ALLAHABAD HIGH COURT

L. Hudson

Vs

Official Liquidator

(Mukerji, J.)

17.05.1929

JUDGMENT

Mukerji, J.

1. This an appeal from the decision of Mukerji, J. who, on 26th February 1929, ordered Mr. Hudson and Mr. Dignasse, member of the late firm of Mrs. Neison Dignasse & Co., to pay the sum of Rs. 89,812-8-0 to the Official Liquidators of the Dehra Dun Electric Tramway Co. in liquidation.

2. The proceedings were under Section 235, Companies Act, 1913.

3. Before proceeding to consider the five charges which were discussed before us we must give a brief outline of the disastrous history of this Company. It was registered on 23rd August 1921, and obtained permission to commence business on 21st October 1921. It was formed to acquire a concession from Mr. Beltie Shah to construct an electric tramway. It was proposed to issue 22 lacs of preference and 28 lacs of ordinary shares. Mr. Beltie Shah became the Managing Agent invested with such wide powers as the drawing of cheques on the Company's behalf. By 26th March 1926, the undertaking was in an insolvent condition and a compulsory winding up order was passed. Official Liquidators were appointed on 8th April 1926, and they commenced to look into the affairs of the Company. They came to the conclusion that Beltie Shah had pursued a systematic course of bleeding the Company whenever opportunity offered, and that he did this by making various fraudulent agreements with other persons whereby they were supposed to be legally entitled to receive sums of money by way of commission or brokerage, and that certain advances, purporting to be made by him to third persons, were in fact not so made and the money was intercepted by him. Beyond all doubt he habitually put himself in funds by drawing cheques upon the Company's account, and the irregularities committed by Mr. Beltie Shah with the Dehra Dun branch of the Allahabad Bank were the subject of an action by the Official Liquidators against the Bank, which action we have been informed by counsel has been settled by payment by the Bank to the Official Liquidators of a very considerable sum of money. Mr.

Beltie Shah was by an order of Mukerji,. J. of 2nd April 1929, ordered under Section 235, to refund to the Company sums of money amounting to more than three lacs of rupees.

4. The audits for which Mr. Hudson is responsible are:

1. The audit for the statutory report of 18th April 1922.
2. The audit of the Company from its inception to 31st March 1923, and
3. The audit of the Company from the 1st April 1923, to 31st March 1924.

5. The learned Judge speaks of the second and third audits as the first and second regular audits respectively, and when referring to the audit for the statutory period, he refers to it by that name. We propose so follow the same plan.

6. The first regular audit is dated 16th August 1923. It was made by Mr. Dignasse, and the second regular audit made by Mr. Hudson is dated 10th December 1924. In each case, a clerk or clerks of the Auditors went to Dehra Dun and examined the books of the Company, and having spent what time was considered necessary, brought back such materials and notes to their principals as appeared to be of importance. The audit was then taken up by either Mr. Dignasse or Mr. Hudson.

7. The first point that was urged before us was that by virtue of Article 118, Articles of Association, the auditors were entitled to the indemnity therein contained, by virtue of their being officers of the Company. If they were in law officers of the Company, they would be entitled to an indemnity out of the funds of the Company except in regard to their own "wilful acts or defaults." The Official Liquidators contend first, that the Auditors are not officers within the meaning of that article, and even if they were officers, the facts disclose that the loss to the Company has been occasioned by their wilful act or default. The article has been set out at length in Mukerji, J's., judgment and need not be repeated here.

8. The three classes of persons entitled to indemnity are "Directors, Officers or Servants." The auditor as such is not specifically included, and reliance has been placed by the liquidators upon the definition in Section 2(ii) of the Act which they urge was intended as regards India to lay down definitely that an auditor should not be regarded as an officer of any Indian Company except in the three instances, Sections 235, 236 and 237 in which he is intentionally included. The actual text of Section 2(ii) is: "Officer" includes "Any Director, Manager or Secretary" but save in Sections 235, 236 and 237 does not include "an Auditor." Some criticizm has been directed to that part of Mukerji, J's. judgment is which he discusses Article 118. He says the whole article deals with the "conduct of the Company's business" and his view is that such a phrase is inapplicable to the case of an Auditor. It is, however, to be noticed that there is an alternative; "Or in the discharge of his duties." If "Auditor" had been included with "Director, Officer or Servant," he could, certainly have claimed an indemnity subject to the exception of

"wilful acts or defaults" in respect of the discharge of his duties. We, however, agree with the learned Judge that there is not in Article 118. nor in any of the Arts. 127 to 134, any phrase which can be construed as showing that the auditors were to be regarded as officers. Art, 128, whilst permitting the auditors to be members of the Company, prescribed that:No Director or other Officer of the Company shall be eligible during the period of his continuance in office.

9. It is true that the word "Office" is used in relation to the appointment of an auditor, but we regard that word as being used in the sense of the word "Official" meaning service, function, duty, business, appointment.

