

P.A. Tendolkar and ors. Vs. Official Liquidator and ors.

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Court : Karnataka

Decided On : Jun-28-1963

Reported in : AIR1964Kant75; AIR1964Mys75

Judge : N. Sreenivasa Rau, C.J. and ;G.K. Govinda Bhat, J.

Acts : [Companies Act, 1913](#) - Sections 195, 196, 202 and 235; Mysore High Court Act, 1961 - Sections 4; [Code of Civil Procedure \(CPC\), 1908](#) - Order 16, Rule 14; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 540; Banking Companies Act, 1949 - Sections 45-H and 45-N; [Companies Act, 1956](#) - Sections 483; Evidence Act - Sections 165

Appeal No. : Company Appeal No. 5 of 1963

Appellant : P.A. Tendolkar and ors.

Respondent : Official Liquidator and ors.

Advocate for Def. : Party in Person, ;G.D. Shirgurkar, ;A.V. Albal, ;K.I. Bhatta, ;N.A. Mandgi, ;B.V. Deshpande, ;G.B. Raikar and ;R.V. Jahagirdar, Advs.

Advocate for Pet/Ap. : K.R. Karanth and ;B.V. Krishnaswamy Rao, Advs.

Judgement :

Govinda Bhat, J.

1. This is an appeal, by three of the Directors of the Supreme Bank of India, Limited, Belgaum (in liquidation), hereinafter referred to as 'the Company', from an Order of Mr. Justice Narayana Pal made in the exercise of the Original Jurisdiction of the Court, directing three of the Directors and the Auditor of the Company to appear and give evidence on oath before the Court in the misfeasance proceedings Initiated by the Official Liquidator against the Directors and other officers of the Company. The question for determination in this appeal is as to whether that order is not legal and valid. For a correct appreciation of the contentions urged on both sides, it is necessary to state briefly the circumstances under which the Order was made.

2. The Company was ordered to be wound up by the High Court of Bombay on 16-4-1956. Consequent on the Re-Organization of States, the winding up proceedings of the Company pending in the High Court of Bombay on 1-11-1956 were transferred to this Court. It was numbered as C.P. (B) 28/1956 and the Official Liquidator of this Court assumed charge of the winding up proceedings.

On the basis of Information gathered from certain reports concerning the affairs of that Company, the Official Liquidator made an application under Section 235 of the Indian [Companies Act, 1913](#) (Central Act VII of 1913), hereinafter referred to as 'the Act', read with Section 45-H of the Banking Companies Act, 1949, to examine into the conduct of 14 respondents named therein and direct them all or such of them as the Court may determine to be liable in particular or generally or jointly, to repay, and restore the money of the Company which the Court may fix. The application, styled as 'Report No. 20', alleged that the respondents have been guilty of misfeasance, breach of trust and fraudulent conduct in relation to the Company and they have misapplied or become liable for a sum of Rs. 4,26,000/-.

Respondents 1 to 7 to the said application were the Directors of the Company at the time of its closing, and respondents 8 to 13 were its officials and respondent 14 was the Company's Auditor. The respondents filed their statements denying the acts of misfeasance charged against them. After the pleadings were filed the case was posted for trial on 10-12-1962 before the learned Company Judge. Four witnesses were examined for the Official Liquidator and four witnesses were

examined on the side of the Respondents.

After the completion of the examination of R.W. 4 Kekare on 11-3-1963, the learned Company Judge suggested ,to the learned counsel appearing before him that he had tentatively decided to require the presence of the Directors and the Auditor for giving evidence) on oath in open Court on matters under investigation before him in the misfeasance application and Invited them to place whatever circumstances they would like to urge before making up his mind finally so as to call them. Having heard the counsel, the learned Judge made the following order;

'In the light of the evidence already placed on record and with a view to ensure as full a clarification of matters in doubt as possible in the circumstances of the case and with a view to see that no party suffers any prejudice by reason of the evidence so far given or not given by the other parties, I Wink it is necessary in the interest of Justice that the second respondent S.K. Samant, the third respondent P.A. Tendolkar and the seventh respondent R.N. Kalghatgi (the Directors) should be required to give evidence. D.B. Kulkarni, fourteenth respondent, who was the auditor of the Company from Its commencement till it came to suspend its business, is not only one of the persons who is likely to be in possession of very useful Information regarding the financial affairs of the Company but also one who is arrayed as a party in this misfeasance application. In the interest of fair trial he should be required to give evidence.

