

(1960) 03 KL CK 0033

In the High Court Of Kerala

Case No : A.S. No's. 1016 to 1019, 1041 and 1080 of 1959

Madhava Naik

APPELLANT

Vs

Popular Bank Ltd., Alleppey

RESPONDENT

Date of Decision : 28-03-1960

Acts Referred:

Companies Act, 1956 — Section 455, 455(2), 477, 478, 531
Constitution of India, 1950 — Article 20, 20(3)
Criminal Procedure Code, 1898 (CrPC) — Section 262

Citation : (1960) KLJ 641

Hon'ble Judges : K. Sankaran, C.J;Anna Chandy, J

Bench : Division Bench

Advocate : A. Madhava Prabhu in A.S. 1016/59, P. Govindan Nair, P.K. Kurien, G. Balagangadharan Nair and K. Sukumaran in A.S. 1017/59, M.K. Nambiar and S. Narayanan Pottis in A.S. 1018/59, T.S. Krishnamoorthy Iyer in A.S. 1019/59, S. Subramonia Iyer in A.S. 1041/59 and A. Hariharasubramaniam in A.S. 1080/59, for the Appellant; Mani J. Meenattur for Respondent in A.S. 1016/59, K.P. Abraham, George Kurien, K.K. Poullose, M. Pathrose Mathai and Mani J. Meenattur for Respondent in A, S. 1017/59, Court Liquidator for Respondents in A.S. 1018 and 1019/59 Official Liquidator for Respondent in A.S. 1041/59, Court Liquidator Mani J. Meenattur for Respondent in A.S. 1080/59, for the Respondent

Final Decision : Allowed

Judgement

Sankaran, C. J.

1. All these appeals are directed against one and the same order. The order appealed against is the order passed by a learned Judge of this Court on 19th October 1959 directing a public examination of all these appellants u/s 478 of the Indian Companies Act and section 45G of the Banking Companies Act. The order was passed in the course of liquidation proceedings carried on in Banking Company Petition No. 8/1956 on the file of the High Court. These proceedings relate to a Banking Company known by the name "The Popular Bank Ltd., Alleppey". This bank commenced its business on 3-9-1944 and owing to financial

difficulty it had to suspend its business on 16-8-1956. The Court passed an order on 19-12-1956 directing a winding up of this Bank. On 10th January 1958, the Official Liquidator filed a petition C.M.P. No. 113/1958 in B.C.P. No. 8/1956 under sections 478, 531, 539 and 541 to 545 of the Companies Act, I of 1956, and under sections 45G, 45H and 45J of the Banking Companies Act, 1949, as amended by Act 52 of 1953, The counter-petitioners to this petition are the Directors and other office bearers of the Bank. The legal representatives of a deceased director were also made counter-petitioners to this petition. The following are the prayers contained in this petition:--

The Court may be pleased

(a) By virtue of the powers under sections 477 and 478 of the Companies Act, I of 1956, and section 45G of the Banking Companies Act, to summon before it the counter-petitioners and publicly examine them as to the conduct of the business of the company and as to their conduct and dealings as officers thereof;

(b) By virtue of the powers u/s 543 of the Companies Act, I of 1956, and section 45H of the Banking Companies Act, 1949 as amended by Act 52 of 1953, to examine the conduct of the counter-petitioners in relation to the affairs of the company and compel them to repay or to restore the monies or properties or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sums 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;

(c) By virtue of the powers u/s 542 of the Companies Act, to declare that the counter-petitioners 1 to 8, 12 and 13 and S. Damodara Pai, deceased father of counter-petitioners 9 to 11, are jointly and severally and personally responsible without any limitation or liability for all the debts of the company and give such further directions as the Court thinks proper for the purpose of giving effect to that declaration; and

(d) By virtue of the powers u/s 545 of the Companies Act, to refer the matter to the Registrar of Companies for prosecuting the offenders or by virtue of the powers conferred on the High Court by section 45J of the Banking Companies Act, 1949, as amended by Act 52 of 1953, to take cognizance of and try in a summary way the offences committed by the counter-petitioners.

