Pravin Sankalchand Shah Vs D.B. Dalal (Official Liquiddator)

Court: Bombay High Court

Date of Decision: July 7, 1965

Acts Referred: Companies Act, 1956 â€" Section 477, 543

Citation: (1967) 37 CompCas 317

Hon'ble Judges: V.D. Tulzapurkar, J

Bench: Single Bench

Advocate: Ajit Mehta, for the Appellant; M.R. Modi, for the Respondent

Judgement

1. The facts giving rise to the present judge"s summons dated 11th June, 1965, taken out by the applicant, Pravin Sankalchand Shah, for vacating

the order passed by this court on 2nd March, 1963, directing private examination of several persons in so far as it relates to the applicant himself

u/s 477 of the Companies Act (1 of 1956) may be stated: The Colaba Land and Mills Co. Ltd. (hereinafter referred to as the company) was by an

order dated 7th October, 1959, directed to be wound up and the official liquidator was appointed the liquidator of the company with all the

powers. It appears that the company was ordered to be wound up, inasmuch as it was found that the affairs of the company had been mismanaged

for a number of years, that the loss caused to the company as a result of such mismanagement ran into lakhs of rupees and that further investigation

was necessary in order to bring to light the acts of mismanagement and frauds perpetrated during such mismanagement. ON 21st February, 1963,

a judge"s summons was taken out by the official liquidator applying for examination of several persons including the applicant whose names were

listed in a schedule to the summons u/s 477 of the Companies Act, 1956, and that application was supported by a signed statement of the official

liquidator dated 8th February, 1963, under rule 243(3) of the Companies (Court) Rules, 1959. In the signed statement it was held on 14th March,

1949, the managing agency agreement with M/s W.H. Brady Ltd. (the former managing agents of the company) was by a resolution terminated

necessitating payment of large amounts to the said M/s W.H. Brady Ltd., and it was further pointed out that the applicant was a director of the

company at the material time and also a signatory to the requisition for calling the said extraordinary general meeting on 14th March, 1949, and

further a liability to the tune of over Rs. 25 lakhs was shown against his name. The application was heard ex parte by Justice K.K. Desai and the

learned judge by his order dated 22nd March, 1963, directed that the examination of persons mentioned in the schedule concerning the trade,

dealings, property, books, papers and affairs of the company be held on 22nd April, 1963, and that each of them do bring with him and produce

at the time all books, papers, deeds, writings and other documents in his custody or power relating to the company. Pursuant to the said order a

summons under rule 243 (2) was served upon the applicant and other persons requiring them to attend this honourable court before the honourable

judge taking company matters in court on 22nd April, 1963 bringing with them and producing at the same time such documents as were in their

custody, possession and/or control in any way relating to or belonging to the company, but his private examination of Pravin S. Shah, the applicant

and others stood adjourned to 24th June, 1963, and the applicant and others were accordingly informed about it. It further appears that owing to

exigency of pressure of work the matter of private examination could not be taken up and was required to be adjourned form time to time and the

last of such adjournments was on 16th September, 1963, when the learned judge was pleased to adjourn the matter until such date as he would be

pleased to fix. However, on that day the learned judge directed the official liquidator to take out a misfeasance summons, restricted to the principal

charges of malfeasance, misfeasance, breach of trust, breach of duty, etc., such as the official liquidator could gather from the investigation report

of the inspector appointed by the Central Government u/s 235(a) of the Companies Act and the investigation report subsequently made by the

Companies Act and the investigation report subsequently made by th3e chartered accountants appointed by the official liquidator himself for a

further investigation in pursuance of the order made by the learned judge in that behalf, and these directions for taking out misfeasance summons

were given as the limitation period 5 years was about to expire. Accordingly, on 5th October, 1964, a misfeasance summons u/s 543(1) of the

Companies Act read with rule 260 of the Companies (Court) Rules was taken out by the official liquidator and when the same came up for hearing

before Mr. Justice Kantawala on 8th January, 1965 the learned judge gave directions under rule 261 and further fixed the hearing of the summons

for 8th November, 1965. It may be stated that the applicant, Pravin S.Shah, whose private examination u/s 477 has been ordered, is respondent

No. 7 to the misfeasance summons and in respect of various dealings, including the termination of Brady''s managing agency, a sum of Rs. 44 lakhs

and old is claimed against him in the said summons. The private examination of the applicant and others, which was adjourned form time to time,

was finally fixed on 14th June, 1965, but in the meanwhile he has taken out the present judge''s summons on 11th June, 1965, for vacating the

order passed on 2nd March, 1963, in so far as it relates to his private examination u/s 477 of the Companies Act.

