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HÁFIZA'BA'I v. KA'ZI ABDUL KARIM.

Attorney for plaintiff:—Mr. *K. D. Shroff.*

Attorneys for first defendant:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorney for the other defendants:—Mr. *K. D. Shroff.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1894.
September 6.

IN RE JEHA'NGIR B. KARA'NI & Co., LIMITED.

HORMASJI RUSTOMJI DASAR AND OTHERS, PETITIONERS, *v.* PESTONJI EDALJI DHA'RWA'R AND ANOTHER, RESPONDENTS.

Company—Voluntary winding up—Inquiry into conduct of liquidators—Indian Companies Act (VI of 1882), Sec. 214—Practice—Procedure.

Where contributories of a company in voluntary liquidation complain of the conduct of liquidators in the winding up, and desire an inquiry under section 214 of the Indian Companies Act (VI of 1882), the proper procedure is by summons in chambers.

Where it is sought to make an officer of a company liable for misapplication of the funds of a company or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits.

RULE *nisi* to set aside an *ex-parte* order dated 19th July, 1894, made under section 214 of the Indian Companies Act (VI of 1882), directing an inquiry into the conduct of liquidators, &c. The Jehángir B. Karáni Co., Limited, was registered as a joint stock company in 1892, and carried on the business of booksellers and publishers, &c. On the 23rd May, 1894, the company went into voluntary liquidation, and Pestonji Edalji Dhárwár and Sorábji Kaikhosru Pátuk were appointed liquidators.

On the 12th July, 1894, the petitioners presented a petition to the High Court complaining of the conduct of the liquidators, alleging that they had sold a considerable portion of the company's property very much below its proper value, and bringing other charges against them in connection with the said sales. The following clauses of the petition set forth the petitioners' case:—

"14. Your petitioners are at a loss to account for the extraordinary conduct of the liquidators aforesaid in selling the company's assets at the ridiculous prices aforesaid. Before doing so they did not cause any valuation or inventory of the assets to

be made, or invite any tenders or advertise, nor did they call any meeting of shareholders or creditors to consult them or ascertain their wishes; and if the said sales are *bonâ fide* sales, which your petitioners do not admit, your petitioners say that the conduct of the liquidators amounts to gross negligence and misfeasance on their part and is a breach of trust reposed in them.

"15. Your petitioners say that there are 37 shareholders in the said company. The creditors of the company have claims amounting to Rs. 65,000 or thereabouts, out of which creditors to the extent of Rs. 20,000 or thereabouts being secured creditors have been paid off, and creditors to the extent of Rs. 14,000 are in England. All the creditors of the said company, your petitioners believe, support this application. All the independent shareholders also, your petitioners believe, support it."

The prayer of the petition was as follows:—

"(1) That this Honourable Court will exercise, in the case of this company, all the powers which this Court might exercise if the said company were wound up by the Court, and in particular will exercise the powers given by section 214 of the Indian Companies Act (VI of 1882).

"(2) That this Honourable Court will examine into the conduct of the said Pestonji Edalji Dhárwar and Sorábji Kaikhosro Pátuk in and about the matter of the sales aforementioned, and will compel them to contribute such sums of money to the assets of the company by way of compensation in respect of the misfeasance or breaches of trust complained of by your petitioners as this Honourable Court thinks just."

On the 19th July the petitioners obtained an *ex-parte* order directing an inquiry in chambers into the conduct of the liquidators with regard to the sales mentioned in the petition, "and as to what sum or sums of money (if any) the said liquidators should be compelled to contribute to the assets of the said company by way of compensation in respect of misfeasances or breaches of trust complained of in the said petition."

On the 30th July, 1894, the liquidators obtained a rule *nisi* to set aside the above *ex-parte* order.

The rule now came on for hearing.

Lang (Advocate General) for the liquidators in support of the rule:—The order of the 19th July was obtained *ex parte*, and without any notice to the liquidators of the charges made against them. The procedure is wrong. The petitioners should have taken out a summons, and the case should have been heard on affidavits filed by both parties before any order was made. There is no precedent for such an order. He referred to sections 162, 182

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and 214 of the Indian Companies Act (VI of 1882) and the corresponding sections of the English Act, *viz.* sections 115, 138 and 165; Lindley on Companies (5th Ed.), p. 97; Rules 78 and 79 under the English Companies Act.

Inverarity for the petitioners showed cause:—Under section 214 of the Indian Companies Act (VI of 1882) the person proceeded against is not entitled to notice. To get an order under that section it is only necessary to satisfy the Court that there is a *primâ facie* case against the persons charged—*Stringer's case*(2). In proceedings under section 115 of the English Act no notice is given to the person against whom the order is applied for. Section 214 of the Indian Act gives a creditor a right to such order. The English rules do not apply in India. He

(1) Indian Companies Act (VI of 1882), sections 182 and 214:—

182:—Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound-up by the Court. Any such application may be made by motion. The Court, if satisfied that the determination of such question or the required exercise of the power will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order or decree on such application as the Court thinks just.

214:—Where, in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for, any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator or of any creditor or contributory of the Company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any monies so misapplied or retained, or for which such officer has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

Explanation I.—The banker of a company is not, as such, an officer within the meaning of this section.

Explanation II.—Proceedings cannot be taken under this section against the representatives of a deceased officer.

(2) L. R., 4 Ch., 475.

referred to *In re Gold Company*[1]; *Re Sir John Moore Gold Mining Company*[2].

