

(1966) 03 CAL CK 0017
In the Calcutta High Court
Case No : A.F.O.O. No. 206 of 1965

Shankarlal Agarwalla

APPELLANT

Vs

Satya Narain Jugal Kishore and Others

RESPONDENT

Date of Decision : 23-03-1966

Acts Referred:

Companies (Court) Rules, 1959 — Rule 197
Companies Act, 1913 — Section 195

Citation : AIR 1967 Cal 1 : (1967) 1 CALLT 281 : (1967) 37 CompCas 146

Hon'ble Judges : D.N. Sinha, C.J.; S.A. Masud, J

Bench : Division Bench

Advocate : C. Bhabra, for the Appellant; A. Sen, for the Respondent

Final Decision : Partly Allowed

Judgement

Sinha, C.J.—The facts in this case are shortly as follows : Messrs Laxmi Spinning & Weaving Mills Ltd. (hereinafter referred to as the said company) is a company incorporated under the Indian Companies Act, 1913. On or about the 31st January, 1953, the company executed a first mortgage of its assets for Rs. 1,25,000 in favour of Shankarlal Agarwalla and Dinanath Agarwalla in the name of their firm of Bansidhar Shankerlal. On the 21st January, 1954, the company executed a second mortgage of its assets for Rs. 2,00,000 in favour of Shankarlal Agarwalla and Dinanath Agarwalla, in the name of their firm of Bansidhar Shankerlal. On the 25th November, 1954, a suit was filed for the enforcement of the said mortgages, being Suit No. 3365 of 1954 (Bansidhar Shankerlal v. Laxmi Spinning and Weaving Mitts Ltd.). In or about February, 1955, one Nathmal Bhojnagarwalla instituted a suit in this High Court against the company and the mortgagees, inter alia, for a declaration that the mortgages were void. On the 13th May, 1955, a preliminary mortgage decree was passed in Suit No. 3365 of 1954. On or about the 22nd August, 1955, an order was made by this High Court for winding up of the said company at the instance of the petitioning creditor, Satya Narain Jugal Kishore. In the winding up proceedings,

an application was made by the said creditor for an order for examination of certain persons including the said Shankarlal Agarwalla u/s 195 of the Indian Companies Act, 1913 (hereinafter referred to as the said Act). On the 31st July, 1957, an ex parte order was passed by the company court, inter alia, for examination of the appellant, Shankarlal Agarwalla u/s 195 of the said Act. The said Shankarlal Agarwalla thereupon made an application for setting aside the said order. On the 14th September, 1961, Mitter J. made an order setting aside the said ex parte order dated 31st July, 1957. The relevant part of the order is as follows :

" It is ordered by and with the consent of the parties without prejudice to the right, if any, of the official liquidator of the said company or any of the creditors including the said firm to make another application on the same grounds or on other grounds that the said order dated the thirty-first day of July in the year one thousand nine hundred and fifty-seven be and the same is hereby set aside, and it is further ordered that if such an application as aforesaid is made within one week from the date of the reopening of this court after the ensuing long vacation the costs of and incidental to this application to be taxed by the taxing officer of this court shall abide by the result of the application to be made as aforesaid and it is further ordered that in default of making such application as aforesaid within the time aforesaid the parties appearing as aforesaid do bear and pay their respective costs of and incidental to this application to be if necessary taxed by the taxing officer of this court and it is further ordered that the summons for examination already issued by this court be and the same are hereby abandoned."

2. In the meanwhile, on 16th November, 1960, Suit No. 301 "of 1955 instituted by Nathmal Bhojnagarwalla was dismissed by consent after sanction was granted to the liquidators to enter into a compromise for the payment of a certain sum of money to the plaintiff in the said suit. It might be mentioned here that in the liquidation proceedings two private liquidators were appointed as the joint liquidators. On the 25th November, 1961, the petitioning creditor, Satya Narayan Jugal Kishore, made another application for the examination of several persons including the said Shankarlal Agarwalla u/s 195 of the said Act. On 21st May, 1962, an ex parte order was made by the company court, inter alia, for the examination of the said Shankarlal Agarwalla u/s 195 of the said Act. Thereupon, the appropriate summons was issued and was served on the "said Shankarlal Agarwalla. A copy of the said order dated 21st May, 1962, is set out at page 77 of the paper-book. The order, inter alia, provided as follows:

1. That the persons mentioned in the schedule in the said order including the said Shankarlal Agarwalla be examined u/s 195 of the said Act concerning the trade, dealings, affairs and properties of the said company, such examination being held by the Registrar of this court or such other officers as he may appoint.