2. The summons for vacating the order directing the applicant''s private examination was pressed by Mr. Mehta on three of four grounds. In the

first place, it was contended that beyond mentioning that the applicant was a signatory to the requisition calling the extraordinary general meeting on

14th March, 1949 (at which the resolution terminating M/s W.H. Brady''s managing agency had been passed) and that he was a director of the

company, the official liquidator had not indicated in his signed statement dated 8th February, 1963 how and in what manner the applicant was

expected to furnish nay information or materials for the effective prosecution of the liquidation and, unless a person was capable of furnishing such

an information concerning dealings or property or affairs of the company, his examination u/s 477 could not be ordered. Secondly, it was

contended that the order dated 2nd March, 1963, obtained ex parte by the official liquidator had been obtained by suppressing certain material

facts or rather without placing all the materials and relevant facts before the court and in this behalf it was pointed out that two material facts were

not placed before the court, viz., (1) that prior to the extraordinary general meeting of the board that was held on 14th March, 1949, where the

resolution sanctioning the termination of the managing agency was passed by the majority, a meeting of the board of directors had been held and at

that meeting it had been stated that the opinion of an eminent counsel had been obtained and (2) both at the meeting of the board of directors as

well as the extraordinary general meetings of the shareholders held on that day certain facts had been mentioned, viz., that a shareholders by name

Padamsi Morarji had already filed a suit in the High Court against the company and the directors and that the said shareholder had taken out a

notice of motion for an injunction restraining the directors and the company form holding the said extraordinary general meeting and that the said

notice of motion had been dismissed by the court on 11th March, 1949, after considering the various affidavits used in the said notice of motion.

Mr. Mehta urged that had these facts been placed by the official liquidator before the learned judge, probably the order directing private

examination of the applicant may not have been passed and, in view of these facts, which are now being put forward, the order directing private

examination of the applicant should be vacated. Thirdly, Mr.Mehta urged that, since the passing of the order dated 2nd March, 1963, directing the

private examination of the applicant and others u/s 477, a supervening event had happened, viz., the official liquidator had taken out a misfeasance

summons on 5th October,1964, and an order from this court fixing 8th November, 1965, as the date of hearing of that summons had been

obtained and what was urged was that the private examination u/s 477 of the applicant, against whom a misfeasance summons on substantially the

same facts has been taken out and is pending, would be oppressive and vexatious, inasmuch as he would be called upon to furnish information and

materials in his private examination which would be used against him later on in the misfeasance summons. Mr. Mehta in fact urged that the

applicant"s private examination would serve no other purpose but afford the official liquidator an opportunity to secure incriminating information

against the applicant in order to proceed effectively with the misfeasance summons against him and, therefore, such private examination of the

applicant should be regarded as oppressive and vexatious. Lastly, it was contended that the applicant would be, so to say, compelled to give

incriminating answers to questions touching the items or topics which are the subject matter of the misfeasance summons and these answers would

be used against him in the misfeasance proceedings and that is opposed to all principles of natural justice and equity. In support of his contentions

Mr. Mehta relied upon the decision of the Supreme Court in the case of Satish Churan Law Vs. H.K. Ganguly, and certain observations made by

Mr. Justice J. C. Shah therein. On the other hand, Mr. Mody appearing on behalf of the liquidator, though he fairly conceded that it was open to

the applicant to take out this judge"s summons for the purpose of vacating the said order. He contended that since the applicant, Pravin S.Shah,

was admittedly a director of the company at the most material period in the history of the company, especially at the time when the extraordinary

general meetings was held at which the resolution terminating the managing agency of M/s Brady & Co. was passed, it could not be said that he

could not furnish information concerning the trade, dealings, property or the affairs of the company. He. therefore, urged that the applicant could be

regarded as a person capable of giving information u/s 477 and, as such, the order directing his private examination should not be vacated. Mr.