On consulting the learned counsel they state that the further recording of evidence in this case may be commenced on Wednesday the 3rd of April 1963.

Accordingly, I direct that the second respondent S.K. Samant, the third respondent P.A. Tendolkar, the 7th respondent R.N. Kalghatgi and D.B. Kulkarni, Auditor, fourteenth respondent, do appear in this Court to give evidence on examination on oath in open Court on Wednesday the third of April 1963 at 245 P.M. They will continue to attend every day of the subsequent hearing of the application until they are permitted to retire from Court.

Out of these four respondents, two of them, viz., the third respondent P.A. Tendolkar and the seventh respondent R.N. Kalghatgi, are now present in Court.

They will take note of this order. In addition, the office of the Court will serve them with a formal notice under the seal of this Court. Similar formal notices will issue by registered post to the second respondent S.K. Samant and D.B. Kulkarni.

Because the trial has yet to proceed, I have stated above only the essential considerations leading to my making this direction. Further and fuller reasons will be stated in the final order, because to discuss them now is, in my opinion, likely to embarrass one or the other of the parties during the remaining stages of this trial.'

Against the said order respondents 3, 5 and 7 in the misfeasance proceedings, have preferred the above appeal. In the appeal, the first respondent is the Official Liquidator, respondents 2 to 6 are the legal representatives of original respondent 1 who is dead, respondents 7 to 11, 18 and 19 are original respondents 2, 6, 8 to 10, 12 and 13, and respondents 12 to 17 are the legal representatives of Original respondent 11. Original respondent 14, the Auditor of the Company, died subsequent to the order under appeal and his legal representative have not yet been brought on record.

3. The Official Liquidator raised a preliminary objection to the maintainability of the appeal. He contended that no appeal lies since the order in question is an interlocutory order which does not finally decide any dispute and therefore is not a judgment. The appeal purports to be one brought under Section 202 of the Act read with Section 483 of the [Companies Act, 1956](#), Section 45-N of the Banking Companies Act, 1949 and Section 4 of the Mysore High Court Act, 1961. Section 483 of the companies Act, 1956, corresponds to Section 202 of the Article. It is not disputed that the matter is governed by the Indian [Companies Act, 1913](#) since the winding up was commenced before the commencement of the Companies Act of 1956. Section 45-N of the Banking Companies ACT, 1949 has no application since that section relates to any order or decision of the High Court in a civil proceeding under the Banking Companies Act.

4. The relevant section of the Act conferring right of appeal from any order or decision made or given in the matter of the winding up of a Company is Section 202 which reads thus.

'Appeals from orders. -- Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to whl'ch appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.'

Divergent views have been expressed by the High Courts on the interpretation of the appeal provision, According to one view 'an order' made in the matter of winding up of a company is appealable provided It amounts to a'judgment' within the meaning of the term in Clause 15 of the Letters Patent of the Presidency High Courts.

The other view, taken by the High Court of Bombay, is that the first part of the section confers a substantive right Upon a party aggrieved by an order made or a decision given by a Company Judge in winding up and the second part which deals with 'the manner and the conditions in which an appeal may be preferred' only refers to the procedural aspect of an appeal and the forum to which the appeal would lie. Vide *Bachharaj factories, Ltd. v. The Hiraji Mills Ltd.*, : AIR1955 Bom355 .

The Bombay view was accepted by a Bench of this Court in *Premier Insurance Co., Ltd. v. Davangere Cotton Mills, Ltd.*, 1960-38 Mys LJ 964; (AIR 1961 Mys 1). Section 4 of the Mysore High Court Act provides for an appeal from a judgment, decree or order of a single Judge in the exercise of the original jurisdiction of the High Court to a Bench consisting of two other Judges of the High Court. Section 4 reads thus:

'Appeals from decisions of a single Judge of the High Court. -- An appeal from a judgment, decree, order or sentence passed by a single Judge in the exercise of the original jurisdiction of the High Court under this Act or under any law for the time being in force, shall lie to and be heard by a Bench consisting of two other Judges of the High Court.'

