

(1962) 07 KL CK 0010

In the High Court Of Kerala

Case No : A.S. No's. 37, 39 and 45 of 1962

K. Joseph Augusti and Others

APPELLANT

Vs

M.A. Narayanan, Official Liquidator, the Palai Central Bank
Ltd., (in liquidation), Ernakulam

RESPONDENT

Date of Decision : 12-07-1962

Acts Referred:

Banking Companies Act, 1949 — Section 45G, 45G(1), 45G(2)
Constitution of India, 1950 — Article 20(3)

Citation : AIR 1963 Ker 81 : (1963) 33 CompCas 123

Hon'ble Judges : M.S. Menon, C.J;P. Govindan Nair, J;M. Madhavan Nair, J

Bench : Full Bench

Advocate : T.S. Krishnamoorthy Iyer, in No. 37/62, K.P. Abraham and George Kurjan, in No. 39/62 and K.T. Thomas, in No. 45/62, for the Appellant; K.V. Suryanarayana Iyer and C.M. Devan, for the Respondent

Final Decision : Dismissed

Judgement

1. These are appeals from a common order in B. C. P. No. 11 of 1960 directing the public examination of the appellants under S. 45S of the Banking Companies Act, 1949 (1962 Ker L. T. 37), The appellant in A. S. No. 37 of 1962 was the Managing Director of the bank in liquidation from 26-1-1927 to 8-8-1960, and the appellants in A. S. Nos. 39 and 45 of 1962 were the Directors of the bank from 14-1-1935 to 8-8-1960 and 25-1-1927 to 8-8-1960 respectively.

2. The application for the winding up of the bank was made by the Reserve Bank u/s 38(3)(b)(iii) of the Banking Companies Act, 1949, which provides that It may make such an application if in its opinion the continuance of the banking company is prejudicial to the Interests of its depositors. By an order dated 8-8-1960 the Official Liquidator of this Court was appointed the Provisional Liquidator of the bank. The order for winding up followed. 5-12-1960, and the appointment of the Official Liquidator" was made on an application by the Reserve Bank u/s 39 of the Act on 8-12-1960.

3. Sub-section (1) of Section 45G of the Act provides that 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. The reports concerned are report No. 192 dated 17-8-1961, report No. 242 dated 26-9-1961 and report No. 350 dated 4-1M961.

4. The contentions of the appellants are:

(1) that Section 45G of the Banking Companies Act, 1949, offends Article 20(3) of the Constitution and that the said section and the order challenged in these appeals should be struck down on that account; and

(2) that even if Section 45G can be considered to be Intra vires of the Constitution, the reports submitted by the Official Liquidator do not justify an order for a public examination under that Section and the order in that behalf cannot be sustained.

There was a preliminary objection as to the maintainability of the appeals. That was considered and negatived in our order dated 28-6-1962.

5. Part 111A of the Banking Companies Act, 1949 in which Section 45G occurs, was inserted in the Act by the Banking Companies (Amendment) Act, 1953. The heading of that Part is: Special provisions for Speedy Disposal of Winding up Proceedings.

6. We have already mentioned Sub-section (1) of Section 45G. Sub-section (2) of that section, the provision under which the public examination has been ordered, reads as follows--

"If, on consideration of 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 companyt.

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."

7. Article 20(3) of the Constitution provides that "no person accused of any offence shall be compelled to be a witness against himself." The real question for determination is whether persons like the appellants who are specified in a report under Sub-section (1) of Section 456 can be considered as persons accused of

any offence. If they are, the right of silence or the privilege against self-incrimination embodied in Article 20(3) of the Constitution - a right or privilege which goes back at least to 1249 and the English resistance to inquisitions into heresy-will certainly be available to them; and If they are not, It must equally follow that the provisions of Section 458 must prevail and be operative.

8. Article 367(1) of the Constitution provides that unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. The word "accused" is not defined in the Act. A definition of the word "Offence," however, is available in Section 3. That definition is: "'offence" shall mean any act or omission made punishable by any law for the time being in force."

9. in *Maqbool Hussain Vs. The State of Bombay*, , *Bhagwati, J.* said:

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

The decision was affirmed by the Supreme Court in *S.A. Venkataraman Vs. The Union of India (UOI) and Another*, . A" stated in *Raja Narayanlal Bansilal Vs. Maneck Phiroz Mistry and Another*, these two decisions

"cannot be said to have considered incidentally the general scope of Article 20 though both of them were concerned directly with the construction and application of Article 20(2) alone."

10. Article 20(3) came up for specific consideration in *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, . in that case the Supreme Court said:

"Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components: (1) It is a right pertaining to a person "accused of an offence"; (2) It is a protection* against "compulsion to be a witness"; and (3) It is a protection against such compulsion resulting in his giving evidence "against himself."

11. In *Raja Narayanlal Bansilal Vs. Maneck Phiroz Mistry and Another*, the Supreme Court surveyed the three earlier decisions of the Court and said:

"For invoking the constitutional right against testimonial compulsion guaranteed

under Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course¹ may result in prosecution."

