BOMBAY HIGH COURT

Sir Fazal Ibrahim Rahimtoola

Vs

Appabhai G. Desai

(M Chagla, C.J. Coyajee, J.)

08.03.1949

JUDGMENT

M.C. Chagla, C.J.

1. This is an appeal from an order of Mr. Justice Bhagwati making an order for the public examination of Sir Fazal Ibrahim Rahimtoola on a summons taken out by the official liquidator of the Associated Banking Corporation of India, Ltd., under Section 196 of the Indian Companies Act.

2. The order is contested by Sir Jamshedji mainly on two grounds. The first ground is that the order made was without jurisdiction. Now, jurisdiction of the Court to make an order for the public examination of a directorand Sir Fazal was a director of the company with which we are concerned in this caseis founded on Section 196 of the Indian Companies Act. That section provides that "when an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by...", then the section goes on to state the class of persons who might be guilty of fraud, and then it goes on, "the Court may, after consideration of the application, direct that any person...", and then it sets out the same class of persons which are mentioned earlier in the section. There is another section to which attention might be drawn in order to understand Sir Jamshedji's contention, and that is Section 177B. Sub-clause (2) of that section provides:

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court.Briefly put, Sir Jamshedji's argument is this that the statutory jurisdiction of the Court can only be invoked after the official liquidator has made a report under Section 177B (2) and the Court can only make an order under Section 196 after taking into consideration the report made by the official liquidator. Sir

Jamshedji says that the jurisdiction of the official liquidator to make a report is based upon Section 177B (2), and he having made that report, it is for the Court to consider it and then proceed to decide whether any particular person should or should not be publicly examined.

3. Now, let us consider a few facts as to how the official liquidator came to apply for an order under Section 196. On May 21, 1948, the official liquidator submitted a report to the Vacation Judge and headed that report as being pursuant to Sections 197, 196, 195 and 237. On that report the learned Judge gave directions to the official liquidator to take out a chamber summons for the public examination of the various persons mentioned in his report as being party to the fraud. Thereupon the official liquidator took out a chamber summons on May 28, 1948, and it was on this summons that the learned Judge made the order complained of. Sir Jamshedji says that the report of the official liquidator is not made under Section 177B but under other sections. Looking to the report it is obvious that the report is made for the purpose of ultimately getting an order under Section 196, and in my opinion at the most there is a clerical error on the part of the official liquidator in not mentioning Section 177B along with other sections that he has mentioned. But I would go further. Looking to the provisions of the law in this country, I am not at all sure that it is not open to the official liquidator to make an independent report under Section 196 from the report contemplated by Section 177B. It is necessary to consider the analogous law which we find in England. The provision with regard to the public examination was first introduced into the English company law by the Companies Winding Act of 1890 and Section 8(2) corresponds to Section 177Bf2) and Section 8(3) corresponds to Section 196 of our Companies Act. It is very significant to note that Section 8(3) speaks of "the Court may, after consideration of any such report", any such report being the report referred to in Section 8(2) corresponding to our Section 177B. When we turn to our Section 196, there is no reference whatever to the report which the official liquidator has got to make under Section 177B. When we turn to the English Companies Act, which is in force today, we find that Section 182 corresponds to Section 177B and Section 216 corresponds to Section 196, and Section 216 provides that "Where an order has been made in England for winding up a company by the Court and the official receiver has made a further report under this Act..." and that report under the Act is obviously the report referred to in Section 182. Again, no similar words are to be found in Section 196 of our Companies Act, and, therefore, in my opinion it would be open to the Court to make an order under Section 196 if the official liquidator applies under Section 196, and in his application he states that in his opinion a fraud has been committed by any person whom he wants to get examined Under that section. There is no doubt that in this case when the official liquidator applied by the chamber summons for an order under Section 196 he has clearly and categorically stated that in his opinion Sir Fazal Was guilty of a fraud and that he should be publicly examined. Therefore I see no force in Sir Jamshedji's contention that the order made by the learned Judge was an order without jurisdiction.

4. Now coming to the second contention, Sir Jamshedji's submission is that looking to the report of the official liquidator dated May 21, 1948, no prima facie case of fraud has been made out by the liquidator against his client and therefore the order made by the learned Judge is not a proper

order. I may just mention in passing that it is rather curious the way our Section 196 has been drafted by the Legislature. If one were to give to the language used in that section its plain grammatical meaning, one would come to the conclusion that once a fraud is alleged against any person in the promotion or formation of the company or against a director, manager or any other officer of the company, then any one of these persons can be examined even if he himself was not guilty of the fraud. It would be enough to allege fraud against one person falling in the category in the first part of the section and then it would be open to the Court even to make an order against any other person mentioned in the second category. I may point out that both the categories are common to Section 196. In the latter part it is not stated that an order can only be made against such person who is charged with fraud under the first part of the section. 'Curiously enough, provision in the English Companies Winding Act, 1890, was similar. The matter came for consideration before the House of Lords in Ex parte Barnes [1896] A.C. 146 and the learned Law Lords after considering the' scheme of the section and of the Act came to the conclusion that however the section might have been worded, an order under Section 196 can only be made against a person who was charged with fraud. After that the different English Companies Acts were consolidated and we come to the present Act of 1929, and when we turn to Section 216 we find that the language used is clear and the second part of that section provides that the Court may, after consideration of the report, direct that that person shall attend before the Court and be examined in public. Therefore, the expression "that person" in relation to what has gone before makes it clear that it is only the person charged with fraud who can be examined in public. But our section remains what it was and the Legislature has not thought fit to bring the language of the section into line with the true position in law. But we must accept Sir Jamshedji's contention that looking to the whole scheme of the Act and of the section, the section only aims at those persons who are charged with fraud and not those persons who may be concerned with the working of the company and are not charged by the liquidator with fraud. Therefore we must now consider whether on the materials before us it can be said that in the opinion of the liquidator a prima facie case has been made out against the appellant of fraud.