Sub-section (1) of Section 455 states that where a winding up order has been made, the Official Liquidator shall, within 6 months from the date of the winding up order, submit a preliminary report to the Court detailing the several particulars as specified in the sub-section about the affairs of the Bank. Under sub-section (2) of the same section, the Official Liquidator may submit a further report or further reports stating the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any officer of the company in relation to the company since the formation thereof, and any other matters which, in his

opinion, it is desirable to bring to the notice of the court. Sub-section (1) of section 45G of the Banking Companies Act also requires the official liquidator to submit a report stating 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. Sub-section (2) of section 45G states that if on a 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, the High Court shall order such a public examination after giving the person concerned an opportunity to show cause why he should not be publicly examined. From the foregoing provisions, it is clear that the basis of the High Court's order for public examination of the directors or the officers of the company is the report submitted by the Official Liquidator under sub-section (2) of section 455 of the companies Act and sub-section (2) of section 45G of the Banking Companies Act. No such report was available to the Court when C.M.P. 113/1958 was filed by the Official Liquidator. No doubt the particulars required to be furnished by the reports contemplated by sections 455(2) and 45G(2) were contained in C.M.P. 113/1958. Accordingly the Court by an order dated 13-6-1958 directed that C.M.P. 113/1958 will be treated as a report u/s 455(2) of the Companies Act and section 45G of the Banking Companies Act and that the Liquidator will be at liberty to make separate applications for such other reliefs as he seeks. Respondents 9 to 11 who are the legal representatives of a deceased Director were held to be not liable to public examination. C.M.P. 113/58 was adjourned to 25-6-1958 for hearing the objections of the remaining respondents. on 18-9-1958 another order was passed by the Court. In that order it was found that the liquidator's report discloses a prima facie case of fraud by counter-petitioners 13, 14 and 15 who were working as Officers of the Company, 13th counter-petitioner as the General Manager of the company and counter-petitioners 14 and 15 as agents of the Alleppey office of the company. On the strength of that finding, their public examination u/s 478 of the Companies Act was ordered. The question of the public examination of counter-petitioners 1 to 8 who were the directors of the company and counter-petitioners 12 and 17 who were respectively the General Manager of the Bank and the Agent of its Kuthiathode office, was deferred to be considered at a later stage. The Official Liquidator was directed to submit further reports expressly implicating each of them with the acts or omissions leading to the loss or acts of fraud as the case may be, together with the grounds therefor. After the public examination of counter-petitioners 13, 14 and 15, the Official Liquidator filed a report on 16-7-1959 making specific allegations against counter-petitioners 1 to 8 and 12 that they are guilty of acts of commission and omission and also acts of fraud calculated to make undue gain for themselves and to bring about loss to the company. Counter-petitioners 1 to 8 and 12 filed objections to this report. After hearing both sides in the light of the reports

submitted by the Official Liquidator and the objections raised by counter-petitioners 1 to 8 and 12, the court passed an order on 19-10-1959 directing that counter-petitioners 1 to 8 and 12 will be publicly examined under sections 478 of the Companies Act and section 45G of the Banking Companies Act. The sustainability of this order has been challenged in the present appeals. A. S. 1016/1959 is by the 7th counter-petitioner in C.M.P. 113/58. A. S. 1017/59 is by counter-petitioners 1, 6 and 8. A. S. 1018/59 is by counter-petitioners 4 and 5. A. S. 1019/1959 is by the 3rd counter-petitioner. A. S. 1041/59 is by the 12th counter-petitioner. A. S. 1080/59 is by the 2nd counter petitioner.

When the appeals came on for hearing, a preliminary objection as to the maintainability of the appeals was raised on behalf of the Official Liquidator who is the respondent in all these appeals. It is argued on his behalf that an appeal shall lie from any order or decision of the High Court in proceedings under the Banking Companies Act only in respect of matters coming u/s 45H of the Banking Companies Act. That section provides for appeals against orders or decisions of a Single Judge of a High Court to a superior Court. That section cannot affect the right of appeal from the orders or decisions of a Single Judge of a High Court to a larger Bench of the same court, if there is a statutory provision to that effect. Matters regulating the internal working of this High Court are now governed by the Kerala High Court Act (Act V of 1959). Section 5 of that Act states that "An appeal shall lie to a Bench of two Judges from a judgment or order of a Single Judge in the exercise of original jurisdiction". Liquidation proceedings under the provisions of the Banking Companies Act are carried on by a Single Judge of this Court in the exercise of the original jurisdiction of the High Court and hence u/s 5 of the Kerala High Court Act, an appeal shall lie to a Bench of two Judges from a judgment or order of a Single Judge, passed in the exercise of such original jurisdiction in respect of liquidation proceedings. Such an order or judgment will become a final order or judgment of the High Court only with the decision in the appeal as provided for in Section 5. If no appeal is preferred against the judgment or order of the Single Judge and if such order or judgment is allowed to become final, then also it would become the final judgment or order of the High Court. The appeals contemplated by section 45H of the Banking Companies Act are appeals against the final orders or decisions of the High Court in civil proceedings under the Banking Companies Act. The present appeals are only appeals against the order of a Single Judge to a Bench of two Judges of the same Court as provided in section 5 of the Kerala High Court Act. The right to prefer such appeals has been expressly conferred by section 5 of that Act and accordingly we over-rule the preliminary objection and hold that these appeals are competent.