And in a later case, *The State of Bombay Vs. Kathi Kalu Oghad and Others*,² the Supreme Court observed

"To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

12. In the order under appeal Raman Nayar J., posed the question; When does a person stand in the character of an accused person? and answered it as follows:--

"I should think, when an accusation is made against him, not in the popular sense of the word "accusation" as meaning a derogatory imputation by whomsoever made, wheresoever made and howsoever made, but in the strict legal sense of the word as meaning information laid against a person with a view to bring him to trial for an offence."

The learned Judge went on to say:

"The word "accusation" is thus defined in Black's Law Dictionary, Fourth Edition:

"A formal charge against a person, to the effect that he is guilty of a punishable offence, laid before a court or magistrate having jurisdiction to inquire into the alleged crime."

I would perhaps substitute the word, "tribunal" for the words "court or magistrate" and I would add to the definition the words "or before an authority competent to investigate the charge and bring the person to trial. The definition certainly lends support to the view I have taken that, before a person can be an accused person, there must be information laid against him with a view to bring him to trial for an offence."

and:

"There can be no doubt that a person against whom an order is made u/s 45G is compelled to be a witness, and it is quite possible that he might have to speak against himself. Two of the requirements of Article 20(3) are thus satisfied, but, in my view, the vital requirement that the person must be accused of an offence is not. After all, all that need be alleged in a report under the section against the person sought to be examined is that he has been guilty of an act or omission (which need not amount to fraud) which has caused loss to the company. There need not be an allegation of fraud, far less of any offence. But, even if the facts alleged do disclose an offence -- and it is the case of the respondents that the facts alleged in the present reports disclose a number of offences under the Indian Penal Code, the Companies Act and the Banking Companies Act, something with which "I do not agree, but on which it is not necessary for me to

pronounce-the purpose of the report and of the examination pursuant thereto is not to bring the person concerned to trial for those offences. The object is, as sub-section (2) of the Section itself shows, that information may be gathered regarding the promotion or formation or the conduct of the business of the company or as to the conduct and the dealings of the person concerned in so far as they relate to the affairs of the company, and even If public examination involves an element of pillorying, what it seeks to secure is information necessary for the beneficial winding up of the company by trading its assets and taking steps for their recovery. The public examination is not a punishment, and the section creates no offence."

We are in agreement with this view.

13. When Emile Zola began his letter to we Aurore with the words "I accuse," he began one of the most terrible Indictments of history and literature. But by that accusation those he denounced, those who had hounded Dreyfus to his detention, did certainly not become "persons accused" within the meaning of that expression as used in Article 20(3) of our Constitution. Something more is required for that purpose; something very much nearer to the investigation, trial and punishment of crime.

14. The object of a report under sub-section (1) of Section 45G, as already indicated, is not the accusation of a crime; but the affirmation of a loss, and even if such a report embodies accusations it can only be in the popular sense of the word that will not alter the essential character of the report or make the persons specified therein "persons accused" within the meaning of Article 20(3) of the Constitution.

15. Sub-section (8) of Section 45G of the Banking Companies Act, 1949, provides that notes of the examination shall be taken down in writing, and shall be react over to or by, and signed by, the person examined any may thereafter be used in evidence against him in any proceeding, civil or criminal. In the light of what we-have stated, that the person examined is not a person-accused at the time of his examination, the provision cannot in any sense be considered as violative of the guarantee under Article 20(3) of the Constitution.

16.Our attention was drawn to sub-section (7) of Section 45G which says:

A person ordered to be examined under this section may, at his own cost, employ any person entitled to appear before the High Court who shall be at liberty to put to him such questions as the High Court may deem just for the purpose of enabling him to explain or qualify any answer given by him:

Provided that if he is, in the High Court, exculpated from any charges made or suggested against him, the High Court may allow him such costs in its discretion as it may deem fit."

and the words "exculpated from any charges made or suggested against him" occurring in the proviso were emphasised. Our attention was also drawn; to sub-

section (9) of Section 45G which says:

"Where on such examination, the High Court is of opinion (whether a fraud has been committed or not)

(a) that a person, who has been a director of the banking company, is not fit to be a director of a company, or

(b) that a person, who has been an auditor of the banking company or a partner of a firm acting as such auditor, is not fit to act as an auditor of a company or to be a partner of a firm acting as such auditor,

the High Court may make an order that that person shall not, without the leave of the High Court, be a director of, or in any way, whether directly or indirectly, be concerned or take part in the management of any company or as the case may be, act as an auditor of, or be a partner of a firm acting as auditors of, any company for such period not exceeding five years as may be specified in the order.";

and to Section 45J which makes special provisions for punishing offences in relation to banking companies which are being wound up. Sub-sections (1), (2), (4) and (5) of that section read as follows:

"(1) The High Court may, if it thinks fit, take cognizance of and try in a summary way any offence alleged to have been committed by any person who has taken part in the promotion or formation of the banking company which is being wound up or by any director, manager or officer thereof:

Provided that the offence is one punishable under this Act or under the Companies Act, 1956."