While Clause 15 of the Letters Patent states that an appeal shall lie to a Bench from the 'judgment' of one Judge of the High Court, Section 4 states that an

appeal shall lie from a 'judgment, decree, or order or sentence' passed by a single Judge. The scope of Section 4 is wider than that of Clause 15 of the Letters Patent. Neither Section 202 nor Section 4 restricts the right of appeal to orders that would amount to judgments.

The Official Liquidator contended that Section 4 cannot be relied upon since the Mysore High Court Act is an enactment of the State Legislature made in exercise of the power conferred by Entry 65 of List 11 of Schedule VII of the Constitution of India and matters relating to winding up of companies are within the exclusive jurisdiction of Parliament coming under Entries 43 and 45 of List 1.

He argued that since the State Legislature has no competence to legislate with respect to the matters expressly provided in List I, Section 4 can have no application to the winding up of Companies and, therefore, we have to look to the provisions of the Companies Act and not to any Act of the State Legislature. This contention of the Official Liquidator, in our view, is untenable.

Right of appeal from orders made in winding up proceedings is derived from Section 202. That Section, however, provides that an appeal against any order or decision may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction. The machinery for appeals is provided by the enactment of the State Legislature and that machinery is to be used for appeals provided by the Companies Act. When Section 202 is read with Section 4 of the High Court Act, it is manifest that a party aggrieved, by any order or decision made or given in the matter of the winding up of a company by a single Judge in the exercise of the original jurisdiction of the High Court, has a statutory right of appeal to a Bench consisting of two other Judges of the High Court. The question, whether we should interfere in the appeal when the order is interlocutory and does not decide the rights of parties, is a matter relating to the merits of the appeal and does not touch the question of the right of appeal. We, therefore, overrule the preliminary objection and proceed to consider the merits of the appeal.

5. Shri K.R. Karanth, learned counsel for appellants, challenged the order under appeal on the following two main grounds:

I. That the Court has no power to summon a party to an action against his wish to give evidence on oath.

II. That the order is arbitrary since it has failed to note the objections urged and give reasons for the order.

Re: Point Number 1: Learned counsel argued that Section 235 of the Act provides for a summary mode of enforcing rights which must otherwise have been enforced by a regular suit, that the procedure prescribed by the Code of Civil Procedure is applicable to the trial of Misfeasance proceedings to the extent they are consistent with the nature of tile proceedings and that under the Code the Court has no power to summon a party to the proceedings against his will to give evidence. He sought support for his argument from Section 165 of the Evidence Act which empowers a Judge to put questions to any witness or party before him.

He further argued that it is only under Section 195 or 196 of the Companies Act, that a Judge has the power in winding up proceedings to summon any Director or other Officer of a Company for examination on oath, but the power under the said sections cannot be invoked or relied upon for summoning a party against his will to give evidence in the trial of Misfeasance proceedings. It was not suggested before us, either by the Official Liquidator or Shri A.V. Albal, learned counsel for respondent 7, that the learned Company Judge exercised any powers under Section 196 of the Act which relates lo art order for public examination of the promoters, directors etc., when the Official Liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the Company.

On a perusal of the order of the learned Judge it appears to us that it was not made in the exercise of his powers under Section 195. The examination contemplated under Section 195 is strictly a private proceeding intended to obtain information from any person concerning the affairs of the Company. That power may be exercised either before or even after the institution of Misfeasance

proceedings for the purpose of obtaining information but not to summon any person to give evidence in the trial of the Misfeasance proceedings.