2. The main point urged on behalf of the appellants in all these appeals is that the order appealed against is hit by clause (3) of Art. 20 of the Constitution, We will therefore at the outset examine the circumstances under which the said order was passed, to see if the point raised on behalf of the appellants is tenable or not. It has already been found that the impugned order is an order passed on

C. M. P. 113/58 filed by the Official Liquidator. Even though by a subsequent order passed by the Court on 13-6-1958, it was directed that this petition will be treated as a report u/s 455(2) of the Companies Act and section 45G of the Banking Companies Act, the petition with all the reliefs claimed therein has been maintained intact and has been kept on the file of the Court. The Liquidator has not chosen to give up any of those reliefs or to amend the petition so as to restrict its scope to a mere application for a public examination of the directors and other officers of the company. Thus the position as it stands is this. As soon as the public examination is over, the Liquidator will be at liberty to apply or press for any of the other reliefs asked for in C.M.P. 113/58. That the petition is not confined to a request for a public examination of the directors and officers of the company under sections 478 of the Companies Act and section 45G of the Banking Companies Act, is clear from the petition itself. The petition expressly states that it is a petition for all the reliefs sanctioned by sections 478, 531, 538, 539 and 541 to 545 of the Companies Act and by sections 45G, 45H and 45J of the Banking Companies Act, 1949 as amended by Act LII of 1953. Sections 538, 539, 541 and 545 of the Companies Act are of particular significance so far as the point raised in the present appeals is concerned. Section 538 deals with offences by officers of companies in liquidation. That section states that if any person being a past or present officer of a company, is found guilty of any of the acts of commission or omission enumerated in that section, he shall be liable to punishment under clauses (m), (n) and (o) of that section with imprisonment for a term which may extend to 5 years or with a fine or with both; and in the case of any other offence, with imprisonment for a term which may extend to two years or with fine or with both. Similarly section 539 provides for punishment for the offences of falsification of the books of the company and states that a person who is found to be guilty of the offences enumerated in that section shall be punishable with imprisonment which may extend to 7 years and shall also be liable to fine. Section 541 provides for punishment for not maintaining proper accounts in respect of the business of the company. Section 545 provides for prosecution of delinquent officers and members of the company. Sub-section (1) of that section states that if it appears to the court in the course of a winding up that any past or present officer or any member of the company has been guilty of any offence in relation to the company the court may direct the Liquidator either himself to prosecute the offender or to refer the matter to the Registrar. The Liquidator in his petition C. M. P. 113/58 has specifically invoked the jurisdiction of the High Court u/s 45J of the Banking Companies Act to proceed against the counter-petitioners. Sub-section (1) of that section states that the High, Court may if it thinks fit, take cognizance 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. Sub-section (3) states that in any case tried summarily under sub-section (1) the High Court need not summon any witness if it is satisfied that the evidence of such witness will not be material, that the High

Court shall not be bound to adjourn the trial for any purpose unless such adjournment is in the opinion of the High Court, necessary in the interests of justice, and that nothing contained in sub-section (2) of section 262 of the Code of Criminal Procedure shall apply to any such trial. Sub-section (5) states that notwithstanding anything to the contrary contained in the Code of Criminal Procedure, the High Court may take cognizance of any offence under this section without the accused being committed to it for trial. It is clear from these provisions that the High Court is empowered to summarily try offences under the Companies Act and under the Banking Companies Act and to punish the directors and officers of the company who are found to be guilty of such offences. Such summary trials may even be concluded without the examination of any independent witnesses. The evidence brought out by a public examination of the directors and officers of the company may itself be sufficient to sustain the conviction of such persons.

3. The scope of a public examination u/s 45G of the Banking Companies Act is very wide. It is obvious that the public examination sought for by the Official Liquidator by presenting C.M.P. 113/58 is to bring out from the directors and officers of the company thus sought to be examined, facts necessary to sustain a conviction of these persons for the various offences alleged against them in the petition. Clause (3) of section 45G permits the Official Liquidator to take part in such examination and also states that if specially authorised by the High Court he may employ such legal assistance as may be sanctioned by the High Court. Sub-section (6) states that the person examined shall be examined on oath and that he is bound to answer all such questions as the High Court may put or allow to be put to him. Sub-section (8) states that the notes of the examination shall be taken down in writing and shall be read over to or by and signed by the person examined and may thereafter be used in evidence against him in any proceedings, civil or criminal. All these consequences are bound to follow from the public examination to be conducted as per the order impugned in the present appeals.