Mody further contended that the mere fact that a misfeasance summons had been taken out and that the same was pending against the applicant

could not be pressed into service for the purpose of drawing an inference that the private examination of the purpose of drawing an inference that

the private examination of the applicant would be oppressive or vexatious. He contended that the purpose or object of section 477 under which

private examination is directed is entirely different form the purpose or object of section 543(1) under which the misfeasance summons is taken

out. He pointed out that since the applicant was a director of the company at the material time, information would be sought a at his private

examination not only on items or topics which are the subject matter of the misfeasance summons but on other points concerning trade, dealings,

property, books, papers and affairs of the company. Regarding the contention that the private examination would be oppressive and vexatious on

the ground that the applicant might be compelled to give answers which might incriminate him or be detrimental to his interest and that his answers

might be used against him in the misfeasance summons, Mr. Mody pointed out that in such a private examination u/s 477 it was open to the

applicant to claim protection from the court against such incriminating question and the court was always there to afford the necessary protection to

him. He further urged that such a stage would only arise after the applicant''s private examination is conducted for some time at the the proper time,

if any incriminating question were put to him, he could always seek protection of the court. But simply because some incriminating questions might

be asked of the applicant in his private examination, that is no ground for vacating the order directing his private examination. He, therefore, urged

that no case had been made out by the applicant for coming to the conclusion that his private examination u/s 477 should be regarded as

oppressive or vexatious, and, therefore, the summons taken out by him was liable to be dismissed.

3. In order to deal with the first two contentions of Mr. Mehta, it will be necessary to consider the provisions of section 477 of the Companies Act

and its scope and object. The relevant provision is contained in sub- section (1) thereof which runs as follows:

Section 477. Power to summon persons suspected of having property of company, etc.-

(1) The court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer

of the company or person known or suspected to have in his possession any property or books or papers of the company, or known or suspected

to be indebted to the company, or nay person whom the court deems capable of giving information concerning the promotion, formation, trade,

dealings, property, books or papers, or affairs of the company.

4. Sub-Section (2) provides for such examination being taken on oath either by word of mouth or on written interrogatories and requires such

person so examined to sign his answers if these are reduced to writing; sub section (3) provides that the court may require such officer or person

so summoned to produce any books and papers in his custody or power relating to the company; sub section (4) provides that if the officer or

person so summoned after being paid or tendered his expenses fails to appear at the appointed time, the court may cause him to be apprehended

and brought before it for such examination. Under sub-section (5) and (6) it has been provided that if the officer or person so summoned admits

that he is indebted to the company or that he has with him any property of the company, the court may order him to pay the amount or deliver the

property to the liquidator and such orders are made executable as if they are decrees under the CPC under sub-section (7). From these

provisions, it will be clear that the section has been enacted with the object of enabling the court in charge of liquidation proceedings to examine the

persons mentioned therein to ascertain, among other things, their conduct with regard to the management of the company. If the provisions of sub-

section (1) are carefully scrutinised it will be clear that the court thereunder is authorised to summon before it four classes of persons for their

examination, viz., (a) any officer of the company, or (b) any person known or suspected to have in his possession any property or books or papers

of the company, or (c) any person known or suspected to be indebted to the company, or (d) any person whom the court deems capable of giving

information concerning promotion, formation, trade, dealings,property, books or papers or affairs of the company. It will be pertinent to note that,

there are no qualifying words used. In other words, if a person to be summoned for examination u/s 477 belongs to the last three classes of

persons, such person must be known or suspected to have in his possession any persons, such person must be known or suspected to have in his

possession any property or books or papers of the company or known or suspected to be indebted to the company or must be one whom the

court deems capable of giving information pertaining to the subjects mentioned therein, but an officer of the company could be summoned

