The Himalaya Bank Ld., in Liquidation Vs D. Connell

Court: Allahabad High Court

Date of Decision: June 16, 1895

Citation: (1896) ILR (All) 12

Hon'ble Judges: John Edge, J; Banerji, J

Bench: Division Bench

Final Decision: Allowed

Judgement

John Edge, Kt., C.J. and Banerji, J.
This is an appeal from an order of the District Judge of Saharanpur made in one of six several

applications to him to proceed u/s 214 of Act No. VI of 1882. The appellant before us was the auditor of the Himalaya Bank from 1888 to 1891.

He was appointed at the annual meeting in each year as the auditor of the bank. He received a fixed remuneration for each half-yearly audit, and he

was bound to make an audit in conformity with Act No. VI of 1882. In the case of the particular bank no articles of association had been filed with

the Registrar under the Act, and consequently table A of the Act applied. The bank had been constituted as a limited company under the prior Act,

but for all necessary purposes connected with this case the later Act and the prior Act are to the same effect. The auditor was charged with

misfeasance, and the order under appeal was an order directing him to contribute a large sum of money to the assets of the company by way of

compensation in respect of the misfeasance found against him. The first application had reference to the dividend which was paid for the half-year

ending the 30th of June 1888. The other applications related to the half-years respectively succeeding that half-year and terminating on the 31st of

December 1890.

2. The first ground taken in this appeal was that Connelly the appellant, was not an officer of the company within the meaning of Section 214 of the

Act. It was contended that no one could be an officer of a 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. For that proposition the decision of Mr. Justice Cave and Mr. Justice Collins in In re the

Liberrato Permanent Benefit Building Society 11 Times L.R. 406 IndAp 11, was relied upon. In that case those learned Judges, or rather one of

them, gave, as an instance of persons who are not officers of the company within the meaning of the corresponding section of the English statute,

an auditor. It would appear that in that case the person before the Court was a solicitor. A solicitor, ordinarily speaking, would not be an officer of

the company within the meaning of that section, but he might, by the position which he agreed to lake up with regard to the company, become an

officer of the company. It appears, however, that Mr. Justice Vaughan Williams in December last held that an auditor was an officer of a company

within the meaning of the section of the English Statute; and since then one division of the Court of Appeal in England has held, on appeal in that

case, that the auditor was an officer of the company within the meaning of Section 10 of 53 and 54 Victoria, Chapter 62. The last decision is very

curtly reported in the English Weekly Notes for 1895, page 74. We have only had any report at length of the decision of the Court of Appeal in

that case in the form in which it appears in ""The Accountant"" for May 4th, 1895. In re the London and General Bank Limited since reported in

(1895) 2 ChD 673. The appellant in this case was not an auditor merely called in to ascertain by way of an audit the position of the bank at any

particular moment; he was not casually called in on an occasion arising for the services of an auditor, but he was the auditor appointed at the

general meetings of the company in accordance with the provisions of Act No. VI of 1882. In our opinion he was an officer of the company within

the meaning of Section 214 of the Act; he was not a servant of the directors, but an officer of the company, and an officer who, although he had

nothing to do with the management of the company, had most important duties to perform as a paid, officer of the company.

3. The next point taken in the appeal was that the remedy against the appellant was barred by limitation. It was contended that Article 178 of

Schedule II of the Indian Limitation Act, 1877, did not apply here. There was the authority of all the High Courts in India to show that that article

was only applicable to applications made under the Code of Civil Procedure, of which this was not one, and it was contended that Article 36 of

that schedule was the article which must be applied. That contention was based on the authority of a case in the Weekly Reporter in which it was

said that a suit was any proceeding instituted in a Court of justice. It is not necessary to consider whether that proposition is correct or not. In our

opinion the ""suit"" of the Indian Limitation Act, 1877, has a specific and limited meaning. It is, according to Section 3 of that Act, distinguished from

an appeal and an application. In our opinion Article 36 does not apply to this case. It may well be that the Legislature intended not to provide any

limitation in cases in which Courts proceeded to enforce the provisions of Section 214 of Act No. VI of 1882. The provisions of that section could

seldom be put in force if Article 36 of Schedule II of Act No XV of 1877 applied. The misapplication or misfeasance of that section might not be

discovered by the Court until after the lapse of two years from the date of the misapplication or misfeasance. It appears to us that there is good

reason why directors, managers and officers of companies registered under Act No. VI of 1882 should not be permitted to plead limitation so as

to absolve them from making restitution of moneys misapplied or lost to the company through their misfeasance. It may be that this is not exactly

the same view of the law as that entertained by some of the Courts in England in cases under 53 and 54 Vic. Cap. 62, Section 10. However, the

Statute of Limitations which Judges in England have to apply to those cases is certainly wider in its wording than the articles of the Limitation Act

which we have to apply in this country. There they did not allow any plea of limitation where the person charged was in the position of a trustee of

the company, such as a director; and the cases in which they allowed this plea of limitation to be raised were actions brought against an officer, and

not proceedings under 53 and 54 Vic. Cap. 62, Section 10. We hold that the proceedings in this case against the appellant u/s 214 of Act No. VI

of 1882 are not barred by limitation.

