

Dr. Sailendra Nath Sinha and Another

Vs

Jasoda Dulal Adhikari and Another

Criminal Appeal No. 28 of 1956

(Syed Jafar Imam, J. L. Kapur JJ)

11.09.1958

JUDGMENT

KAPUR J. -

This appeal by special leave raises a question of interpretation of section 237 of the Indian Companies Act. Appellant No. 1 is one of the past directors of the Bank of Companies Ltd., now in liquidation, and appellant No. 2 was its Managing Director. The bank was ordered to be wound up by the High Court of Calcutta on August 7, 1950, and one G. K. Dutt, Bar-at-law was appointed its official Liquidator but on September 7, 1950, the official Receiver was appointed in place of Dutt. On July 23, 1952, respondent No. 1, filed in the Court of the Presidency Magistrate a complaint against the appellant under sections 120B, 406, 467, 477A, Indian Penal Code and 182A of the Indian Companies Act, and stated that he was doing so under the authority of the official liquidator and the official liquidator had obtained the directions of the High Court to file the complaint. On May 5, 1953, the appellant applied to the Presidency Magistrate for dismissal of the complaint as being without the sanction of the company judge and therefore the official liquidator in his official capacity was incompetent to prefer the complaint, being the creation of the statute he could only act within the four corners of the statute. He possessed only those powers which the statute conferred on him. This application was dismissed by the Presidency Magistrate on June 13, 1953.

The appellant then applied to the High Court for quashing the criminal proceedings on the ground that the prosecutions was ab initio void because of the absence of prior direction judicially given by the High Court under section 237(1) of the Indian Companies Act. The High Court found against the appellants and discharged the rule. The learned Chief Justice held that the provisions of section 237(1) are no bar to a prosecution by the liquidator; that under section 237(1) there is "nothing in the nature of a judicial proceeding"; that it could not be said that the order was not a valid direction under section 237(1). He said :

"There can be no question in the present case that the relevant facts were all placed before the company judge, because they are all set out in the report of Adhikary and the affidavits annexed thereto to which the order expressly refers and with reference to which the liberty to bring legal proceedings was expressly given. In view of those circumstances, it is impossible to say that the company court had not before it all the facts on which the prosecution is based or that it did not apply its mind to the consideration relevant to section 237(1)."

He also held that clause (a) of section 179 empowers the liquidator to institute or defend legal proceedings in the name of the company and that it was expressly concerned with the powers of the

liquidators whereas section 237 dealt with the powers of the court to give directions. P. B. Mukherji J. gave a concurring judgment. After referring to the history of section 237, he held that under that section the company judge can act ex parte and it was not necessary for him to hear a director or an officer of the company complained against and that direction given under that section was not a condition precedent to a prosecution by the official liquidator nor is it the intention of that section to impinge on the powers of a criminal court under the Code of Criminal Procedure. Leave to appeal having been refused by the Calcutta High Court, the appellants have come to this court in pursuance of special leave.

On the application of the official liquidator Bachawat J. on January 15, 1951, made an order which must be taken to be one under section 179. In this order it was said :

"And it is further ordered that the said applicant be at liberty to institute or defend any suit or prosecution, or other legal proceedings, civil or criminal in the name and on behalf of the said bank and to continue all pending suits and execution proceedings by or against the said bank and for that purpose to engage advocates, Vakils and other lawyers and to pay out of the assets of the said Bank in his hands all costs of and incidental to such suits, prosecutions and/or legal proceedings."

On July 22, 1952, the official liquidator obtained the order from Bannerji J. which the High Court has held, and in our opinion rightly, to be an order under section 237(1) of the Indian Companies Act. This order said :

"It is ordered that the said applicant be at liberty to take such civil or criminal proceedings as he may think necessary over the report of the said Jasoda Dulal Adhikary read with the affidavits of H. Sen Gupta and Nepal Chandra Adhikary read with the affidavits of H. Sen Gupta and Nepal Chandra Mitra as set out in the said exhibit "A"".

The passage already quoted from the judgment of the learned Chief Justice shows that all the relevant facts were before the Company Judge, as they were all set out in the affidavit placed before him. The complaint was then filed on July 23, 1952. During the pendency of the complaint the appellants took an appeal against the order of the company Judge dated July 22, 1952, but it was dismissed on the objection taken by the liquidator that it was an administrative order and not a judicial order.