irrespective of whether he has in his possession any property, books or papers of the company or not, whether he is indebted to the company or

not or whether or not the court deems him capable of giving information. In the present case, since the applicant was admittedly a director of the

company and, therefore, an officer of the company within the meaning of section 2(30) of the Companies Act, he would fall under the first category

of persons mentioned in sub-section (1) of section 477 and as such could be summoned by the court for his examination under the section at any

stage of the liquidation proceedings. It is, therefore, not possible to accept Mr. Mehta''s contention that the order directing the applicant''s private

examination should be vacated because the official liquidator in his signed statement dated 8th February, 1963, had not indicated how and in what

manner the applicant was expected to furnish any information or materials for effective prosecution of the liquidation. The scheme of section 477

clearly indicates that an officer of the company shall, unless the contrary was established, be always deemed to be a person, who will be in a

position to furnish information, inter alia, about his conduct with regard to the management of the company and concerning the trade, dealings,

property, books or affairs of the company. Apart form this, it is an admitted position on record that the applicant was a director of the company

form 13the May, 1948 to 30th April, 1949, that is to say, for a period of about one year, and it was during this period, viz., on 14th March, 1949,

that the extraordinary general meetings of the company was held at which the resolution sanctioning the termination of the managing agency of M/s

W.H. Brady and Co. Ltd. was passed and it is an admitted fact further that the applicant was one of the signatories to the requisition for calling the

said extraordinary general meeting on 14th March, 1949. Further, it is not disputed that such termination of the managing agency of M/s Brady and

Co. Ltd. gave rise to disputes between the company on the one hand and M/s Brady and Co. Ltd. on the other and that the said disputes were

referred to arbitration and as a result of the award that was made large amounts were required to be paid by the company to M/s Brady and Co.

The question whether the applicant is accountable therefore or not is a different matter. In view of these facts there could be no doubt that the

applicant, who at the most material time was the director of the company, would be a person who could be having in his possession information

concerning the dealings and affairs of the company and as such his examination u/s 477 could be ordered.

5. Similarly, there is no substance in the contention of Mr. Mehta that the official liquidator had obtained the order dated 2nd March, 1963, ex

parte, without placing two most material facts (referred to by me in the earlier part of the judgment) before the court or that the court would not

have passed the order directing the applicant''s private examination it those facts had been placed before it. In the first place, on my construction of

section 477 as indicated above, there was no necessity on the part of the official liquidator to place before the court any other fact except the fact

that the applicant was a director and, therefore, an officer of the company in order to obtain the order in question. Secondly, though it is true that

these two facts had not been not been mentioned by the official liquidator in his statement dated 8th February, 1963, it cannot be said that simply

because these facts were not mentioned by him to the learned judge,the official liquidator had deliberately suppressed those facts from the court.

Further, even after considering these material facts which have been put forward by the applicant at this stage, I am unable to persuade myself to

take the view that no useful information-useful form the point of view of furthering the liquidation proceedings-would be forthcoming from the

applicant concerning the trade, dealings, property, books or papers or affairs of the company. In fact, the disclosure of these facts-on which the

applicant is strongly relying in exculpation of himself or by way of extenuation-renders his private examination u/s 477 all the more necessary, for it

would help the official liquidator to ascertain and appreciate all the facts correctly.

6. The next contention of Mr. Mehta has been that, since the passing of the order directing private examination of the applicant and others u/s 477,

a supervening event has happened, viz., a misfeasance summons has been taken out by the official liquidator against the applicant and the same is

pending in this court, and , therefore, the order directing private examination of the applicant should be vacated. The circumstances about the

pendency of the misfeasance summons taken out by the official liquidator against the applicant was relied upon by Mehta for presenting a two-fold

argument. In the first place, he urged that once a misfeasance summons is taken out by the official Liquidator u/s 543 of the Companies Act the

official liquidator should be taken to have crystallised all the allegations against the applicant as a delinquent director and should be taken to have

crystallised specific items of claims to be put forward against him as such delinquent director and that, therefore, a private examination u/s 477,

which is inquisitorial in character and resorted to for the purpose of collecting information and materials, should not be allowed to be held.

