This matter however cannot be concluded without a reference to the previous Company Rule 200. By that Rule it was provided that such applications were to be made ex parte by

petition verified by the Official Liquidator. It is plain that Rule 137(2) was introduced deliberately for putting a stop to the previous practice of ex parte application by the Official Liquidator on a petition under previous Rule 200. In my view the requirement of Rule 137(2) must be strictly complied with and notice of consideration of the report must be given as required by that rule.

19. Then again, if a party who is going to be affected by the order comes to court on receiving the notice under Rule 137(2) and makes a prayer to be heard, should this court deny him the right to be heard or the right to put his contentions on an affidavit, if he desires so to do? Can this Court tell him that although under the Rules he has been given notice of consideration of the report he is permitted only to be a mute observer of the proceedings of this Court? I do not think so. There is a purpose in giving the notice and that purpose is quite clear, namely, that if a party comes to court and wants to be heard he must be heard. If he wants to file an affidavit, he must get the opportunity to file the affidavit.

20. I do not desire to say however that the Official Liquidator should give notice either by a Judge's summons or by any other means individually or personally to the party against whom the order for examination is sought Nor do I desire to say that the Report should be supplied to the party otherwise than in compliance with the provision in the Companies Act 1956.

21. Coming now to the order which was made by this Court on March 4, 1963, it is to be noticed that there is nothing in the order which requires the Official Liquidator to give notice of the application to the respondents. Leave has been given to the liquidator to file an affidavit if he is so advised. Leave has been given to the respondents to file an affidavit-in-opposition and similarly to the Official Liquidator to file an affidavit-in-reply. The order made on June 18, 1963, for public examination of the respondent was discharged and this court directed that the hearing of the matter on the report should take place after the filing of the affidavits. I do not see, in this order any difficulty for the Official Liquidator in discharging his functions under the Act or the Rules, nor do I visualise any complication serious or otherwise, much less hardship to the liquidator, in complying with the directions given in the order made on March 4, 1963. In the affidavit filed by the Official Liquidator, he has stated that it would be extremely difficult if not impossible to carry out the said order. This difficulty however did not become at all clear to me in the submissions made on behalf of the official Liquidator.

22. I should in this connection refer to the decision of the Bombay High Court in Sir Fazal Ibrahim Rahimtoola Vs. Appabhai G. Desai, relied upon by Mr. S. Sen. In this case Chagla, C. J., while considering an application u/s 196 of the Companies Act, 1913, expressed the view that orders for public examinations u/s 196 should not be made ex parte. Mr. S. Sen relied upon this case in support of his contention that notice was required to be given before the new rules came into force. It seems that the views of Chagla, C. J., were expressed having

regard to the Company Rules of the Bombay High Court. But it is not necessary to consider the effect of that judgment in as much as Rule 137 (2) of the Companies (Court) Rules has laid down the procedure to be followed.

23. Mr. S. Sen contended that the judgments of the Court of appeal in England in the two cases mentioned above were considered by the House of Lords in *Ex parte George Stapylton Barnes*, (1896) AC 146 and Lord Halsbury, L. C., overruled the conclusions of the court of appeal. But it is to be noted however that the House of Lords did not consider or express any view on the question whether the matter could be considered by the court on the report of the liquidator made *ex parte*. On that question, as I have noticed earlier, the majority view of the court of appeal in England was that the application might be made *ex parte*.

24. Mr. S. Sen next submitted that the laws in this country are based on the principle of natural justice and that if a man is going to be charged with fraud and an order is going to be obtained against him for his public examination, at which creditors and contributors will be entitled to appear and put any questions to him, the person sought to be charged cannot be condemned unheard. Such a course, according to Mr. Sen, would be a violation of the principles of natural justice upon which the laws in this country are based. In support of this proposition Mr. Sen referred to a decision of the Supreme Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, in which Bose, J., held:

"That our laws and procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

25. In that case however the Supreme Court was considering the effect of Section 105 of the Representation of the People Act of 1951. But although the observations quoted above were made in connection with that particular statute, in my view they are of general application. More particularly, that must be so, when the Rules framed under the Companies Act, 1956, have given to the party the right to a notice of the date when the report of the liquidator would be considered by the court. If the Rules have given him the right to come to court at the time when the matter is being considered by the court, I do not see how it can be said that although an order is going to be made to his prejudice and in his presence, yet he must be denied the right to be heard by this Court.

26. Mr. S. Sen next submitted that *Vaughan Williams, J.* (1892) 3 AC 307 had held that the party against whom an order is sought for public examination had the right to come to court to plead that the court had no jurisdiction to order an examination. By this, the learned Judge certainly meant, that he could come before the order for examination was made. Mr. S. Sen contended that the jurisdiction contemplated under the Companies Act was not territorial

jurisdiction, but the jurisdiction meant fulfilment of certain conditions precedent which have been set out in Buckley, 13th Ed., page 65. These conditions are:

- (a) that the Official Liquidator should make a further report,
- (b) that such report must contain a finding of fraud,
- (c) that the finding of fraud must be against the person against whom an order for public examination is sought and
- (d) the individual must be one who has taken part in the promotion or formation of the company or who has been an officer of the company.

The conditions mentioned in Clause (d) are also the conditions laid down in Section 478(1) of the Companies Act, 1956. Mr. S. Sen further submitted that the respondents were entitled to challenge the jurisdiction of this Court, on the grounds mentioned above, even before the order was made for their examination. In my opinion this contention of Mr. S. Sen is sound. A person who has been charged with fraud by the Official Liquidator must, if he so claims, get the opportunity of challenging the jurisdiction of the court on the grounds mentioned above before being condemned to a. public examination on charges of fraud. The rule mentioned above is in my view intended to give him that opportunity. Such opportunity should not be denied to him.