On August 5, 1953, the official liquidator took our misfeasance proceedings under section 235 of the Companies Act and the appellants then applied to the High Court for quashing the criminal proceedings already started on the ground of commencement of proceedings under section 235. This application was also heard with the rule which was issued on June 29, 1953, and it was dismissed by the same judgment by which the rule was discharged, i.e., of June 21, 1954.

The general scheme of the Companies Act is that the court should have complete control of all proceedings in winding up and it was therefore urged that the official liquidator was not authorised to do anything either without the sanction of the court or without its direction. Section 179 deals with the powers of official liquidator. It provides :

"The official liquidator shall have power, with the sanction of the court, to do the following things :

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal in the name and on behalf of the company;.....".

Under section 180 the Court may provide that the official liquidator may exercise any of the powers given under section 179 without the sanction or intervention of the court. Section 183 deals with the exercise and control of the liquidator's powers. Sub-section (3) authorises him to apply to the court for directions in relation to any particular matter arising in the winding up. Sub-section 4 is a provision under which the official liquidator is entitled to use his own discretion in the administration of the assets of the company and in the distribution amongst the creditors. Sub-section 5 provides :

"If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances."

These provisions show that section 179 deals with the powers of the liquidator.

Under section 235 the Court has the power to assess damages against delinquent directors and the Court may on the application of the liquidator or a creditor or a contributory examine into the conduct of a director and compel him to pay or restore money or property or to contribute such sum to the assets of the company by way of compensation in respect of any misfeasance on his part and this power may be exercise irrespective of the criminal liability of the director. Section 237 deals with prosecution of delinquent directors and the relevant portion of this section is :

(1) "If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court, that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar."

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the Central Government for further enquiry, and the Central Government shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the Central Government for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the registrar under sub-section 2 it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate-General or the public prosecutor and if advised to do so institute proceedings :

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

#....."##

It was this section which the appellants pressed in support of the argument that without the order of the court the official liquidator cannot lodge a criminal complaint against a past director and if he does so the proceedings will be ab initio void. All that sub-section (1) requires is that if the court finds, in the course of winding up that any past or present director, etc., has been guilty of any offence in relation to the company the court may either on the application of the person interested or of its own motion direct the liquidator to prosecute the offender or to refer the matter to the registrar. In the latter case if the registrar finds that the prosecution ought to be instituted he can do so if advised by the Advocate-General or the public prosecutor. But emphasis was placed by counsel for the appellants on the proviso that no prosecution could be undertaken without first giving the accused person an opportunity of making statement to the registrar or of being heard and it was urged that if the registrar cannot institute prosecution without first giving an opportunity to the person accused to file an explanation, no directions could be given by the Judge unless the persons accused are first allowed an opportunity of giving an explanation. But this contention must be repelled. Under section 237(1) the court may direct the liquidator to himself prosecute the offender or to refer the matter to the registrar. Giving an opportunity to the offender before such direction is given by the court is not a prerequisite of the Judge making an order under sub-section (1). Under sub-section (6) the registrar is required to give the offender an opportunity to show cause before a prosecution is undertaken. That is a far step from saying that section 237(1) of the Companies Act requires a Judge to give the offender an opportunity before he gives a direction for prosecution by the liquidator or for reference to the registrar.

It was further urged that under sub-section (4) in the case of voluntary liquidation, the liquidator has to proceed after obtaining the sanction of the court and, therefore, it was urged that the liquidator cannot institute criminal proceedings without such sanction in the case of winding up by the court. Whatever may be the case of a liquidator under voluntary winding up sub-section (1) of section 237

makes no such provision in the case of compulsory liquidation. Our attention was drawn to some passages from the Indian Companies Act by Sircar and Sen, 1937 Edition. At page 624 it is stated that the object of the section is to provide against abuses and indiscriminate commencement of prosecutions and also for the first time a provisions has been made under this section for prosecutions being conducted as crown prosecutions. In a passage at page 628 it is stated :

"But before the court can exercise its jurisdiction it must come to the conclusion that in the course of winding up the person intended to be charged under this section has been guilty of an offence in relation to the company for which he is criminally liable. But such a finding is not to prejudice the accused in anyway in his trial. Per Chitty J. in re Charles Denham & Co. Ltd. L.T. 570 at 571."