"(2) When trying any such offence as aforesaid, the High Court may also try any other offence not referred to in Sub-section (1) which is an offence with which the accused may, under the Code of Criminal Procedure, 1898 be charged at the same trial."

"(4) All offences in relation to winding up alleged to have been committed by any person specified in sub-section (1) which are punishable under this Act or under the Companies Act, 1956, and which are not tried in a summary way under sub-section (1) shall, notwithstanding anything to the contrary contained in that Act or the Code of Criminal Procedure, 1898, or in any other law for the time being in force, be taken cognizance of and tried by a Judge of the High Court other than the Judge for the time being dealing with the proceedings for the winding up of the banking company."

"(5) Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1898, the High Court may take cognizance of any offence under this section without the accused being committed to it for trial and all such trials shall be without the aid of a Jury."

17. The order under appeal dealt with the provisions mentioned above as follows:

"True the proviso to sub-section (7) of the section shows that a charge is made or suggested against the person to be examined from which he might be exculpated. But then the charge is that mentioned in sub-section (D). It is not a charge of an offence, but only a charge that the person has been guilty of an act or omission resulting in loss to the company. True again that sub-section (8) provides that the deposition of the person examined may thereafter be used in evidence against him in any proceedings civil or criminal, but that is only something that might happen in the future. It is not the object either of the report or of the examination that the person examined should be brought to trial for any offence that either. We report or the examination may disclose. Then, there is the disqualification for which sub-section (9) provides and it is said that at least this sub-section creates an offence. Even so, neither the report nor the examination has for its object the imposition of such a disqualification although such a disqualification might be a consequence. "Therefore, even if sub-section (9) creates an offence there is in the report no formal accusation of such an offence. Nor do I think that Sub-section (9) does create an offence. The disqualification it contemplates which is akin to the disqualification which might be imposed on an advocate under the Bar Councils Act or against a chartered accountant under the Chartered Accountants Act or against a candidate in an election under the Representation of the People Act, is not a punishment in the sense in which the words "punishable by any law for the time being in force" are used in the definition of "offence" in Section 3(38) of the General Clauses Act. Lastly, there is the provision in Section 45J by which this very court may take cognizance of and try in a summary way certain offences alleged to have been committed by any person who has taken part in the promotion or formation of the banking company which is being wound up or by any manager or officer thereof. It is said that a report under 5.45B may disclose such offences and that the present reports do, in fact, disclose such offences, which this very court may take cognizance of and try u/s 45-J. This leads us back to the question whether a report u/s 45G is a formal accusation of offences which it might disclose and which this very court may take cognizance of and try u/s 45J. I think not, for as I have said more than once, even if the report does disclose facts making out offences which may be tried u/s 45J, it is not information laid with a view to bringing the person concerned to trial for such offences. It is laid only with a view to eliciting from him such information as he possesses regarding the conduct of the business of the company and his own conduct and dealings in relation to it."

We are in agreement with the learned Judge.

18. Two cases which support the conclusion reached by the learned Judge are in *re In Re: Central Calcutta Bank Ltd. (in Liqn.)*, and *Mallela Suryanarayana and Others Vs. Vijaya Commercial Bank*, . Both the decisions had occasion to consider the provisions of section 456 in relation to Article 20(3) of the

Constitution.

19. The second of the two contentions urged before us is based on the assumption that all the information necessary is already in the possession of the Official Liquidator and no useful purpose will be served by a public examination u/s 45G of the Act. There is no doubt that an order for a public examination is within the discretion of the Court. This is clear from the wording of Subsection (2) of Section 45G and the provision therein for an opportunity being given to the person proposed to be publicly examined to show cause why he should not be so examined.

20. In *Annison v. District Auditor for St. Pancras Borough Council* (1962) 1 Q.B. 489 Lord Parker, C. J., had to consider the question whether a discretion has been conferred on the Court. The words that the Court may make a declaration "if satisfied that there is proper ground for doing so". His Lordship said:

"I pay no regard to the word "may", which probably ought to be construed as "must", but it seems to me that a discretion is clearly introduced by the provision that the court may make the declaration if satisfied that there is proper ground for doing so".

21. The contention is that the "discretion has not been properly exercised by the learned Judge as the facts or the case do not disclose any necessity for a public examination. We are not satisfied that this contention is justified. The reports of the Official Liquidator no doubt contain many details; but that is not the same thing as saying that all the data necessary is already available and that a further probe by way of a public examination can be safely avoided.

22. In the light of what is stated above we must hold:

(1) that Section 45G of the Banking Companies Act 1949, is not violative of Article 20(3) of the Constitution;

(2) that the order directing a public examination of the appellants under that section is an order and proper exercise of the discretion conferred thereon; and

(3) that the order under appeal should be sustained. We decide accordingly.

23. The appeals fail and are hereby dismissed with costs.