27. There is another matter regarding the notice contemplated by Rule 137(2) to which I wish to refer. Upon enquiry by me during the hearing, if in this case the said Rule was complied with by the Official Liquidator, I was informed by Mr. M.M. Sen that the Rule had not been complied with. That is to say, the notice of the date of consideration of the report was not put up on the notice board. Mr. M.M. Sen however submitted that non-compliance with that Rule was not material having regard to the Rules 6 and 33. This, in my view, is a very serious omission. The party against whom an order for public examination is going to be asked for, is entitled to the notice and he must have it. Neither Rule 6 nor Rule 33 provide any excuse for non-compliance with Rule 137(2). Rule 6 merely provides that the practice and procedure of the court and the provisions of the CPC so far as applicable shall apply to proceedings under the Companies Act and the Rules thereunder. Rule 33 provides that service under the Rules shall not be deemed to be invalid by reason of any defect in the name or description of a person in the list of contributors or in petitions, summons, notice or other proceedings provided the court is satisfied that such service is in other respects sufficient. These two Rules therefore have nothing whatsoever to do with the consequence of omission to comply with Rule 137(2). Mr. M.M. Sen however contended that the matter was published in the daily list of this court under the Rules of the Original Side of this Court and that is to be treated as sufficient compliance with Rule 137(2). I cannot accept this contention. Notice of the date of hearing of the matter, when an order for public examination is going to be made against a person, is certainly of the utmost importance to that person. The daily list, published under the Original Side Rules of this Court, is not available to any and

every member of the public. In my view Rule 137 (2) must be strictly complied with and if the notice contemplated by that Rule is not given, the report cannot be considered by this Court until requirement of that Rule has been complied with.

28. There remains only the question regarding the maintainability of the application. Mr. S. Sen submitted that the court in exercise of its inherent powers u/s 151 of the CPC cannot assume jurisdiction to grant a review where it has been expressly forbidden by the legislature to entertain such application. He submitted that in this case a review of the order cannot be granted under Order 47 Rule 1 of the CPC and that being so the inherent power should not be exercised u/s 151. In support of this contention Mr. S. Sen relied upon a decision of this Court in *Sasibhushan Mukherjee v. Radhanath Bose* 19 Cal. W.N. 835: (AIR 1915 Cat, 137). He also referred to another judgment of this Court in *Kanailal Ghose v. Jatindranath*, 22 Cal. W.N. 446: (AIR 1918 Cal. 925). In this case it was held that it would be a misapplication of Section 151 if a court were in exercise of its inherent power to assume jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application. Mr. S. Sen next referred to a judgment of the Allahabad High Court in *Ebadullah Khan Vs. Municipal Board and Another*, in support of his contention that the mere fact that a point was not argued in the original case would be no ground for an order for review, unless an error apparent on the face of the record was held to have been committed. Mr. S. Sen also referred to a judgment of the Judicial Committee in *Chhajjiram v. Neki*, 49 Ind. App. 144: (AIR 1922 P.C. 112) in which it was held that Order 47 Rule 1 of the Code must be read subject to the limits imposed, under which a review of a decree or order is permitted, and a court hearing an application for a review of a decree on appeal has no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at.

29. Mr. M.M. Sen referred to a decision of this Court in *In the matter of, Steel Construction Co. Ltd.* 39 Cal. W. N. 1259 in support of the proposition that an order which has been drawn up but not completed or filed may be reconsidered by the Judge and if necessary recalled. Mr. S. Sen however conceded that as a proposition of law it is sound and he was not disputing the jurisdiction and power of this Court to recall, reconsider or modify an order made by this Court before such an order has been perfected. But he contended that in the facts of this case, no case had been made out for exercise of the inherent powers of this Court to recall the order made. Mr. M.M. Sen also referred to another decision of this Court in support of the same proposition in *Parlmabati Dasi v. Rasiklal Dhar* I. L. R. 37 Cal 259.

30. In my opinion this Court undoubtedly has the jurisdiction to recall the order already made as the same has not yet been perfected. But in the facts of this case the inherent powers of this court should not and ought not to be exercised and the order made should not be recalled.

31. Before concluding I should once again refer to the order sought to be recalled or set aside. On June 18, 1963, this Court had made an order for public examination of the respondents after consideration of the report of the Official Liquidator. Thereafter the respondents Nos. 1, 3, 5 and 6 made an application for discharge of the order made on June 18, 1963. This application for discharge of the order was disposed of by the order made on March 4, 1963 which is now sought to be recalled. It will be seen that the matter has not been finally disposed of. But the consideration of the report is to be taken up after the respondents have been given the opportunity to file an affidavit. This they would have been entitled to do if they had come to this Court upon getting notice of the date of hearing from the publication of the notice on the notice board of this Court. The Official Liquidator's prayer for public examination of the respondents has not been disposed of. All that the said order of March 4, 1963, directs is that the Report of the Official Liquidator should be considered in the presence of the respondents and the court should take into consideration any affidavit that the respondents and the liquidator may file. The discharge of the order of public examination made on June 18, 1963, has not in any way fettered the right of the Official Liquidator to ask for public examination of the respondents when the report is considered by the court in the presence of the respondents and after taking into consideration any submissions that may be made on their behalf. That being so, I do not at all see any reason why the court should recall or set aside the order made on March 4, 1963, or rehear the application on which the said order was made.

32. For the reasons mentioned above this application is misconceived and is dismissed with costs. The Official Liquidator will be entitled to retain cost out of the assets in his hands. Certified for Counsel.