5. Now, to say the least, this particular Bank that was set up was run in a most extraordinary and curious manner. It seemed more to be a domestic family affair than a public corporation looking after the interests of the shareholders and the depositors. The majority of the shareholders were all relations. At the head of the tree stood Cassumally Munjee with his sons, his son-in-law, the father-in-law of his son, Sir Fazal Rahimtoola, and the liquidator in his report clearly states that the affairs of the Bank rested exclusively with Cassumally Munjee, his said two sons, his son-in-law Mahomedally Javeri, and Sir Fazal Rahimtoola. Then the liquidator goes on to point out various gross cases of fraud which came to light after the company went into liquidation. He points out that the Munjees and their allied concerns are indebted to the Bank in the sum of Rs. 13,00,000 and there is also a prospective liability for calls of about 6J lacs, and he adds that the Munjees have dominated the Bank and they have literally played ducks and drakes with the moneys of the Bank which they have advanced to themselves and their allied concerns without any intention to repay the same. He then points out the case of a loan of 38 lacs being advanced

to Shiraj Ali Hakim and his relative Gulam Mahomed Ebrahim. This loan was advanced on so-called securities which were not worth the paper on which they were printed. Then he deals with the case of a fixed deposit of Rs. 5 lacs made by Messrs. Kardar Productions. It seems that on this fixed deposit Kardar Productions were allowed to have an overdraft account. Then he was persuaded by the Munjees to transfer the fixed deposit of Rs. 5 lacs to one of their own concerns and to replace this fixed deposit a guarantee was given by one of their firms. On that the Bank was left with the paper guarantee of one of the Munjee concerns and the hard cash of Rs. 5 lacs disappeared from the Bank and went to fill the till of the Munjee concerns. Then there is another instance of this Shiraj Ali Hakim having pledged with the Bank 62,500 shares of the Famous Cine Laboratory and Studios, Ltd., against a loan given to him. Subsequently lie was allowed to remove these securities and he handed over these securities to another creditor of his, Govindram Rungta. So the Bank was left without any security to secure this particular loan.

6. Now Sir Jamshedji says that there is no specific averment by the liquidator in this report; that his client is guilty of fraud. I frankly admit that this report could have been much better drafted. But as has been pointed out in England in many decided cases, 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, Let us take two or three important allegations made by the official liquidator in this report. He says that Sir Fazal Rahimtoola along with the other directors were in the exclusive control and management of the Bank. He then points out various cases of fraud being practised upon the shareholders and the depositors by the money of the Bank being lent out on worthless securities or in order to benefit the Munjees. Then he points out that Sir Fazal Rahimtoola is closely related to the Munjees. In my opinion, the inference is irresistible, and the inference is that a man who is a director of the Bank and who takes an active part in the management of the Bank cannot but know of what was going on in the Bank, and therefore what the liquidator in effect does is this; he suggests that Sir Fazal is privy to the frauds practised which he has enumerated in his report. Sir Fazal made an affidavit in reply to the affidavit made by title official liquidator in support of the chamber summons, and it is pertinent to note that in this affidavit there is no denial of the statement in the report that he along with a few other directors was in exclusive charge, control and management of the affairs of the Bank, nor is there any statement with regard to the various frauds set out by the official liquidator, nor does he say that he was not aware of all that was going on in the Bank. It is a contentious affidavit which merely takes up a technical defence and does not place any materials before the Court which would lead the Court to the opinion that the opinion of the liquidator was not justified. Then to this affidavit the official liquidator made an affidavit in rejoinder and in that affidavit he categorically states that the records of the Bank show that Sir Fazal Rahimtoola has attended almost all the meetings of the directors and also the meetings of the sub-committees appointed to sanction loans and that he has voted for the various loans which have directly or indirectly benefited the Munjees. So here we have a definite statement by the liquidator that Sir

Fazal had voted for the loans advanced to the Munjees. As the record stands the appellant has not chosen to put in any affidavit in rejoinder to challenge the statement in the affidavit.

7. There is rather an important point of practice to which Sir Jamshedji has drawn our attention. The official liquidator took up the attitude that orders for public examinations under Section 196 can be made ex parte. We wish to make it clear that in our opinion that would not be a sound practice for the Court to adopt. The Advocate General draws our attention to the practice prevailing in England and that practice is that an order is made ex parte for the public examination of a person, then an order is served upon him, and it is open to him to come to Court to get that order discharged. That strikes us as rather a circuitous way of achieving the same result. It would be much better to adopt the practice which was followed in this case, viz. that when an order is sought for under Section 196, the official liquidator should take out a chamber summons and the chamber summons should be served upon the person affected so that the Court before it makes an order would have all the materials before it. I may also draw attention to the warning sounded by Sir Lawrence Jenkins in The Ahmedabad Advance *Spinning and Weaving Co. v. Lakshmishanker*[1]. He said that the practice of passing ex parte orders involving the person affected in serious liability is much to be deprecated. With very great respect I entirely endorse this sentiment.

8. The order made by the learned Judge is a discretionary order and in appeal it is for Sir Jamshedji to satisfy us that we should interfere with the discretion exercised by the learned Judge. We would only interfere with that discretion if we were satisfied that there were no materials before the learned Judge on which he could have come to the conclusion that no prima facie case for investigation of fraud had been made out against the appellant. I have drawn attention to all the materials which were before the learned Judge and it is impossible to say that on these materials the learned Judge was not justified in making the order that he did. The result is that the appeal fails and must be dismissed with costs.

Cases Referred.

1(1904) I.L.R. 30 Bom. 173, 185, S.C. Bom. L.R. 246