The Order under appeal directs respondents 2, 3, 7 and 14 to appear in Court 'to give evidence on examination on oath in open Court.' They are not summoned to give 'information' as contemplated under Section 195. At the commencement of his order the learned Judge states that after the completion of the examination of R. W. 4 Kekare on the 11th March 1963, he suggested to the learned counsel appearing before him that he had tentatively decided to require the presence of the Directors and the auditor for giving evidence on oath in open Court on matters under investigation in the Misfeasance application and invited them to place before him whatever cir-cum stances they would like him to consider before making up his mind finally so as to call them.

6. After hearing the objections of the counsel, the Order extracted above was made. The presence of the Directors and the Auditor was required for giving evidence on oath on matters under investigation in the trial of the Misfeasance proceedings. The Official Liquidator cited some decisions of the English Courts in support of his contention that a Judge has the power to summon a party to give evidence in winding up proceedings. The said cases, however, are of no assistance since the power of summoning the Officers of the Company in those cases was exercised under Section 115 of the English Companies Act corresponding to Section 195 of the Act.

Shri Karanth cited some cases of the English Courts wherein it is observed that justice is best done by a Judge who holds a balance between the contending parties without himself taking part in their disputations and if a Judge should himself conduct the examination of witnesses, 'he so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.'

Learned counsel relied on the observations of the Court of Appeal, in *Re, Enoch and Zaretsky Bock and Co.*, 1910-1 KB 327, to the effect that Judge has no power to call witnesses in a civil dispute. That was a case arising out of arbitration proceedings where the award of the arbitrator had been challenged on the ground that the arbitrator had called witnesses of his own accord against the will of either of

the parties to the arbitration, and that amounted to legal misconduct. It was observed By Fletcher-Moulton, L.J. that an arbitrator occupies a judicial position and exercises judicial powers and that a Judge has no power to call witnesses in a civil dispute.

That a judge in a criminal trial has power to call such witnesses that he considers necessary in the interests of justice has never been disputed. Vide, Halsbury's Laws of England Volume 10 (3rd Edition), page 423 wherein the law on the question is stated thus :--

POWERS OF JUDGE:

'A Judge has a discretionary power to recall witnesses of any stage of the trial, even after the final speech for the defence, to rebut a case set up by the defence. He may also call a witness not called by either side, without their consent, if he considers it to be necessary in the interests of justice. He should not, however, call such a witness after the defence is closed except where a matter has arisen ex improvison which no human ingenuity can foresee on the part of the prisoner, and once the summing up is concluded no further evidence ought to be introduced to the jury except in exceptional circumstances in favour of the defence.'

In our country Section 540 of the Code of Criminal Procedure recognises the power of a Judge to summon any person as a witness or examine any person in attendance though not summoned. In civil actions also the powers of a Judge are similar. Rule 14 of Order XVI of the Code of Civil Procedure provides that the Court may, at any time it thinks necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession.

It is therefore clear that our Codes of Civil and Criminal Procedure recognise the power of a judge to summon and examine any witness he thinks necessary. The common law of England also recognises the power of a Judge in a civil action to call as a witness any person that the judge thinks necessary. Lord Esher, M.R., in *Coulson v. Disborough*, (1894) 2 QB 316, observed as follows :--

'If there be a person whom neither party to an action chooses to call as a witness, and the Judge thinks, that that person is able to elucidate the truth, the judge in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before.'

Prof. Wigmore in his 'Treatise on the Anglo-American System of Evidence', Vol. IX, (3rd Edition) at page 268, has commented on the view expressed by the Court of Appeal in 1910-1 KB 327 as follows:--

'It is deeply regrettable to have to note that the English Court of Appeal in a modern case changed its view, holding now that in a civil case the judge may not call a witness: (1910) 1 KB 327 (332), approved in *Rex v. Harris*, (1927) 2 KB 587. But the reason given by L.C.J. Hewart in the latter case is astonishing: 'In civil cases the dispute is between the parties and the judge merely keeps the ring.' This philosophy is not only low in its standard, but is false to the conduct and status of the English Judge during the last three centuries. It can hardly be doubted that before long in the highest tribunal these two rulings will be repudiated, and a return be witnessed to the principle laid down by Edmund. Burke.'

At 268 Prof. Wigmore concludes his discussion by stating.

