

(1979) 11 DEL CK 0025

In the Delhi High Court

Case No : Company Appeal No. 8 of 1973

Shiv Dayal

APPELLANT

Vs

Liberty Finance (P) Ltd. (in Liquidation)

RESPONDENT

Date of Decision : 20-11-1979

Acts Referred:

Citation : (1980) 50 CompCas 529 : (1980) 18 DLT 51

Hon'ble Judges : S.B. Wad, J;S. Ranganathan, J

Bench : Division Bench

Advocate : A.K. Jain and B.N. Nayar, for the Appellant;

Judgement

S. Ranganathan, J.

(1) This is an appeal against the order of the learned single Judge directing the public examination of the appellant Managing Director of the Company in pursuance of the application moved u/s 478 of the Companies Act by the Official Liquidator of the company against which winding up order has been passed on 13.2.1967. The dates and the period it has been taken to pass final order are indeed for distressing and a point to ponder about the delays, calling for urgent steps if system is to maintain its credibility.

(2) On 28.7.1970 the Official Liquidator filed a report u/s 455(1) of the Companies Act being C. P. 74-D/66 which he brought to the notice of the Company Judge together with the observations of the auditor. In the report the Official Liquidator has mentioned that payments were made and not accounted in the books of accounts, over payments and double payments were made to the parties, preferential payments to creditors were made after the orders for provisional winding up was passed; no securities were obtained by the company against the loan/investments made and the failure of the company to realise outstanding due from the hirers/debtors in time aggravated the financial position. Some of the instances mentioned were that though the amounts have been entered in day books as having been received from the hirers of the

company but no entry has been made in the ledger; no receipts from payees were obtained while making payments which would indicate dubious nature of payments and full address of payees are not available on record. It was mentioned in the application that the auditors report had already been sent to the Judge in the Chamber which may be treated as a proof of this application. The Official Liquidator Therefore prayed that order should be passed to examine publically the Managing Director of the Company to whom it may be necessary to put such examination concerning the conduct of the business. On the same date i.e..28.7.70 while forwarding the report u/s 455 of the Act the Official Liquidator being report No. 131/70 also prayed that the auditors report brings serious irregularities, misappropriation of funds of the company which need to be explained by the Managing Director/Officers of the Company to consider further action u/s 531, 531A, 542 & 543 of the Companies Act and that an Advocate be appointed to conduct the public examination of the Managing Director. The Auditors report had already been sent to the court. On that application Rangarajan J. vide his order dated 29.8.72 directed that he considered necessary to have the public examination of the appellant. Notice of that order having been sent to the appellant, he moved the company Judge praying that the ex-parte order dated 29.8.72 directing the public examination be set aside. The learned Judge has refused to set aside the order for public examination of the appellant and the matter has come up before us in appeal.

(3) There is difference of views as to the competency of appeal against an order directing public examination. 1963(1) Co. L. J. 41 K.Joseph, Augusti & others v. Official Liquidator, Palai Central Bank, Ltd. & Chokkalingam Chettiar Vs. In Re: The Nagarathar National Bank (in liquidation), in re; the Nagarather National Bank (in Liquidation), Ramnad at Madura, have held that the appeal against such order lies while 1936 Ran 166 U Po Ke. v. U Po Thein, has held that no appeal lies against such order. We now ever, do not consider it necessary to give our views on this aspect because on merits we are satisfied that the order directing the public examination was an appropriate and valid order.

(4) Mr. Jain, the learned counsel for the appellant, urges that before an order u/s 478 directing public examination can be passed there must be a charge of fraud alleged against a person who is being called for public examination. He refers to the report u/s 451 and says that there is no definite allegation with regard to any particular charge and hence the condition precedent for directing the public examination u/s 478 does not exist. The argument seems to assume as if it is a requirement of law that there must first be a specific charge against a particular person mentioned in the report of the official liquidator before he can be called for public examination. That is not the position in law.

(5) The principles which are to be followed in directing the public examination u/s 478 are by now well settled. There is no necessity to specify the charge of fraud with the same particularity as would be necessary in a criminal charge under the penal code, and the court has to be satisfied that some facts are given

in the application which entitle the court to find that there is a prima facie case of fraud against the particular person named. In Re: Indian State Bank Ltd.,

(6) Where money is lent on shares in the bank) which is expressly prohibited by the articles, which suggests fraud and Therefore would justify the public examination and Therefore the Director is responsible. Chokkalingam Chettiar Vs. In Re: The Nagarathar National Bank (in liquidation), . In a matter u/s 214(1) of the Companies Ordinance of Uganda) which is equivalent to Section 478 of our Act, Privy Council observed that, "the need for prima facie case was satisfied and that the charge in the report need not be such as would support civil or criminal proceedings, but that report must not be flimsy or skating "Dealing with the aspect of attribution of particular basis of alleged fraud to particular individual the Privy Council observed that this appears to their Lordships to compel the conclusion that if a company with say three directors was carrying on some business in a fraudulent manner, none of the directors could be brought to book unless he or they chose to tell the Official Receiver which of the three director had been the actual perpetrator or perpetrators of any of the fraud lent acts in question. This would be a reduction ad absurdum which their Lordships find impossible of acceptance. 1963(1) Go. L. J. 191 Musabhai Nootmohamed Tejani & others v. Official .Receiver.