The procedure under section 237(1) as stated in this book at the same page is as follows :

"The application should be made on a petition verified by an affidavit in which materials must be set out sufficient to make out a prima facie case.

It is not quite settled as to whether the liquidator should make the application upon notice to any one. Generally the application should be ex parte, but the court may direct notice to be given to any person who is in its opinion entitled to be heard."

These passages do not support the contention that before a prosecution can be validly instituted against the past director the sanction of the court is necessary. Mr. Choudhary then relied on an observation of Buckley J. In Re London and Globe Finance Corporation ([1903] 1 Ch. 728, 733), also quoted in Sircar and Sen's book at page 625. There the principles guiding the court in ordering prosecutions have been laid down as follows :

"I have next to consider upon what principles I ought to exercise the power given me by section 167 of the Companies Act, 1862, to direct the official receiver to institute and conduct a prosecution at the expense of the assets. It is obvious that no one legitimately can or ought to institute a criminal prosecution with a view to his personal profit. Neither should a prosecution be instituted from motives of vengeance against the offender. The motive of every protection ought to be to inflict punishment upon the criminal for the proper enforcement of the law and for the advantage of the State and with a view to deter others from doing the like."

This passage does to support the giving of an opportunity to the offender before the judge can given direction nor do they affect the powers of the liquidator to start a prosecution or the criminal court to entertain a complaint when filed by the liquidator.

The following passage from Buckley's Company Law under the commentary under section 334 of the English Companies Act, 1948, which corresponds to section 237 of the Indian Companies Act was then referred to :

"Proceedings will accordingly be taken by the Director of Public Prosecution (or Lord Advocate) or not at all."

But this is because of the peculiar and express language of section 334 under which the Judge can only direct the liquidator to refer the matter to the Director of Public Prosecutions or to the Lord Advocate as the case may be. In the English Act, special provision has been made for England

saving the institution of criminal proceedings by private prosecutors. Merely because no such provision has been made in regard to Scotland does not affect the argument.

Mr. Choudhuri then relied on certain English cases dealing with the mode of giving directions. In re Northern Counties Bank Limited ([1883] 31 W.R. 546), the Judge had ordered the liquidator to ascertain by circular the wishes of the creditors and after they had appeared to oppose the starting of the prosecution, it was held (1) that it did not sufficiently appear that the offence had been committed and (2) that as 2/3 of the creditors opposed the application the prosecution should not be ordered as expenses will have to be paid from out of the money belonging to the creditors. The main question for decision in that case was whether the prosecution should be at the cost and expense of the assets of the company, but competency of the liquidator to file the complaint was not in dispute. Reference was then made to Palmer's Company Precedents, 1952 Edition, Vol. II, again stating as to when leave to prosecute should be given but the law stated there does not support the case for the appellants. At page 605 it is stated :

"The summons will be ex parte, and should be supported by affidavit showing a strong case for prosecution, and also the extent of the assets and liabilities. The court is not willing, when the assets are small, to sanction proceedings which may swallow up or largely reduce those assets."

The form at page 607 does not show that under the English Companies Act when liberty is given to prosecute the person accused is heard. All that is required is that the court will make its order upon affidavits etc., filed before it and it can also order that the costs and charges incurred by the liquidator shall be paid out of the assets of the company.

It was next contended that although the language of section 237 was not in the negative form still the effect of the words was that no prosecution could be instituted without the sanction of the court being obtained by the liquidator. In support of the submission counsel relied on *The Queen v. Cubitt* ([1889] 22 Q.B.D. 622) which was a case under the Sea Fisheries Act which created certain offences and by section 11 provided :

"The provisions of this Act..... shall be enforced by sea-fishery officers",

who are defined by that section and it was held that the effect of the words was that no one except the sea-fishery officer could prosecute an offence under the Act. But there are no such words of limitation in section 237. In *Taylor v. Taylor* ([1875] 1 Ch. 426) the words of the statute were "entitled to the possession or the receipt of the rents and profits" and it was held that the order under the statute could only be made upon a petition which was within the words above quoted and if there was no such person no order could be made but that again was decided on the peculiar language of the statute. Counsel also relied on *Nazir v. Crown* ([1936] L.R. 63 I.A. 372, 381) where it was held that if the statute authorities the doing of an act in one way then it had to be done in that way or not at all.