Secondly, he urged that the private examination of the applicant, against whom a misfeasance summons on substantially the same facts has been

taken out and is pending, would be oppressive and vexatious, inasmuch as he would be called upon to furnish information and materials in his

private examination, which would be used against him later on in the misfeasance summons. According to Mr. Mehta, the private examination of

the applicant in the present case, would only afford the official liquidator an opportunity to secure incriminating materials against the applicant and

would facilitate the prosecution of the misfeasance summons against him. In order to deal with these contentions of Mr. Mehta, it will be necessary

to consider side by side the provisions of section 477 and 543 of the Companies Act as also the objects underlying these two sections. In the

earlier part of my judgment I have already referred to the provisions of section 477 and I have also indicated the object with which that section

appears to have been enacted. Now section 543 runs as follows:

543. Power of court to assess damages against delinquent directors, etc-(1) if in the course of winding up a company, it appears that any person

who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers,

manager, liquidator or officer of the company-

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the court may, on the application of the official liquidator, of the liquidator, or of any creditor or contributory, made within the time specified in that

behalf in sub-section (2), examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator or

officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the court

thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance

or breach of trust, as the court thinks just.

(2) An application under sub-section (1) shall be made within five years form the date of the order for winding up, or of the first appointment of the

liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable.

7. Reading the section as a whole, it will appear clear that the principal object of the section is to enable the court, upon an application being made

to it by official liquidator in that behalf, to assess the damages or the exact amount for which a delinquent director or officer of the company could

be held liable or accountable to the company in respect of the acts of misfeasance or breach of trust or any property or money which has been

misapplied or retained by him. In other words, the provisions of these two sections are materially different in their object. Reading section 477 and

543 of the Companies Act side by side, it will at once become clear that, though both are procedural sections, the nature of the machinery

provided is also different. Whereas the step or proceeding contemplated u/s 477 is of an exploratory nature, that is to say, it is a proceeding in the

nature of an inquiry and investigation for the purpose of collecting information on subjects mentioned therein, the proceeding u/s 543 is a further

step for ascertaining and assessing the amount that may be due or accountable by a delinquent director officer to the company. Further, it is also

clear that there is nothing in either of these two sections or nay other provision of the Companies Act to warrant an inference that once a

misfeasance summons is taken out u/s 543, private examination u/s 477, that is to say, a proceeding by way of an inquiry or investigation for the

purpose of getting information on subjects mentioned in that section should cease. In fact, the opening words of section 477 clearly indicated that

the examination thereunder could be applied for and directed ""at any time after the appointment of a provisional liquidator or the making of a

winding-up-order"". The test for making the order under the section, as has been held in many English cases and in the Supreme Court decision in

Satish Churan Law Vs. H.K. Ganguly, is whether it is just and beneficial for the purposes of the winding up of the company. It is well settled that

mere pendency of an action against an officer of the company is not sufficient to justify him in refusing to submit himself to the examination under

the section. In Ex-parte Leaver (1884) 51 LT 817 it has been held that the liquidator may properly apply for examination u/s 115 of the English

Companies Act, 1862 (similar to section 477 of our Act) for the purpose of ascertaining whether the proceedings should be continued against an

officer of the company. So also In re Metropolitan Bank (Heiron''s case) (1880) 15 Ch. D.139, it has been held that it is open to the liquidator to

apply for such examination either before or even after he has brought an action against an officer of the company. It is, therefore, not possible to

accept Mr. Mehta''s contention that once a misfeasance summons is taken out by the official liquidator u/s 543, a private examination u/s 477

could not or should not be held.

8. Turning to the second branch of Mr. Mehta''s argument that the private examination of the applicant, against whom a misfeasance summons on

substantially the same facts has been taken out and is pending would be oppressive and vexatious, it is not possible to accept that arguments either.

