
(1961) 04 CAL CK 0007
In the Calcutta High Court
Case No : A.F.O.O. No. 132 of 1960

Satish Churan Law

APPELLANT

Vs

R. Goho, (Official Liquidator)

RESPONDENT

Date of Decision : 17-04-1961

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 10, 9
Companies (Court) Rules, 1959 — Rule 243, 244, 245, 246, 247
Companies Act, 1956 — Section 477, 483

Citation : AIR 1962 Cal 23 : (1962) 1 CALLT 231

Hon'ble Judges : S.C. Lahiri, C.J; R.S. Bachawat, J

Bench : Division Bench

Advocate : Sankar Banerji, for the Appellant; Sabyasachi Mukherji, for the Respondent

Final Decision : Partly Allowed

Judgement

Bachawat, J.—The appellant was a director of the Ballygunge Real Property and Building Society Limited, now in liquidation. On the 18th January 1960 the Official Liquidator applied to the Company Judge for an order u/s 477 of the Indian Companies Act. The application was made ex parte by summons in form No. 109 of the Companies (Court) Rules 1959. The summons was accompanied by a statement signed by the Official Liquidator setting forth the materials on which the application was based. On reading that statement the learned Company Judge made an order directing the issue of a summons requiring the appellant to attend for being examined touching the affairs of the company and further directing him to produce certain books and documents specified in the order. The appellant was served with the summons directed to be issued under this order. Subsequently the appellant applied to the Company Judge for an order that the order dated the 18th January 1960, be set aside or modified and also for an order that the appellant be given leave to inspect the records of Court including the statement of the Official Liquidator upon which, the order dated the 18th January 1960, was based. By an order dated the 15th July 1960 the learned

Company Judge Law, J. dismissed the application. He held that as the order dated the 18th January 1960 had been drawn up and filed the Court had no power to set aside or modify it. He also held that the appellant is not entitled to the inspection prayed for. The appellant has preferred this appeal from this order.

2. At the outset the respondent contends that no appeal lies from the order dated the 15th July 1960. Now an order or a decision in the winding up of a company in order to be appealable u/s 483 of the Companies Act, 1956 must amount to a judgment within the meaning of Clause 15 of the Letters Patent. On behalf of the respondent it was contended that having regard to the decision in Madan Gopal Daga Vs. Sachindra Nath Sen, , the order dated the 18th January 1960 was not appealable and that a fortiori the subsequent order refusing to discharge or modify the main order is also not appealable. It may be that no appeal lies from the order if the only ground of appeal is that the order is wrong on the merits. But in my opinion an appeal lies from the order where, as in this case, the ground of appeal is that the learned Judge has refused to exercise a jurisdiction vested in him by law and has wrongly held that he has no jurisdiction to discharge or modify the previous order. An appeal lies under Clause 15 of the Letters Patent from an Order which may not be otherwise appealable where the ground of appeal is that the Court has wrongly assumed a jurisdiction which is not vested in it by law, see National Textiles Vs. Premraj Ganpatraj, ; equally an appeal lies under Clause 15 from an order which may not be otherwise appealable where the ground of appeal is that the Court has wrongly refused to exercise a jurisdiction vested in it by law. The order being appealable, the appellate court need not confine itself to a declaration that the learned Judge has jurisdiction to make the order; on finding that the learned Judge had jurisdiction to make the order, the appellate court may pass any order which in its opinion ought to have been passed by him.

3. The order appealed from so far as it decides that the appellant is not entitled to inspection of the statement of the Official Liquidator is also appealable. The order decides that the appellant has no right to inspect the document and such a decision amounts to a judgment within the meaning of Clause 15 of the Letters Patent. The summons taken out on behalf of the appellant asks for inspection of documents in somewhat general terms. In this Court counsel for the appellant has confined his claim for inspection to the statement of the Official Liquidator and the annexure thereto.