'that a trial judge may call a witness not called by the parties, or may consult any source of information on topics subject to judicial notice, or may put additional questions to a witness called by the parties, or may 'ex mere motu' exclude inadmissible evidence, or may take a view of a place or thing'.

He proceeds stating

'that the trial judge has no power to cause the evidence produced by the parties to be supplemented, never will be conceded, so long as the Bench retains a true conception of its constitutional function and, a due sense of self-respect.'

On the question of the inherent power of the Court to summon and to question witnesses, Prof. Wigmore at page 267 observes 'that the general judicial power itself, expressly allotted in every State constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate

implies necessarily a power to summon and to question witnesses.'

7. Jones on Evidence, 5th Edition, Value 4, pages 1641-42, has the following passage on the same topic:

'From early times, the common law has recognized and enforced a duty on the part of citizens and persons generally to appear in the courts and testify to such facts within their knowledge as may be necessary to the due administration of justice.

Every court having power definitely to hear and determine any suit has, by the common law, inherent power to call for all adequate proofs of the facts in controversy, and, to that end, to summon and compel'

the attendance of witnesses before it. The Congress of the United States has implied power to subpoena witnesses and compel them to attend and give testimony which is necessary to the efficient exercise of the legislative function. Although courts have Inherent power to compel the attendance of witnesses, statutory enactments commonly deal with authority to require witnesses to attend and with the process and proceedings to compel attendance.'

As a necessary incident of its power to adjudicate, a Court of justice, within the sphere of its jurisdiction, has inherent power to compel the attendance of witnesses in proceedings before it and the giving of testimony concerning relevant facts within their knowledge. The power to investigate is ancillary to the power to decide and the power to investigate implies necessarily a power to summon and to question witnesses. our rules of procedure -- civil and criminal -- have recognised these principles and made appropriate provisions in Rule 14 of Order XVI of the Code of Civil Procedure and Section 540 of the Code of Criminal Procedure.

It was, however, argued by Shri Karanth that Rule 14 of Order XVI refers only to witnesses but not to parties and, therefore, the Code has not conferred any power on a judge to call a party as a witness against his will. The language of Rule 14 assumes that there is an Inherent power in the court to summon a party. In the absence of any statutory or constitutional bar precluding the summoning of a party

by a judge, we are not prepared to accept the argument of the learned counsel that the court has no inherent power in a civil action to summon a party to give evidence in the case. Ordinarily, there may be no occasion for a judge in a civil action to summon a party as a witness against his will. But in proceedings like the winding up of a company, where proceedings are initiated by the Official Liquidator, who is an officer of the Court, and the Directors and other officers of the Company, who are the best persons to explain their conduct in regard to the affairs of the company, stay away from the witness box, it may become necessary for the court in the exercise of its inherent power to summon even a party against his will to give evidence on oath.

The first ground of objection that the court has no power to summon the parties to give evidence in Misfeasance proceedings, therefore, fails.

8. Re : Point Number 11-- The second ground of objection also, in our view, is without substance. The grievance of the appellants is that the learned judge should have noted the objections urged at the hearing and given detailed reasons for his order.

The learned judge in his order stated that he invited the learned counsel appearing before him to place whatever circumstances they would like him to consider before making up his mind finally so as to call some of the Directors and the Auditor, for giving evidence in open court on matters under Investigation in the Misfeasance application, and that the order was made after Hearing the counsel. The reasons for the court summoning the parties to give evidence have been briefly indicated and it is further stated that further and fuller reasons will be given in the final order, because to discuss them now is likely to embarrass one or the other of the parties during the remaining stages of the trial.

It is clear from a perusal of the order that it does no purport to be one made with the consent of the parties. The appropriate stage, to set out and deal with the objections urged at the hearing, would be when the learned judge makes the final order. In the circumstances of the case, we do not consider that the reasons given are inadequate. The appellants have a right of appeal against the final decision if it goes against them and we do not find any reason to interfere at this stage with an

interlocutory order made by the learned company Judge.

9. For the above reasons, this appeal fails and is dismissed. In the circumstances of the case, there will be no order as to costs.

10. Appeal dismissed.

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