It may be that in the private examination of the applicant, items or topics which are the subject-matter of the misfeasance summons might crop up

and question on those topics might be put to him, but that by itself is no reason why his private examination has been directed u/s 477 is to enable

the official liquidator to obtain information concerning the trade, dealings, property, books, papers and affairs of the company. Since the applicant

was a director of the company for about one year which was the most material period in the history of the company, he was unquestionably

concerned with guiding the affairs of the company during that period and,therefore, prima facie a person who would be able to give information

likely to promote the purpose of winding up and as such it cannot be said that his to promote the purpose of winding up and as such it cannot be

said that his private examination would only serve the purpose of facilitating the prosecution of the misfeasance summons against him, as is

contended by Mehta. There is a possibility that items or topics which are the subject matter of the misfeasance summons might crop up in his

private examination, but such mere possibility cannot be a ground for holding that his private examination would be oppressive or vexatious. Mr.

Justice J.C. Shah in the case of Satish Churan Law Vs. H.K. Ganguly, and the relevant observations which occur in paragraph 10 of the judgment

runs as follows:

The jurisdiction to vacate or modify an ex parte order under rule 243 being granted, the question which falls to be determined is whether the

order passed by Mr. Justice Mitter was oppressive or vexatious or otherwise liable to be vacated or modified for adequate grounds. In our view,

there is no ground for holding that the order is liable to be vacated or modified. It was never even suggested in the High Court that the order for

examination was per se oppressive or vexatious. This is not a case in which the order is sought to facilitate the progress of an action filed by the

official liquidator against the appellant, nor is there reason to hold that the order is sought in aid of some collateral purpose-a purpose other than

effective progress of the winding up in the interest of the company.

9. Relying upon these observations Mr. Mehta urged that if the order for private examinations was going to facilities the progress of an action filed

by the official liquidator against the director or officer of the company, such order is liable to be vacated and according to Mr. Mehta, in the

present case, since the misfeasance summons has already been taken out by the official liquidator against the applicant, his private examination u/s

477 would facilities the progress of the action taken against him. It is not possible to accept the interpretation which Mr. Mehta is seeking to put

upon the observations themselves do not warrant the interpretation that is sought to be put thereon, it is obvious that these observations will have to

be understood in the context of the facts of that case and the questions which arose for determination in that case. Principally, two question arose

for determination in the case; the first, whether an ex parte order directing examination of a person u/s 477 was liable to be modified or vacated on

an application by the person affected thereby and, secondly, whether there was any ground for discharging or modifying the order that had been

made u/s 477. On the first question, the Supreme Court has taken the view that, since the order u/s 477 is usually obtained ex parte, it is liable to

be modified or vacated on an application by a person affected thereby. On the second question, their Lordships had to consider whether on facts

the appellant had brought out facts and circumstances on the basis of which the order directing his private examination could be vacated or

discharged and, while considering this aspect of the matter, their Lordships pointed out that it was not a case in which it could be said that the

order for private examination was sought to facilitate the progress of any action filed by the official liquidator against the appellant, for there was no

action filed by the official liquidator against the appellant, for there was no action pending against the appellant at the instance of the official

liquidator in that case and, therefore,all that their Lordships were concerned in pointing out was that, since there was no such action pending

against the appellant concerned, there will be no question of the private examination being sought for the purpose of facilitating the progress of any

such action. It is in this context that these observations relied upon by Mr. Mehta will have to be understood. I do not think that the Supreme

Court wanted to lay down as a proposition of law that once a liquidator had taken action against the officer of the company the liquidator could not

obtain an order for a private examination of such officer of the company. In my view, what must be shown by a person who is affected by the

order directing his private examination is that not only an action at the instance of the liquidator is pending against him but also that his private

examination is sought solely for the purpose of facilitating the progress of that action against him or that his private examination is sought for the

purpose of harassing him. In the present case no materials have been brought on record by the applicant to show that his private examination was

sought by the official liquidator either for harassing him or solely for the purpose of facilitating the progress of the misfeasance summons taken out

against him. In fact, it may be pointed out that the order for private examinations of several persons including the applicant on 5th October, 1964.