4. The appellant bases his claim to inspection of the statement of the Official Liquidator and the annexure thereto upon Sub-rule (1) of Rule 360 of the Companies (Court) Rules 1959. That Sub-rule is as follows:

"Inspection of file--Every duly authorised officer of the Central Government, and, save as otherwise provided by these Rules, every person who has been a director or officer of a company which is being wound-up, shall be entitled, free of charge, at all reasonable times to inspect the file of proceedings of the liquidation and to take copies or extracts from any document therein, and, on payment of

the prescribed charges, to be furnished with such copies or extract".

5. The appellant contends that the statement of the Official Liquidator forms part of the tile of proceedings of the liquidation. For this purpose he relies upon Rules 14 and 115 of the Companies (Court) Rules 1959 which are as follows:

14. "Serial number of proceedings--Every petition or application shall bear its distinctive serial number, and an interlocutory application shall bear, besides its own serial number, the serial number of the main proceeding to which it relates. Every order made, process issued or document filed, shall bear the serial number of the proceeding to which it relates".

115. "Form of proceedings after Winding up order is made--After a winding up order is made, every subsequent proceeding in the winding up shall bear the original number of the winding Op petition besides its own distinctive number, but against the name of the company in the cause title, the words "in liquidation" shall appear in brackets".

6. The application u/s 477 was art interlocutory application made in the course of the winding up proceedings. It bore its own serial number as also the serial number of the winding up petition. The statement of the Official Liquidator was filed in course of the proceedings u/s 477. In this connection the appellant relief upon Rule 243 of the Companies (Court) Rules 1959 which is as follows:

"Application for examination u/s 477:

1. An application for the examination of a person u/s 477 may be made ex parte, provided that where the application is made by any person other than the Official Liquidator, notice of the application shall be given to the Official Liquidator;

2. The summons shall be in Form No. 109 and, where the application is by the Official Liquidator, shall be accompanied by a statement signed by him setting forth the facts on which the application is based. Where the application is made by a person other than the Official Liquidator, the summons shall be supported by an affidavit of the applicant setting forth the matters in respect of which the examination is sought and the grounds relied on in support of the summons".

7. The appellant also relies upon Form No. 109 to show that the order u/s 477 is based upon the statement of the Official Liquidator. The appellant therefore contends that the statement and the annexure thereto form part of the file of the proceedings of the liquidation and by virtue of Rule 360 he is entitled to inspect it. The argument at first sight appears to be formidable but I am not inclined to accept it.

8. Rule 360 of the Companies (Court) Rules 1959, appears to be some what similar to Rule 19 of the English Companies (Winding up) Rules 1949. By Rule 19 of the English Companies (Winding up) Rules 1949 every person who has been a director Or officer of a company which is being wound up and every duly authorised officer of the Board of Trade, shall be entitled, free of charge, and

every contributory and every creditor whose claim or proof has been admitted, shall be entitled on payment of the prescribed fee, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or be furnished with such copies or extracts on payment of the prescribed fee. The clue to the meaning of the expression "the file of proceedings" is to be found in Rule 16 of the English Companies (Winding up) Rules 1949. Rule 16 provides that all petitions, affidavits, summons, orders, proofs, notices, depositions, bills of cost and other proceedings in the High Court shall be kept and remain on record in the office of the Registrar and, subject to the direction of the Court, shall be placed in one continuous file and no proceedings shall be filed in the Central Office. There is no rule in the Companies (Court) Rules 1959, corresponding to Rule 16 of the English Companies (Winding up) Rules 1949.

9. The Companies (Court) Rules 1959 contain no positive direction that the statement of the liquidator shall form part of the file of liquidation proceedings. According to the English practice such a statement is not kept on the file of the winding up proceedings. The origin of this practice is to be found in the following observations Of Jessel M. R. in *Re Gold Co.* (1879) 12 Ch. D 77 :

"The liquidator, according to the practice of the Court, comes ex parte, and, as a general rule, he makes no affidavit, for a very good reason, that it is not desirable for him to put anything upon the files of the Court which can be inspected by the person against whom he intends to proceed, and which, if so inspected, might afford information which would enable him to defeat any proceeding to be taken against him."