2. That the said persons do bring with them and produce any document or documents in their custody or power relating to the said company at the time of

such examination.

3. Leave be granted to the applicant (Satya Narain Jugal Kishore) to attend with attorney and advocate to assist the Registrar or such other persons as he may appoint for the purpose of such examination.

4. That the examining officer be at liberty to appoint a stenographer and interpreter.

5. Leave be granted to the said applicant to obtain on payment of usual charges the copies of the proceedings before the said officer."

3. On 24th February, 1964, the said Shankarlal Agarwalla made an application before the company court for being represented and/or assisted by attorney and/or counsel at the examination. This application was contested by the petitioning creditor. On 11th March, 1964, the company court dismissed the application and the dismissal was without prejudice to the contention of Shankarlal Agarwalla that the order dated 21st May, 1962, was bad. On the 22nd April, 1964, the said Shankarlal Agarwalla made an application, inter alia, for the following orders :

1. That the ex parte order dated 21st May, 1962, be recalled and/or set aside and/or discharged.

2. In the alternative that the said ex parte order dated 21st May, 1962, be varied or modified.

3. In the alternative, the examination of the petitioner be limited to specified matters and or directions be given that no question may be asked which are directly or indirectly connected with the said mortgages mentioned above.

4. That the examination of the applicant may be held in open court before the learned judge taking company matters.

5. Leave be given to the applicant to be represented and/or assisted by attorney or by counsel or by advocate at the examination to be held in court.

4. This application was contested by the petitioning creditor and, after hearing the parties, Datta J. made an order on 29th January, 1965, modifying the ,said order dated 21st May, 1962. The modification was as follows:

"The ex parte order is modified by (i) restricting the examination from 1st January, 1963, and onwards, (ii) by directing production of books and records, and (iii) by directing the counsel and solicitor for the creditor not to divulge the information obtained by them in the course of the public examination and/or utilising them excepting the winding up proceeding or proceeding arising from the public examination."

5. This appeal is directed against the order of Datta J. Mr. Bhabra appearing on behalf of the appellant has taken three points before us. The first point is that u/s 195 of the said Act read with Rule 195 of the Company Rules framed by this court (hereinafter referred to as the "said Rules"), only the official liquidator

could make an application for examination of the appellant u/s 195 of the said Act. As the application was made by the petitioning creditor, it was incompetent and the court had no jurisdiction to make an order for examination of the appellant u/s 195 of the said Act. The second point is that there has been a violation of the provisions of Rule 197 of the said Rules, inasmuch as persons who are not entitled to attend the examination have been given the right to attend. The third point is that the summons ought to have specified the points upon which the examination of the appellant should be directed and as it does not specify the points the order is invalid. In order to appreciate the points raised, it will be necessary to examine certain provisions of the said Act and the said Rules. The relevant provisions of Section 195 of the said Act are as follows :

" 195. (1) The court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company or any person whom the court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(2) The court may examine him on oath concerning the same either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The court may require him to produce any documents in his custody or power relating to the company ; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(6) The said rules have been framed under the provisions of Section 246 of the said Act granting powers to the High Court to make rules consistent with the said Act and the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up of a company, etc. The rules which are important for our purposes are Rules 195, 196, 197 and 199. They are set out below :

" 195. An application for the examination of a person or persons u/s 195 of the Act shall be made ex parte to the judge by petition verified by the official liquidator stating the facts upon which the application is based. At the hearing of the application the judge may, if satisfied that a prima facie case for examination has been made out, direct the issue of a summons or summonses against the person or persons named in the order for examination and/or for production of documents. The summons shall be in Form No. 68.

196. At the examination of a person so summoned, the official liquidator.....may attend in person, or.....by attorney or advocate and assist the court in examining the person summoned.

197. At such examination, save and except the liquidator and the advocate or attorney employed by him and the person to be examined, no person shall be entitled to attend.

199. In the High Court the judge may, at the time of making the order for such examination, direct that it shall be held by an officer of the High Court, and that the powers of the court as to the conduct of the examination, but not as to costs, shall be exercised by such officer."