That the Supreme Court did not want to lay down such a proposition of law, as is contended for by Mr. Mehta, will be clear form the further fact

that the English decision reported as In re Metropolitan Bank (Heiron''s case) (1880) 15 Ch. D. 139, where it has been held that it is open to

liquidator to apply for such private examination either before or even after he has brought an action against an officer of the company, was cited

and has been approved of by the Supreme Court. In that case (Heiron''s case) a liquidator, who had already brought an action on behalf of the

company against an officer, had exhibited interrogatories, which had been fully answered by the defendant and thereafter the liquidator sought an

order form the court to examine the defendant u/s 115 of the companies Act, 1862 (similar to section 477 of our Companies Act), and it was held

that the action of the liquidator was vexatious. The observations of Lord Justice Bramwell, which appear at page 142 of the report, are very

material and they run as follows:

I am of the same opinion. It is unjust to say that this summons is a matter of right, for, when the sections to which we have been referred are

considered, the court is to grant it if it appear to be just and beneficial. Now this liquidator was clearly entitled to come to the court for this

examinations before he brought the action, and he was also entitled to apply to the court after action brought; but the question now is, what are his

rights after he has examined the defendant on interrogatories which have been sufficiently answered? I am of opinion he ought to have made this

application earlier. He has harassed and vexed this defendant with one set of interrogatories, and now, upon a surmise that he may learn something

more on another examination, he wants to do so again. I am of opinion that in order to obtain this order the liquidator ought to come to the court

with such materials as to shoe that, plus the interrogatories already exhibited, he has a case which entitled him to have a further examination of the

defendant. Here no such case is made out. It is much better, therefore, that liquidators should understand that if they wish to exercise this

inquisitorial power they ought to do so in the first instance, and not wait until after they have tried their hand at one attempt, which may not perhaps

have turned out quite so successful as they anticipated.

10. From these observations two positions become very clear. In the first place, the liquidator is entitled to an order for private examination of an

officer of the company either before he institutes any action against that officer or even after he has instituted action against that officer and,

secondly, if the liquidator has already made an attempt to get the necessary information form the officer concerned by exhibiting interrogatories to

him, any other attempt in the same direction by resorting to the provisions of the Companies Act, which entitled the liquidator to obtain private

examination of the officer, would amount to harassment to the officer and in those circumstances private examination should not be ordered. In

other words, it will appear clear that the liquidator''s application seeking private examination of the officer concerned was held vexatious not

because he had already filed an action against that officer, but because he had, prior to his application, exhibited interrogatories to that officer and

that officer had fully answered them. In the present case no such harassment or harassment of any other kind has been shown. In my view,

therefore, the mere fact that a misfeasance summons has been taken out against the applicant and that the same is pending and a mere possibility

that items or topics which are the subject matter of the misfeasance summons might crop up in his private examination, are no grounds for holding

that the applicant''s private examination would be oppressive or vexatious.

11. As regards the last contention that the applicant would be called upon to give answers to question which might be incriminatory in nature or

would be detrimental to his interest either in the misfeasance or in any criminal proceeding that may be launched against him, I do not think that the

apprehension entertained by him is in any manner justified. It is a well known proposition that at such private examination it is open to the examinee

to refuse to answer question on matters in which he might incriminate himself or on matters involving professional confidence. If need be, I may

refer to two passages, one form Buckley on the Companies Acts, and the other is Halsbury''s Laws of England. The relevant passage in Buckley

appear at page 562 (13th edition) and it runs as follows:

The only matters as to which the witness can refuse to answer are matters in which he may incriminate himself, and matters involving professional

confidence.

In Halsbury, 3rd edition, volume 6, paragraph 1218 (relevant portion) runs as follows:

The witness may, it seems, refuse to answer matters in which he may incriminate himself, and matters involving professional confidence.

12. The aforesaid passages, if I may state, are based upon an English decision reported as Whitworth''s case: In re Silkstone and Dodworth Coal

and Iron Co. (1881) 19 Ch. 118. The applicant can always invoke the court''s protection in such matters.

13. In the result, I feel that no case has been made out by the applicant for vacating or modifying the order dated 2nd March, 1963. The judge''s

summons is, therefore, dismissed with costs. Costs to be taxed.