The argument of Mr. Choudhuri really comes to this that the complaint filed on behalf of the official liquidator was incompetent in the absence of a direction under section 237 or without complying with the procedure laid down in that section. Section 237(1) does not lay down any procedure for the giving of directions and the provisions in regard to the action taken by the registrar do not have any relevancy to what the court should do before it gives directions. English cases that have been cited do not go to the extent of saying that no prosecution can be instituted without the sanction of

the court. They deal with another subject and that is the circumstances in which the Judge would give directions for prosecution and would sanction assets of the company to be expended in prosecution. Besides nowhere has it been stated that the court cannot give directions without first hearing the person accused or that the directions of the Judge are a condition precedent to the lawful institution of criminal proceedings by the liquidator.

On the other hand it has been held that under section 179 of the Indian Companies Act no sanction is required for commencing a prosecution. In *Jaswantrai Manilal Akhaney v. The State of Bombay* ([1956] S.C.R. 483), at the instance of the official liquidator a report was lodged with the police against the Managing Director of a Bank and police submitted a charge-sheet to the Magistrate. It was observed by Sinha J. at page 502 :

"In terms the section lays down the powers of the official liquidator. Such a liquidator has to function under the directions of the court which is in the charge of the liquidation proceedings. One of his powers is to institute prosecutions in the name and on behalf of the company under liquidation with the sanction of the court. This section does not purport to impose any limitations on the powers of a criminal court to entertain a criminal prosecution launched in the ordinary course under the provisions of the Code of Criminal Procedure."

It was also pointed out in this judgment that section 179 contains no words corresponding to the language of the Drug Control Order, 1943, which was held to be a condition precedent for instituting prosecution in the case of *Basdeo Aggarwalla v. King Emperor* ([1945] F.C.R. 93) nor are there any prohibitory words like those that are contained in sections 196 and 197 of the Criminal Procedure Code. In the former case no prosecution could be instituted without the previous sanction of the Provincial Government and the latter provides that "no court shall take cognizance....." There are two cases decided by two Indian High Courts which supports the submission of the respondents' counsel.

In *Emperor v. Bishan Sahai* (I.L.R. [1937] All. 779) it was held that the Companies Act nowhere provides that without the directions of a Judge no criminal prosecution can be instituted. In *Mrityunjoy Chakravarti v. Provot Kumar Pal* (A.I.R. 1953 Cal. 153), it was held that neither section 179 nor section 237 indicates that if the liquidator takes action without a direction of the court this action would be illegal or invalid or it would invalidate a prosecution.

It would thus appear that both on the language of section 237(1) as well as on precedent the complaint made by the liquidator against the appellants suffers from no such infirmity as to make the proceedings null and void. The section contains no such words which indicate that such prosecution cannot be instituted by a liquidator without the sanction of the judge or that the court cannot take cognizance of a complaint without such sanction or direction. Section 179 as the learned Chief Justice of the Calcutta High Court has rightly pointed out, deals with the powers of liquidators to institute or defend proceedings with the sanction of the court and section 237(1) deals with the powers of the court to give directions for prosecution of delinquent directors etc.

It was further urged on behalf of the respondents that in the case before us there was a proper direction under section 237(1). The judgment of the High Court shows that before the learned Judge gave a direction on July 22, 1952, there were before him proper materials, and, therefore, his sanction was perfectly valid, legal and proper. Before this order made by Banerji J. there was an order of Bachawat J., dated January 15, 1951, under section 179 and, therefore, when the liquidator

authorised his Assistant, respondent No. 1 to institute the proceedings he was entitled to do so. As we have said above even in the absence of such directions the legality of the criminal proceedings instituted would not be affected.

Nothing that we have said in this judgment must be taken to be an expression of opinion which in any way affects the control by the judge of proceedings in winding up or over the liquidators.

We would, therefore, dismiss this appeal.

Appeal dismissed.

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