4. The next question is--was Connell guilty of misfeasance within the meaning of the section? In order to decide that point it is necessary to

consider what was the state of the bank as it would have appeared to anyone making a careful audit, when he took over the duties of auditor. Its

state was this. Its capital had been gone for years. Its reserve fund was pledged as security to another bank. It was keeping on its balance sheets

as assets debts which were, some of them, barred by limitation and others beyond all hope of recovery. As to these debts any auditor who

understood and did his duty could have ascertained their nature from a cursory examination of books of the bank. There were debts to a large

amount on which no interest had been paid for years, and still that interest kept appearing in the books of the bank as a realizable asset of the

company. The debts which were hopelessly bad amounted to lakhs of rupees. The reserve fund, being in Government paper in the hands of

another bank as security, had ceased for practical purposes to be a reserve fund. The capital of the bank was gone, and practically the working

assets of the bank, and the only working assets which the bank had, consisted of the deposits of such people as had been foolish enough to

deposit their money in the bank. What was done at the bank was this. The manager or accountant of the bank prepared a balance sheet which was

not in accordance with the form of balance sheet required by Act No. VI of 1882. That balance sheet was submitted to the auditor, and,

according to his statement, he checked apparently the totals in that balance sheet with the totals as they appeared in the books of the bank, He did

not see that the debts owing to the bank were divided into three classes as required by the balance sheet of Act No. VI of 1882. The inference

which we draw is that this auditor practically did nothing except have before him the balance sheet which had been prepared and check off in a

most cursory manner the totals of the balance sheet with the totals in the books of the bank. That he ever examined, as he certified, the books of

accounts of the bank, as a proper auditor should and would have done, we do not believe. It is said on his behalf that he was not a skilled auditor.

That, no doubt, is true. He was secretary and accountant to a Brewery Company. Probably he knew little or nothing about the duties of an auditor

or the provisions of Act No. VI of 1882. His ignorance in our opinion would not excuse him in proceeding u/s 214 of Act No. VI of 1882. He

accepted the office of auditor and the remuneration attached to that office, although it was small, and he undertook to perform duties which, not

only in the interests of the company, but in the interests of the creditors of the company and in the interests of the investing public, it was necessary

should be performed carefully and properly. His duties were defined by Act No. VI of 1882. In one sense, in our opinion, he never performed any

part of those duties. It is true he signed a balance sheet, and he signed a certificate each half-year; but each half-year"s balance sheet was false, as

he must have discovered had he taken the slightest pains to perform the duties ?of an auditor. In our opinion this auditor was guilty of misfeasance,

and grave misfeasance, within the meaning of Section 214 of Act No. VI of 1882. However, that is not sufficient to make him liable u/s 214. An

auditor can only be made liable u/s 214, if he has been guilty of misfeasance in his office, and if the natural and proximate result of that misfeasance

was that loss to the company ensued. Compensation u/s 214 is of the nature of damages, and in civil proceedings under that section to obtain

compensation for misfeasance of an officer it must be shown in our opinion that in consequence of that misfeasance a particular loss or losses-was

or were suffered by the company. What happened in this case was that the dividend for each half-year was actually paid and distributed by the

directors of the company one, two or three months before the audit for that half-year, and before any balance sheet had been signed or any

certificate given in respect of that half-year by the auditor. It cannot be said, for example, that the dividend paid by the directors for the half-year

ending the 30th of June 1888 was paid in consequence of any audit or any balance sheet or any certificate of this auditor for that half-year. It is

contended by Mr. Conlan that the bank suffered a loss in this way. He said that if the auditor had done his duty and had shown on a proper

balance sheet that the bank was insolvent, the directors would have been obliged to close the doors of the bank, or to take steps for the

reconstitution of the bank, and that they could not have paid any dividends for the succeeding half-years. He also-contended that if a true balance

sheet had been made by the auditor, that balance sheet would not have been passed by the shareholders at the general meeting and the dividends

already paid would not have been confirmed. On the latter point, to take it first, all that need be said is that, if these dividends could not be

recovered, they were already lost before the balance sheet for that half-year was certified by the auditor. If they could be recovered there would

have been no loss. It is not shown here that any attempt has been made by the liquidator to recover the dividends paid to the shareholders during

those years, and for all we know no loss may have been sustained. To deal with the other branch of the argument, it appears to us that it is based

upon grounds far too speculative to be adopted by a Court of justice in awarding damages. We do not know what the result, might have been on

the action of the directors in future half-years if this auditor had done his duty and represented and certified that the bank was insolvent. If we were

to speculate on that matter, looking at the proceedings of the directors and the way in which this bank was managed, we might possibly conclude

that if the auditor presented a true statement of the affairs of the bank to the directors he would cease to be auditor and the bank would not close

its doors. This, however, is merely a matter of speculation. The loss-of dividends in succeeding half-years was not the immediate consequence of

the breach of duty of the auditor in this case. It was also contended by Mr. Conlan that the bank suffered a loss in this way., Mr. Conlan

contended that the auditor had conspired with the directors to give these untrue certificates and to pass these false balance sheets, and, being a

party to that conspiracy, which, Mr. Conlan argued, extended over several years, his misfeasance had in fact caused loss. Although we think that

the auditor neglected every duty which he was bound to perform as auditor, we see no evidence in this case that he was a party to any conspiracy

with the directors or any one. His remuneration was small. He was ignorant of his duties, and he did not perform them, and there we think the case

ended so far as he was concerned.

5. We hold that it is not proved that any loss was suffered by this bank in consequence of the misfeasance of its auditor. We accordingly allow this

appeal and set aside the order of the Court below, but without costs.