10. The question has arisen in various cases. The principal ones to which we were referred were:

11. In In re, London and Central Bank [1895] 2 Ch. 166 the auditors were appointed by a banking company in pursuance of Section 7, Companies' Act, 1879. They were spoken of as officers of the company in the Articles of Association. The question which arose in the case was whether an auditor of the Bank could be properly regarded as an officer within the meaning of Section 10, Companies' Act of 1890. Lindlay, L. J observed that in order to decide that question one must consider what an auditor is, how he is appointed, by whom he is paid and what his duties are. He found that he was appointed by the company, that he was paid by the company and his position was described in the Articles as that of an officer of the company although he was not servant of the directors, but, on the contrary, was appointed by the company to check the directors. He concluded that an auditor of a banking company was an officer within the meaning of the section. Lopes, L.J. also took the same view but he rested his decision inter alia upon the fact that an auditor was made liable for misfeasance in Section 10. If an auditor might in collusion with the directors prepare a false account which would involve misapplication of the assets, this would amount to a breach of duty and it will be permissible to conclude from this that an auditor would be an officer within the meaning of Section 10.

12. The present case differs from the ruling referred to above, inasmuch as the auditor has not been mentioned in the Articles of Association as an officer.

13. The last mentioned case has been followed in Kingston Cotton Mill Co.[1] In re, *Kingston Cotton Mill Co*[2]. by the Court of appeal and In re, *Western Counties Steam Bakeries and Milling Co*[3]. In In re, *Kingston Cotton Mill. Co*[4]. Lindley, L.J. observed:The duty of an auditor generally was very carefully considered by this Court in Re. London and General Bank and I cannot usefully add anything to what will be found there. It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance sheet showing the true financial position of the company at the time to which the balance sheet refers.

14. It is therefore not necessary that an auditor should be associated in the internal administration of management of the company. In In re, Western Counties Steam Bakeries and Milling Co.

[1897] 1 Ch. 617(Supra), the question arose whether the auditors could properly be made respondents to a misfeasance summons Sterling, J., answered the question in the affirmative. The matter was dealt with by the Court of Appeal. Lindley, L.J. observed as follows:An auditor may or may not be an officer of the company. So may anybody else-e.g., a banker or solicitor, prima facie such persons are not officers".... But to be an officer there must be an office, and an office imports a recognized position with the rights and duties annexed to it and it would be an abuse of words to call a parson an officer who fills no such position either de jure or defacto but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word.

15. It follows that an auditor who is casually called in to do the work of auditing is not an officer; but the same cannot be said with reference to persons who have been appointed auditors in a general meeting of the shareholders.

16. In In re, *Kingston Cotton Mill Co. [1896] 1 Ch. 6(Supra),* Vaughan Williams, J., is reported to have observed:I want to say generally of auditors that I have no doubt myself but that auditors who have to perform that duty are not only in this case but in all cases, officers of the company.

17. It appears to us that the proposition has been expressed a little too widely and is not supported either by appeal to facts or by authority. This view does not appear to have been adopted by the Court of Appeal, which was composed of a very strong Bench consisting of Lord Hershchell, A.L. Smith, L.J., and Righby, L.J. While affirming the conclusion of the trial Court, the Court of Appeal appears to have rested its decision mainly upon the decision, in In re, *London and General Bank*[5]. This matter' had come up before this Court in *Connel v. Himalaya Bank*[6] *It* was contended in this case that no one could be an officer of the company within the meaning of that section unless he had control of the business of the company and of the monetary dealings of the company. There was no statutory definition of an officer in Act 6 of 1882. It was held by Edge, C.J. and Banerji, J., that where a person had not been casually called in on an occasion arising for the services of an auditor, but he was the auditor appointed at the general meeting of the company in accordance with the provisions of Act 6 of 1882 he was an officer of the company within the meaning of Section 214, Act 6 of 1882.

18. In In re, *City Equitable Fire Insurance Co. Ltd*[7]. the question arose whether an auditor could be held liable for misfeasance. The question whether an auditor was an officer of the company was not decided.

19. The general result of the decisions is that where an auditor has been appointed by a limited liability company at a general meeting of the shareholders, he must be taken to be an officer of the company. It is not absolutely necessary that he should be mentioned as an officer in the Articles of Association. If things stood here, we might have felt considerable difficulty in holding the contrary. But we are confronted with the following facts: The term officer" had not been

defined in Act 6 of 1882, but in Connell's case [1895] 18 All. 12, it had been held that an auditor was an officer of the company. There was a long train of reported English decisions in support of the same view. We find, however, that the legislature has introduced a statutory definition of the term "officer" in Section 2, Clause 2, Act 7 of 1913, which says that "officer" includes any director, manager or secretary but, save in Sections 235, 236 and 237, does not include an auditor. We are bound by this statutory definition. In enacting Act 7 of 1913 the legislature seems to have consciously departed from the view which had been taken in decided cases in the past so far as this country was concerned.