6. In order to appreciate the point, it will be necessary to consider a little of the history of the court's power to summon persons suspected of being in possession of any property of a company, etc. The court's power which has been granted by Section 195 of the Companies Act, 1913, as amended in 1936, has been in existence in India since about 1862. In England, it existed even earlier. In Section 195 itself, the power has been granted to the court and nothing has been stated as to the person who should make an application. It should be contrasted with the provisions of Section 196 where it is specifically stated that the application should be made by the official liquidator. The rules came into existence in 1939. Up to 1939, it was settled law that such an application may be made by the liquidator, a creditor or a contributory. The court could even do it suo motu. The position has been very clearly explained in the notes to Section 195 in the annotated edition of the Indian Companies Act, 1913, by Sircar and Sen. The relevant part is set out below :

" The section in itself gives no right at all to a liquidator, creditor or contributory to apply for and obtain an order for examination. It gives power to the court, if in its discretion it thinks it right so to do, to order any person capable of giving information concerning the trade dealings, estate or effects of the company, to be summoned before it for the purpose of being examined. This therefore leaves it open to the court to say if at the instance of any other person it will make the order : per Cotton L. J. in *In re Imperial Continental Water Corporation* (1886) 33 Ch. D. 314.. The court can therefore make an order suo motu : *In re Land Securities Co.* (1894) WL.N. 91 : 42 W.R. 624.

In practice, however, the court had got to be put into motion by somebody. Generally; it is the liquidator who does it. Where he does it, he applies ex parte ; he makes no affidavit. The reason why in his case no affidavit is asked for is, as was explained by Jessel M.R. in *In re Gold Co.* (1879) 12 Ch. D. 77 "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."

An application can also be made by a creditor or a contributory. Where they apply, they have got to give notice to the liquidator. In the case of a contributory he should make out a prima facie case : Ex parte Nicholson : *In re, Willson* (1880) 14 Ch. D. 243. A creditor or a contributory so applying may be required to file evidence by the liquidator.

The liquidator has the first option of taking proceedings, and if he agrees to do so, he will be allowed the conduct of the proceedings without any limit being

imposed on him, but if he refuses, the conduct of the proceedings would be given over to the applicant or any other creditor or contributory who comes forward for the purpose : In re Gold Co.; In re, Silkstone and Dodworth Coal and Iron Co.: Whitworth's case (1881) 19 Ch. D. 118.. The party examining can, as in an ordinary case, have the help of counsel and solicitors in the examination : Haribans Prasad v. National Sugar Mills Ltd. [1931] 1 Comp. Cas. 151.

Where a liquidator refuses to institute proceedings, he loses all rights to interfere with the proceedings which may be taken by a creditor or a contributory: In re Gold Co. As a general rule, when committing an

examination to some creditor or contributory, the judge should point out the extent and the limits of that examination.

No person is entitled to the order as a matter of course, not even the liquidator, and the question as to whether an order will be made or not is one essentially for the discretion of the judge : In re Metropolitan Bank: Heiron's case (1880) 15 Ch. D. 139. The section gives the judge discretion both as to (a) the extent of the examination, (b) the occasion on which it will be ordered, and (c) as to the persons who are to conduct it: In re Silkstone and Dodworth Coal and Iron Co.: Whitworth's case (1881) 19 Ch. D. 118."

7. The corresponding section in the English Act is Section 268. In Palmer's Company Precedents (17th edition, pages 471-72), the position is stated as follows :

" Private examination and discovery u/s 268.--A liquidator is invested, as we have seen, with many rights and powers, but for the useful exercise of these it is essential that he should have the means of ascertaining the facts connected with the company--how it has been promoted, for example, how the directors have dealt with the funds, what assets are still outstanding and recoverable. To enable a liquidator to inform his mind on these and similar matters a section--Section 115--was inserted in the Companies Act, 1862, which is now replaced by Section 268.....The object of the examination is to get information to enable the court to determine what course ought to be followed with reference to some matter or some claim in the winding up. The object is discovery. There need not be any specific dispute ; but the court is bound to see that the inquisitorial powers given by the section are not used for vexation or oppression.....The court sanctions a private examination to enable the liquidator to obtain the necessary information to proceed in the winding up and opposing parties in contemplated litigation should not be allowed to be present, especially as in a proper case disclosure can be ordered under Rule 74. Undertakings may therefore be required from witnesses and their solicitors (and clerks) not to disclose information without the leave of the court...A prima facie case against any person need not be made out in order to justify an examination; it is sufficient if the judge is satisfied that there is a fair suspicion. It may, however, be necessary for a creditor or contributory-applicant as opposed to a liquidator to show something more--see

Ex parte Nicholson : In re Wittson (1880) 14 Ch. D. 243. where under the corresponding legislation in bankruptcy it was held that a creditor applying for an examination is bound to show a prima facie probability of benefit to the estate.....A contributory applying for an order must give notice to the liquidator, for if the liquidator is prepared to take the proceedings, the court will give him their conduct."

