(1958) 09 KL CK 0019

In the High Court Of Kerala

Case No : Civil Miscellaneous Petition No. 113 of 1958

Official Liquidator APPELLANT

Vs

Krishna Kamath and Others RESPONDENT

Date of Decision : 27-09-1958

Acts Referred:
Banking Companies Act, 1949 — Section 45, 45G, 45G(7)
Companies Act, 1956 — Section 478

Citation : AIR 1959 Ker 388

Hon'ble Judges : Raman Nayar, J

Bench : Single Bench

Advocate : Mani J. Meenattur, for the Appellant; P. Govindan Nair, P.K. Kurian, K. Sukumaran, S. Narayanan Potti, A. Hariharasubramonian, T.S. Krishnamurthy Iyer, T.M. Mahalinga Iyer, S.K. Bramanadan, A.B. Prabhu, S. Subramonia Iyer, K. Rama Iyer, M. Paul, Thomas and S. Narayana Iyer, for the Respondent

Judgement

Raman Nayar, J.—So far as counter petitioners 13, 14 and 15 are concerned the Liquidator''s report discloses a prima facie case of fraud by each one of them. Counter Petitioner 13 was first the General Manager and then the Secretary of the Banking Company in liquidation; and counter petitioners 14 and 15 were agents of the Alleppey office of the company at the time of the alleged fraud. They are all officers of the company and are in the circumstances liable to public examination u/s 478 of the Companies Act.

2. Counter Petitioner 16, so far as the report says, was only the Cashier of the Alleppey office. If that be so he is not an officer of the Company, nor is he a promoter, director or auditor of the company. He is not therefore liable to public examination either u/s 478 of the Companies Actor u/s 45G of the Banking Companies Act.

3. Of the remaining counter petitioners, counter petitioners 1 to 8 were directors of the company; and counter petitioners 12 and 17 officers thereof, the former being its General Manager and the latter the agent of its Kuthiathode office. They

arc therefore persons coming within the scope either of Section 478 of the Companies Act or Section 45G of the Banking Companies Act, in the case of counter petitioners 1 to 8 of both. But the report while alleging acts and omissions in general, many of them amounting to fraud, does not attempt to attribute these acts and omissions to any individual person or to say that any act or omission of that particular person caused loss to the company. Section 478 of the Companies Act expressly states that it is only that person against whom fraud is alleged that the court may, after considering the report, summon for public examination.

It is not as if on a prima facie case of fraud by any person whatsoever, all the persons mentioned in Section 478 are liable to public examination; such examination can only be of the particular person who has committed the fraud. But it has been argued on the strength of, In Re: Calcutta City Bank Ltd., that in view of the different wording of Section 45G of the Banking Companies Act, there need be no act or omission leading to loss by the individual person summoned for examination, that so long as there is an act or omission leading to loss by any of the persons mentioned, all such persons irrespective of whether or not they were responsible for the act or omission, are liable to public examination.

I think this is putting the case too high. In the first place the court has to be of opinion that the person concerned should be publicly examined and I venture to say that a court will not come to that opinion unless it thinks that the person was in some way or other responsible for the act or omission. The wording of Section 45G of the Banking Companies Act is. so far as this matter is concerned, similar to the wording of S. 196 of the Indian Companies Act, 1913 and Section 8 of the English Companies (Winding-lip) Act, 1890. In Ex parte Barnes, (1898) A.C. 146, the House of Lords held that, under the latter provision, a general finding of fraud would not be enough and that the individual person, sought to be examined must be incriminated.

The spirit of this decision was explained in re Civil, Naval and Military Outfitters Ltd. 1899 1. Ch. 215 as demanding 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". (And the decision contains no such disclaimer regarding its authority as a precedent as seems to be suggested in (S) In Re: Calcutta City Bank Ltd., On the contrary what was emphasized was that the defective report of the receiver in that case, which was however held to meet the bare requirements of the law, was not to be regarded as a precedent for future reports). These cases have been followed by the Indian Courts in construing Section 196 of the Indian Companies Act, 1913 (See for example In Re: Indian State Bank Ltd., where it was observed that the words that the court "may direct that any person shall attend before the court .... and be publicty examined" appearing in the section do not justify the court, on a general allegation of fraud, in making an order for the public examination of "any person" not directly implicated in the report of the liquidator, and that the report must state some facts which entitle the court to find that there is a prima facie case against the particular person named for examination).

It was only in 1956 that the Indian Legislature (following the English Companies Act of 1948) resolved the ambiguity in Section 196 of the Indian Companies Act, 1913 by providing in Section 478(1) of the Companies Act, 1956 that when the liquidator has reported that a fraud has been committed by a person the court may require that person to attend and be publicly examined, thus making it clear that it is only the individual persons incriminated that the court has jurisdiction to so examine Section 45G of the Banking Companies Act was enacted earlier on the model of the Companies Act then in force, and no argument based on the difference in language between that section and Section 478(1) of the Companies Act, 1956, the "any person" of the former, arid the "that person" of the latter, is available.

On the ether hand the proviso to Sub-section (7) of Section 45G of the Banking Companies Act, which says that the Court may allow costs to a person publicly examined who is exculpated from any charge made or suggested against him, necessarily implies that only a person against whom some charge (and unlike a case falling u/s 478 of the Companies Act the charge need be only of an act or omission leading to loss and need not necessarily be one of fraud) has been made or suggested can be so examined. With due respect I think that the statement in the Calcutta case already referred to that where there is a loss "that creates a prima facie case for public examination of the directors who were responsible for the management at the relevant time", is too wide. Even in the case of a banking company it would not be proper to assume that every loss must be the result of some act or omission on the part of one or more of the persons mentioned in Section 45G and that every director at the time must have been party to that act or omission.

4. There will be a public examination of Cr. Petitioners 13, 14 and 15 u/s 478 of the Companies Act on 20-11-1958. (Notice under Rule 23Q by publication in one issue each of the Indian Ex press and Malaysia Rajyam), So fall as the remaining Cr. Petitioners are concerned I call for a further report or reports from the liquidator (which he may in his discretion submit either before or after examination of Cr. petitioners 13, 14 and 15) expressly implicating each one of them whom he seeks to subject to a public examination with the acts or omissions leading to the loss or acts of fraud as the case may be, together with the grounds therefor, and such particulars that he may under stand what it is from which he will have to exculpate himself. And in the case of Cr. Petitioner No. 16 the report, if any, will further explain how he is an officer of the company. Call on 20-11-58.