4. It may now be considered whether the impugned order is hit by clause (3) of Art. 20 of the Constitution. That clause runs as follows:

No person accused of any offence shall be compelled to be a witness against himself.

The scope of this clause was considered by the Supreme Court in *M. P. Sharma v Satish Chandra* (A. I. R. 1954 S. C. 300) and there it was pointed out that the right conferred by this Article consists 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.

All these tests have been fully satisfied by the public examination ordered in C. M. P. 113/58. Counter-petitioners 1 to 8 and 12 against whom that order was passed have been clearly accused of various offences punishable under sections 538, 539, 541 and 545 of the Companies Act. The main object of the public examination sought for by the Official Liquidator is to elicit facts from the mouth of these counter-petitioners themselves in support of all the accusations made against them in C. M. P. 113/58. Under clause (6) of section 45G of the Banking Companies Act, these counter-petitioners are bound to answer all the questions put to them in a public examination, irrespective of any consideration whether such answers would incriminate them or not. The answers thus recorded from them in such a public examination can be used against them in any civil or criminal proceedings against them, because such use is expressly sanctioned by clause (8) of section 45G. After such examination, it will be open to the Official Liquidator to invoke the summary jurisdiction of the High Court u/s 45J to convict these counter petitioners for the offences made out against them on the strength of the facts elicited in their public examination. Under clause(3) of section 45J, the High Court is empowered to try these persons summarily and to punish them for the offences proved against them by their own evidence given at the public examination. So far as the present case is concerned, there is no necessity to file any fresh complaint. All the requisites of a criminal complaint are satisfied by C. M. P. 113/1958 which is still pending on the file of the court. In relief D, in paragraph 20 of that petition the official Liquidator has made the specific prayer that the High Court may by virtue of the powers conferred on the High Court by section 45J of the Banking Companies Act, take cognizance of and try in a summary way the offences committed by the counter-petitioners. It is on such a petition that the impugned order for the public examination of the counter-petitioners was passed. The effect of that order is that counter-petitioners 1 to 8 and 12 who are accused of the various offences punishable under sections 538, 539, 541 and 545 of the Companies Act, are compelled to be witnesses against themselves and to give evidence in support of the accusations against them. The protection granted by clause (3) of Art. 20 of the Constitution is against such compulsion. All the elements necessary to bring the matter within the mischief of this clause are present in this case and accordingly we hold that the impugned order is hit by clause (3) of Art. 20 of the Constitution. The objection based on Art. 20 (3) of the Constitution was over-ruled by the learned Single Judge by observing that the counter-petitioners ordered to face a public examination "are not persons accused of an offence even if it be that the allegations against them disclose a criminal offence." We are unable to agree with this observation. We have already pointed out that C. M. P. 113/58 contains specific accusations against these persons and that therein it is alleged that they are guilty of the offences punishable under sections 538,539,541 and 545 of the Companies Act. It will not therefore be correct to say that these persons are not persons accused of any offence or that their public examination will not result in their giving evidence against themselves in respect of such offences. The decisions in *Suryanarayana v Vijay Commercial Bank* (A. I. R. 1958 Andhra Pradesh 756) and

in *Narayanlal v Maneck Phirose* (A. I. R. 1959 Bombay 320) cited in the order of the learned Single Judge have no real bearing on the facts of the present case. It does not appear that the persons sought to be publicly examined in those cases had been accused of specific offences punishable under the provisions of the Companies Act. The larger question that even in the absence of specific accusations regarding the commission of offences punishable under the Companies Act, a public examination u/s 478 of the Companies Act and section 45-G of the Banking Companies Act would come within the mischief of clause (3) of Art. 20 of the Constitution. was also raised by the learned counsel appearing for the appellant. But we do not think that a decision on that larger question is called for in these appeals because as we have already found, all the elements necessary to attract clause (3) of Art. 20 of the Constitution are satisfied by the impugned order. For that reason alone the impugned order has to be set aside.

5. In view of the conclusion already recorded by us, it has become unnecessary to examine the various reports filed by the Official Liquidator and to see that these reports disclose sufficient grounds to justify the passing of an order for the public examination of counter-petitioners 1 to 8 and 12 u/s 478 of the Companies Act and section 45G of the Banking Companies Act. We are not expressing any opinion on that question. In the result all these appeals are allowed and the impugned order is set aside. On a consideration of the circumstances which led to the passing of the impugned order, we do not think that it will be proper to direct the payment of the costs of these appeals from the assets of the bank in liquidation. Accordingly we direct the appellants in these appeals to bear their own costs.