8. The question is whether Rule 195 has completely changed the law by excluding applications to be made by a creditor or contributory and confining the same to the official liquidator. It is relevant in this connection to refer to the fact that the Rules have now been altered by the Companies (Court) Rules, 1959. The corresponding section in the Companies Act as amended in 1956 is Section 477 and the relevant rule is 243 which runs as follows :

" 243. 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. "

9. Thus we see that Section 195 itself does not mention that an application can only be made by an official liquidator. It was in 1939 that the rules laid down that the application should be made by the official liquidator. In 1959. it has been made clear again that the application can also be made by others with notice to the official liquidator. The question is whether, under Rule 195, it was intended that no other person excepting the official liquidator could make such an application under any circumstances. In my opinion, it was not intended that it should be so. As stated above, a private examination is primarily intended for the benefit of the official liquidator; but where the official liquidator does not take action, it could not have been intended that the rules should whittle down the power of the court contained in Section 195, The power to order private examination is vested in the court and neither in the official liquidator nor in any other person. Regard being had to the object with which such power has been granted to the court, it is obvious that primarily it is for the official liquidator to move in the matter. But if the official liquidator fails to do so or refuses to do so, the court is not powerless to exercise the power at the instance of other parties like a creditor or contributory. Coming to the facts of the present case, we find that originally joint liquidators were appointed ; but there are serious allegations made against them. The application by Satya Narain Jugal Kishore for examination of several persons including the appellant, dated 25th November, 1961, was on notice to the joint liquidators, but they evinced no interest in it. In

the order made by Mitter J. dated 14th September, 1961, it was expressly mentioned that it was made without prejudice to the right of the official liquidator to make an application, but he has not made any such application. The allegations made as grounds for making the order for private examination u/s 195 (the learned judge in the court below was in error in describing it as a "public examination") are serious, and the court has rightly used its discretion in ordering such an examination, with certain safeguards. We propose to order certain additional safeguards. As such, we are unable to uphold the ground that the application is without jurisdiction and void because the official liquidator has not made it. In the English case of *In re Gold Co.* (1879) 12 Ch. D. 77 it was held that where a judge had used his discretion in making an order under the corresponding Section 115 of the Companies Act of 1862, the Court of Appeal will not interfere, unless in an extreme case. The position has been made clear in *Whitwoth's* case (1881) 19 Ch. D. 118, which has been dealt with later on in this judgment.

10. The second point raised is that the provisions of Rule 197 have been violated, inasmuch as persons other than the liquidator and the advocate and attorney employed by him and the person to be examined, have been allowed to attend the proceedings. The only person allowed to attend is the creditor who has made the application and obtained an order u/s 195. In view of what I have held above, it would be impossible to exclude them. Having held that Rule 195 does not debar the court from allowing the creditor to make such an application it would be absurd to hold that he himself should be excluded from attending it, particularly as it emerges that the official liquidator is not prepared to take the initiative in the matter. This brings me to the question of the interpretation of Rule 197.

11. It does lay down that no person save and except the liquidator and the advocate or attorney employed by him and the person to be examined, shall be "entitled " to attend. But, it does not mean that the court cannot allow any other person to attend. This point, namely, the right of creditors to attend the private examination, was dealt with in an English case, *In re Greys Brewery Co.* (1884) 25 Ch. D. 400 Chitty J. held that creditors have not a general right to attend. The learned judge said as follows :

" That such a discretion exists as I say has not been contested at the Bar, nor could it be, because the court does in certain cases where the official liquidator, who is the officer of the court, and (to use Sir G. Jessel's expression) in *dominus litis* (I only use those words in analogy because here there is no *Us pendens*), allow him to have the conduct of the proceedings, and where he is willing to undertake the examination under the 115th section the court does not hand over the conduct of those proceedings to the creditor or contributory. But where the official liquidator himself declines to proceed, either from want of funds or for some other reason, the creditor or contributory is allowed in a fit and proper case, and on a proper statement communicated to the judge, to take

proceedings. So that I am quite satisfied the court has discretion to allow a creditor or a contributory to attend even this secret tribunal. "

12. I hold that the law to be applied in India is the same. Rule 197 says that certain persons shall be " entitled " to be present. It means no more than that they have a legal right to be present. Generally, creditors have no legal right to be present, but in an appropriate case the court may allow them to be present although they are not entitled to do so as a matter of right. Rule 197 has not taken away the court's right in that behalf. This is apparent from the new Rule 247 of the Companies (Court) Rules, 1959, which enables the court to allow any creditor or contributory to be present, subject to such conditions as it may impose.