10. The existing practice is stated thus in *Buckley on the Companies Acts*, 13th edition (1957) at page 557 thus;

"The liquidator may apply ex parte, and upon written statement, not affidavit (as the object is to keep the proceedings secret). A prima facie case is not necessary, a case of suspicion may be enough; the object may be to ascertain whether a suspicion is well founded, (1879) 12 Ch. D. 77".

11. Rule 243 of the Companies (Court) Rules 1959, has adopted the English practice. That rule enables the liquidator to move ex parte and "upon his statement unsupported by affidavit. He is not required to file an affidavit. The Court acts upon his statement, but the statement not being an affidavit need not be placed on the file of the liquidation proceedings. In *Re London and Lancashire Paper Mills Co.*, (1888) 57 LJ Ch. 766, North, J. held that the deposition of the person summoned u/s 115 of the English Companies Act, 1862 corresponding to Section 477 of the Companies Act 1956 need not be kept on the file in spite of the general words of Rule 58 of the General Order of the 11th November 1862 which required that depositions and other documents relating to a winding up were to be filed as far as might be in one continuous file; on the other hand Vaughan William, J. held in *Re Standard Gold Mining Company* (1895) 2 Ch. 545

that the deposition must Be kept on the file under Rule 11 of the Companies (Winding up) Rules of April 1892 which required that all depositions and other proceedings in a Winding up were to be kept and remain :on record in the office of the Registrar in one continuous file. Rule 248 of the Companies (Court) Rules 1959, shows that the deposition taken u/s 477 of the Companies Act 1956 need not be kept on the file of the liquidation proceedings; the deposition "is not open to inspection by any creditor, contributory or other persons, save upon orders of Court. Section 477 read with Rules 243 to 248 shows that a proceeding u/s 477 is a private proceeding. The Com-panies (Court) Rules 1959 do not specially require that the statement of the liquidator upon which the order u/s 477 is based, must be kept on the file of the liquidation proceedings. Those Rules do not even contain a provision corresponding to R. 11 of the English Companies "(Winding Up) Rules enumerating the documents which are to be placed on the file. Rule 360 contemplates that there is or should be a file of liquidation proceedings; but the very general words of that rule do not show that the statement of the liquidator must be kept on the file. The statement is a secret document; it is not open to the inspection of any person other than the liquidator save by order of Court and ft ought not to be placed on the file of the liquidation proceedings.

12. Law, J, has pointed out that as a mattes of fact on the Original Side of this Court the proceedings of liquidation are not kept in one continuous file. Assuming for a moment that as a general rule all proceedings in the winding up to a company bearing the original number of the winding up petition should be kept in one continuous file and in the eye of the law are deemed to be so kept, in my opinion the statement of the liquidator upon which the ex parte order of the Court u/s 477 is obtained ought not to be treated to be on that file.

13. The appellant is therefore not entitled to inspection of the statement of the liquidator and of the annexure thereto under Rule 360 of the Companies (Court) Rules, 1959.

14. Apart from Rule 360 the appellant has no right under the general law to obtain inspection, of any document which has been filed in course of the winding up proceedings. The appellant is a witness. Though the order u/s 477 directs him to appear and to produce documents, he is no party to the proceeding. As he is not a party to the proceedings he is not entitled, as a matter of right, to inspection of the material upon which the order was made.

15. By Rule 16 of the Companies (Court) Rules 1959 save as provided in those rules, the rules of tile Court for the time being in force relating to search and the certification and grant of copies shall apply to proceedings under the Act and the rules, as they apply to other proceedings in the Court. Rules 9 and 10 of Chapter IV of the Original Side Rules contain general directions with regard to searches of the Court records. Under Rule 9 of Chapter IV of the Original Side Rules the appellant is not entitled to inspection, of the proceeding u/s 477 for he is not a party to that proceeding. Under Rule 10 of Chapter IV of the Original Side Rules

a person who is not a party to a proceeding is not entitled, as a matter of right, to inspection and copies of the proceeding while the proceeding is pending. The liquidation proceedings are still pending. During the pendency of those proceedings the granting of the inspection and of the copies is entirely in the discretion of the Registrar subject to the order of the Judge. Having regard to the peculiar nature of the proceeding u/s 477, inspection of the statement of the liquidator produced before the Court under R. 243 of the Companies (Court) Rules 1959 ought not to be allowed to the appellant under Rule 10 of Chapter IV of the Original Side Rules.