20. We hold therefore that an auditor cannot claim to be an officer within the purview of Article 118 of the Articles of Association.

21. We are therefore of opinion that the auditors cannot avail themselves of the protection given by Article 118, but inasmuch as this opinion may be wrong, we propose to say, with respect to any charges that may be proved, whether Mr. Hudson would be entitled to an indemnity on the assumption of an auditor being an officer.

22. It will therefore be convenient at this stage to consider the second point of law raised viz., what is the meaning to be attached to "wilful acts or defaults" on the assumption that the auditors were officers?

23. The adjective "wilful" in "wilful acts or defaults" has evidently been used as a description and not as a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as the result of the non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. We have also to eliminate the elements of accident or inadvertence or honest error of judgment. The default must be the result of deliberation or intent or be the consequence of a reckless omission. "Wilful default" therefore is indicative of some misconduct in the transaction of business or in the discharge of duty by omitting to do something either deliberately or by a reckless disregard of the fact whether the act or omission was or was not a breach of duty.

24. The above view is amply supported by authority. *Forder v. G.W. Ry. Co*[8]. was an action for damages against a railway company for the arrival of a parcel in a damaged condition, which parcel had been consigned;.by the plaintiff on the terms of a consignment note for goods to be carried at owner's risk. The question which arose in the case was whether there had been "wilful misconduct" on the part of the servants of the defendant's company. Lard Alverstone, C.J., observes as follows at p. 535:I am quite prepared to adopt with one slight addition the definition of "wilful misconduct" given by Johnson, J., in *Graham v. Belfast and Northern Countries Ry. Co.*[9] where he says "wilful misconduct" in such a special condition means misconduct to which the will is a party as contradistinguished from accidents and is far beyond any negligence even

gross or culpable negligence and involves that a person wilfully misconduct himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do or to fail or omit to do (as the case may be) a particular thing and yet intentionally does or fails or omits to do or persists in the act, failure or omission regardless of consequences. The addition which I would suggest is 'or acts with reckless carelessness, not caring what the result of his carelessness may be.

25. Pollock, M.R. agrees with the definition quoted by Lord Alverstone and with the addition he proposes to make and is of opinion that this definition is in close accord with the previous decisions on the subject, Re. *City Equitable Fire Insurance Co [1925] 1 Ch. 407(Supra).* Queen v. Senior[10], was a case against a father for manslaughter of his child by wilful negligence under Section 1, Prevention of Cruelty to Children Act, 1874. Lord Russell, C.J. held (p. 290) that:wilfully means that the act is done deliberately and intentionally, not by accident or inadvertence but so that the mind of that person who does the act goes with it.

26. In a similar case *Queen v. Downes* [11]Lord Coleridge, C.J., is reported to have observed as follows:

By wilful neglecting I understand an intentional and deliberate abstaining from providing the medical aid knowing it to be obtainable.

27. In In re,*City Equitable Fire Insurance Co. [1925] 1 Ch. 407(Supra),* which has already been referred to Romer, J., observes at p. 434 that:an act or omission to do an act is wilful where the person of whom you are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of duty and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing and intends to commit a breach of his duty or is recklessly careless in the sense whether his act or omission is or is not a breach of duty.

28. Warrington, L.J.,

quotes with approval a passage from the judgment of Bramwell, L.J., in Lewis v. G.W. Ry. Co. [1895] 3 Q.B.D. 206, which runs thus:Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful.

29. Sargant, L.J., was of the same opinion p. 529, and held that:the word "wilful" connoted that the person "was consciously acting or failing to act in a reprehensible manner. If an officer failed to give a consideration to the question of his duties, acted recklessly and without caring whether he was fulfilling them or not," such an officer could not be protected.But he adds:In my judgment these were words which would excuse an officer if through mere inadvertence or error

of judgment and while endeavouring honestly to carry out his duty he does or omits to do something which apart from those words might have rendered him liable.

30. We adopt the rule laid down above as specially applicable to this case. (Their Lordships then discussed evidence as to specific charges and allowed the appeal in part and ordered as follows.) We order Mr. Hudson to pay to the liquidators costs proportionate to their success in this appeal. We decline in the circumstances to award any costs to Mr. Hudson on the issue on which he has succeeded.

Cases Referred.

1[1896] 2 Ch. 279 at pp. 284 and 288
2[1896] 1 Ch. 6
3[1897] 1 Ch. 617
4[1896] 2 Ch. 279
5[1895] 2 Ch. 166
6[1895] 18 All. 12
7[1925] 1 Ch. 407
8[1.05] 2 K.B. 562
9[1901] 2 I.R. 13
10[1899] 1 Q.B. 283
11[1875] 1 Q.B.D. 25