(7) In Sir Fazal Ibrahim Rahimtoola v. G. Desai, AIR 1948 Bom 339 Chagla C. J. speaking for the court observed, "it is not necessary for the Liquidator in terms to say that the party against whom he is seeking for an order of public examination is guilty of fraud. If he sets out all the necessary facts from which the necessary inference can be drawn by the court that there is a prima facie case of fraud, that would be sufficient in law to attract the jurisdiction of the court." In that case the official liquidator had pointed out that the deposits made in the bank were loaned on worthless securities. The reports also indicated that the person who was called for public examination was the Director of the bank and took active part in the management of the bank) the court on these upheld the order of public examination.

(8) Reference to the various details mentioned in the report of the official Liquidator here would show that no receipts were obtained for making alleged payment and that the entries have been made in the day book but no entry is made in the hirers ledgers and that payments were not accounted for in the books of account and over payments were made. Mention is also made of good number of account sheets issuing from depositors" ledger and that fraudulent and preferential payments have been made to several creditors. It is specifically stated that the appellant be called for public examination so as to ask him about the conduct of business. It seems to us that in view of this wealth of details it is pointless for Mr. Jain to urge that the Official Liquidator was not suggesting that fraud had been com- mitted. The argument of Mr. Jain that fraud must be established as a fact before asking the public examination is unacceptable. Law only requires a prima facie satisfaction at this state. Of Course if even on the

allegation made not prima facie case is made the court will not be entitled to direct public examination but whereas in the present case, the person called is the Managing Director and the allegations are that the double payment had been made and amounts received had not been shown in the books of accounts, there cannot be a better case for public examination.

(9) Mr. Jain referred to the Official Liquidator Madras v. C. V. Raman and three others 1966(2) Co. LJ 124 in which public examination was directed with regard to the co-directors including the Managing Director. The court set aside the order with regard to three other directors but upheld the order in so far as the Managing Director was concerned. The reason why it set aside the order with regard to the three directors was that in the report of the Official Liquidator, it is mentioned that the conduct of the Managing Director was fraudulent and the report went on to say that even if it was assumed that the directors had not participated in the Managing Director's fraudulent acts they would be liable to reimburse to the company for the loss caused thereby. So in that case even on Official Liquidator's showing there was not even a suggestion of prima facie case against those directors. So while refusing to call them, the prayer of Official Liquidator to call the Managing Director was upheld. That case is clearly distinguishable. In the present case Managing Director has been called, and there is serious allegation suggesting fraud and about his conduct, he being the Managing Director.

(10) One of the arguments strongly contended by Mr. Jain was that as the appellant had moved an application also u/s 478(7)(a) for being exculpated from the charges made or suggested against him it was necessary for this application to be decided before holding his public examination. We find no warrant in law for such a proposition. The scheme of Section 478 is that on considering the report from the Official Liquidator and being prima facie satisfied an order directing the public examination of the person is made. The person has to be on oath and shall answer examined questions put to him. The person to be examined has to be given the copy of the Official Liquidator's report and may also employ an advocate, who shall be at liberty to put to him such questions for enabling him to explain or qualify any answer given by him Sub-section (7) (a) permits the person to apply to the court to be exculpated and if the court after giving hearing any evidence or witnesses called, grant the application, the court may allow the applicant such costs as it may think. The scheme Therefore really contemplates that the public examination which had been ordered will go on but permits the person so called to apply to be exculpated. Obviously the court cannot be in a position to exculpate the person concerned unless it has heard evidence and no better evidence can be given excepting by the person who has been called for public examination. It would be an impossible suggestion that without examination of the person concerned the court could exculpate him, after the court had prima facie satisfied itself and issued a direction for public examination. The application for exculpation u/s 478(7)(a) does not stop the operation of the order directing the public examination. All that a person gains by

moving an application under Sub-section (7) of Section 478 is that after the public examination the court will go further and will have to decide whether the person concerned should be exculpated. If the court thus exculpates him it entitles the person concerned to be paid costs. This is an advantage which he gets for moving for exculpation. But it does not mean that public examination must be kept in abeyance. Moving an application is not an automatic stay of the operation of the order of the public examination. The Judge is seized of the matter and it is for him to devise a method best suited to find out the truth. In this connection reference may be made to 1910(2) king's bench 687. In Re. : John Tweddle & Company Ltd. In that case also public examination had been directed. After the public examination the person concerned applied to the Judge for an order exculpating him. Ultimately the Judge allowed that application. What is relevant to note is that an application had been done. It was not even suggested that public examination must be postponed if an application for exculpation was to be moved. Thus there is no bar in first holding a public examination of the person concerned and then dealing with an application for exculpation moved by him. As a matter of fact that might result in more satisfactory method as before exculpation can be given full facts must be established on record, Mr. Jain's contention Therefore that because of the moving of the application for exculpation the order for public examination against the appellant should have been held over has no merits and must be rejected. We may note that the counsel for the respondent had sought to raise the objection as to the limitation with regard to the filing of the appeal. The argument was that this order directing the public examination was passed on 29.8.1972 and that the knowledge of this order was with the appellant because he moved the court on 7.10.1972 to set aside the order while the appeal has been filed in August, 1979. Mr. Jain's contention, however, has that the appeal is against the order dated 7.7.1973 the limitation should be counted from that date we have only mentioned this contentions but as we have disposed of the matter on merits it is unnecessary to decide about the point of limitation.

(11) As a result of the above the appeal is dismissed with costs.