16. The appeal must therefore fail in so far as it raises the question of the right of the appellant to inspect the statement of the liquidator.

17. I must now examine the question whether the appellant is entitled to the discharge or modification of the order dated the 18th January, 1960 as a general rule an order of the Court which has been passed and perfected cannot be subsequently set aside or amended. But the general rule is subject to exceptions. The order u/s 477 was passed ex parte. The appellant is affected by the order. He complains that the order is vexatious and oppressive and amounts to an abuse of the process of the Court. The appellant has a right to move the Court to discharge or modify the order on those grounds. Rule 9 of the Companies (Court) Rules 1959 preserves the inherent power of the Court. The Court may rescind or modify the ex parte order where that course is necessary for the ends of justice or to prevent an abuse of its process. Even a subpoena issued to an ordinary witness may be set aside if the issuing of it was oppressive and an abuse of its process, see *R.v. Baines* (1909) 1 KB 258, *Steele v. Savory*, (1891) WN 195. In my opinion Law, J. was in error in holding that he had no power whatsoever to set aside or modify the order dated the 18th January, 1960.

18. On the merits no case has been made out for setting aside the order dated the 18th January 1960, in so far as it directs the appellant to appear before the Court for being examined touching the affairs of the company. The appellant was a director of the company and it is desirable and necessary that he should be so examined.

19. The order dated the 18th January 1960, also directs the appellant to produce the cash books, general ledgers, journal, minute books and property register for the period 1939 to 1948 of Ballygunge Estate (Private) Ltd., the cash books, general ledger, journals, minute books and property register of Ballygunge Building Society Private Ltd; for the period 1945 to 1948 and the general ledger for 1949 of Ballygunge Real Property and Building Society Ltd. (in liquidation). Now the Ballygunge Estate (Private) Ltd. and the Ballygunge Building Society Private Ltd. are not parties to these liquidation proceedings. It is said that the appellant is a director of both those companies. Assuming that to be so it is difficult to say that as a matter of law the books and documents or those companies are or can be said to be in the custody or power of the appellant. In my opinion the order dated the 18th January 1960 in so far as it directs the

appellant to produce the books and documents of those companies is harsh and oppressive. If at a subsequent stage of the proceedings or from the answers given by the appellant in course of his examination u/s 477 it appears that the appellant should be directed to produce those documents no doubt the learned Judge would be free to make an order directing him to do so. This case is somewhat similar to the case before Simonds, J. in *Re Maville Hose, Ltd.* (1949) Ch. 32. I propose to discharge that part of the order which requires the appellant to produce those books and documents. But in doing so I do not pre-judge what document should be ordered to be produced by the appellant upon the answers given by him.

20. The order dated the 18th January 1960 so far as it directs the appellant to produce the general ledger for 1949 of Ballygunge Real Property and Building Society Ltd. ought not to be discharged at this stage. This company is now in liquidation and the order was made in the proceedings for its liquidation. The appellant was for some time its director. The appellant states that he is not in possession of the general ledger for 1949. He should bring this fact to the attention of the Court when he attends the Court pursuant to the summons issued to him. If, as he says, the document is not in his custody or power he has a lawful excuse for not producing it. But the order for its production cannot be said to be oppressive and that part of the order ought not to be discharged at the stage.

21. I propose that the following order be made.

22. The appeal be and is hereby allowed in part and the order dated the 18th January 1960 in so far as it directs the appellant to produce the books and documents of Ballygunge Estate (Private) Ltd. and of Ballygunge Building Society Private Ltd. be and is hereby discharged and set aside. The rest of the order dated the 18th January 1960 will stand. Save as aforesaid the appeal is dismissed. Each party will pay and bear his own costs of the appeal. The liquidator will retain the costs of and incidental to the appeal as between attorney and client out of the assets in his hands.

Lahiri, C.J.

23. I agree.