13. In this connection, a point has been raised, which requires consideration. In the order dated 21st May, 1962, the creditor has been permitted to attend with attorney and advocate to assist the officer conducting the examination. On 24th February, 1964, the appellant made an application for being represented and/or assisted by Attorney and/or counsel at the examination, but B. C. Mitter J. by his order dated 24th February, 1964, rejected the same.

14. Mr. Bhabra argues that it is unjust that the creditor should have the advantage of employing a lawyer but not the appellant. We are of course unable to sit on appeal against the order of Mitter J. dated 24th February, 1964 ; but the order is after all an interlocutory order and in the altered circumstances of the case, (inasmuch as we are limiting the subject-matter of the examination) there can be no bar to our re-examining the question in the light of it. I will come back to the question after dealing with the third and last ground taken by Mr. Bhabra, that the summons ought to have specified the points upon which the examination of the appellant would be directed. The summons under the relevant rules is Form No. 68 (at page 721, of the High Court Rules Original Side), which does not prescribe for any specified points being set out.

15. However, I have discussed above the scheme of Section 195 and the corresponding provisions in the English law. The examination is intended to be a private one and merely for information in the liquidation proceedings, primarily to enable the official liquidator to make up his mind about the steps which he should take. It is not meant to be an inquisition and certainly not intended to be of a fishing nature, to gather information for purposes unconnected with the liquidation proceedings. The whole position has been lucidly explained by Jessel M.R. in Whitworth's case (1881) 19 Ch. D. 118. The Master of Rolls said:

" As I understand the 115th section of the Companies Act, 1862, it gives the judge discretion both as to the extent of the examination and as to the occasions on which it will be ordered, and also as to the persons who are to conduct it. Now, considering that the object for which the examination is ordered is discovery, it is the better and the usual course to entrust the examination to the official liquidator, who is under the control of the court, and represents the whole

company, creditors and contributories. But there may be some cases in which he declines to interfere, or some creditor or contributory may think that he or his agents ought not to examine in a particular case. Although there is no ground for removing the liquidator, yet the judge may then commit either the whole or some part of the examination to some creditor or contributory. As a rule, when committing an examination to some creditor or contributory, the judge points out the extent and limits of that examination, but it may in many cases be extremely difficult to see beforehand how far an examination should be properly carried, and therefore it is left within his discretion as to the limits he may think proper to impose in each case,....."

16. In the instant case, the order has been made at the instance of a creditor but no limit has been specified. We considered this unsatisfactory and asked Mr. Sen, appearing on behalf of the creditor to specify the headings upon which the examination will be confined. He has given the following headings :

(i) Mortgages (i) Dated 31st January, 1953

(ii) dated 21st January, 1954

and transactions in connection therewith.

(2) Accounts of the dealings and transactions between the company and the firms of:

(a) Banshidhar Shankarlal

(b) Shantilal Banshidhar

(c) Shantilal Banshidhar from 1953 onwards.

(3) Accounts of the dealings and transactions between Shankarlal Agarwalla and the company from 1953 onwards.

(4) Regarding the machinery and other assets of the company the possession of which was taken over by the mortgagee.

(5) Accounts of the dealings and transactions in respect of the shops of

(i) K. B. Munno and Bros.

(ii) Olympia Rubber Works from 1953 onwards.

(6) Re : Possession taken by the auction purchasers from the previous liquidators.

(7) Re : running of the said mill under the previous liquidators.

(8) Re: stocks, assets and properties standing in the name of K.B. Munno Bros. and/or Olympia Rubber Works and as to dealings with the same.

(9) Re: assets and stocks and furniture received from the previous liquidators in the business of K.B. Munno Bros, and Olympia Rubber Works and dealing with the same.

(10) Dealings and transactions between the company (in liquidation) and K.B. Munno Bros and Olympia Rubber Works.

17. We direct the examination to be confined to these points. Since we are directing this to be done, we cannot deny to the appellant the services of his lawyer. Since the creditor has been granted the services of his lawyer, it would be injustice to deny it to the appellant. He will therefore be entitled to the services of his lawyers during the examination to assist the officer in keeping the examination within the bounds prescribed by the court. But lawyers for neither side will have the right of general address. If the creditor agrees not to have his lawyer present, then the officer conducting the examination may exclude the presence of lawyers altogether.

18. The order will therefore be that the appeal succeeds in part only. The order made by the court below will be sustained, with the addition that the examination will be confined within the headings set out above and that the appellant will be entitled to the presence of his lawyers at the examination, as set out above.

19. Each party will bear and pay his or their own costs of the appeal.

Certified for two counsel.

Masud, J.

20. I agree.