Lowndes for English creditors on the same side.

FARRAN, J.:—In this matter the Advocate General obtained a rule *nisi* on the 30th July last to set aside an order made on the 19th idem, directing an inquiry into the conduct of the liquidators of the company under section 214 of the Indian Companies Act (VI of 1882), on the ground that it was improperly made without notice to the liquidators and otherwise than on affidavit.

The point involved is of little importance, and, though it was argued at considerable length, of no difficulty. It involves merely a question as to the proper procedure to be adopted in order to enable creditors and contributories of a company to put the Court in motion under section 214. Though the company is in course of voluntary liquidation, the Court, on its aid being invoked by the liquidators or contributories, is enabled by section 182 to determine questions and to exercise powers given by the Act to the same extent as if the company were being wound up by the Court or under its supervision. This section has been interpreted by the Courts in England in the broadest and most extensive sense. In *In re Union Bank of Kingston-upon-Hull*[3] Sir George Jessel, M.R., said: "In a voluntary winding-up, a liquidator may apply to the Court to decide any question fairly arising in the winding up, and it is much cheaper to bring it before me by way of motion than by an action. 809-10."

It was at one time a question whether the Court would exercise the stringent powers conferred by section 214 in the case of a company being voluntarily wound up, but that doubt was set at rest by *Rance's case*[4], where the Court of appeal, reversing a decision of the Master of the Rolls, made an order, in the case of a company being wound up voluntarily, that one of its past directors should repay a sum of £125 to the company. That case is also important as showing how the Court's aid is invoked in such a case. There the liquidator took out a summons to have it declared that Mr. Rance was liable to pay the sum in question,

(1) 12 Ch. D, 77.
(2) 25 W. R., 900.
(3) 13 Ch. D., 808.
(4) L. R., 6 Ch., 104.

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and asking for an order that he should pay it. The same course was adopted in *In re National Funds Assurance Co.*(1), where a summons was also taken out. This was a compulsory winding up. In the case of *In re British Corporation*(2), leave to serve a summons in Scotland, taken out under the section in question, was granted. Mr. Palmer in his work (p. 808, 4th Ed.) states that the application was usually made by summons. The form is given at p. 809. I have examined all the cases in the Law Reports cited by Mr. Palmer under the section, and find that in all of them (a very large number), where the nature of the proceedings is indicated (except in *Stringer's case*, where the application was upon notice of motion) they were by way of summons. It may, therefore, I think, be taken that the practice in the Supreme Court in England under the Act of 1862 was to initiate proceedings under section 214 by summons. Throughout this judgment I refer to the sections by their numbers under the Indian Act (VI of 1882).

The wording of the section corresponding with section 214 was altered by the Act of 1890, and under it rules have been framed (Rules 78 and 79) which provide that in Courts other than the Supreme Court, application under the revised section shall be by motion (after eight days' notice), while in the Supreme Court the old practice of taking out a summons is to be observed. There can now be no question as to the English practice. The case of *In re Gold Company*(3), cited by Mr. Inverarity, shows that when proceedings allowed by section 182 of the Indian Act are initiated by contributories, notice to the liquidator ought to be given, as *primâ facie* he is, as it were, *dominus litis*, and is presumably the most proper person to conduct the proceedings. When the proceedings are, however, taken against the liquidator himself, it may be presumed that he does not desire to initiate them himself, and in such a case it is not, therefore, necessary that he should have notice beyond the notice given by the service of the summons upon him. It might have been thought, having regard to the closing provision of section 182 of the Indian Act, that the Court, before issuing a summons under section 214, should give its leave

(1) 10 Ch. D., 118. (2) 5 Ch. D., 749.

(3) 12 Ch. D., 77.

or sanction to such proceedings being taken,—beyond I mean the sanction involved in the issuing of the summons itself. This is not so. I cannot find in the English cases any trace of the Court, when its assistance is invoked under section 182, to put in force the provisions of section 214, making any preliminary order or even giving any preliminary sanction. In *Rance's case*(1), where the application of section 214 to the case of a voluntary liquidation is so fully discussed, the Court does not suggest the necessity of such preliminary order or sanction. The reason is this. The section (182) provides that "the Court, if satisfied that the required exercise of power will be just and beneficial, may accede, wholly or partially, to such application on such terms and subject to such conditions as the Court thinks fit, or it may make such other order or decree on such application as the Court thinks just." It is thus in a certain sense a discretionary jurisdiction given to the Court. The section (182) does not give the applicant an absolute right to call on the Court to exercise its powers. It is, therefore, fit and just that the person attached, on the return of the summons taken out against him, should have an opportunity of showing not only that he has a good defence upon the merits, but also that there are peculiar circumstances in the case; that it would involve him in some peculiar hardship if the claim against him were to be tried in this summary way; which would render it unjust to put the powers of section 214 in force against him. If an *ex-parte* order has already been made under section 182, that an inquiry shall take place under section 214, the Judge hearing the summons would be deprived of his power to hear the person sought to be charged in support of such an objection. He would be robbed of his discretion. The case *In re Gold Company*(2), relied on by Mr. Inverarity, and the cases of *In re Silkstone, &c., Coal and Iron Company*(3) and *In re Metropolitan Bank*(4), all decided upon section 162, are different. They are cases in which the order of the Court was to examine a witness, an officer of the company, in relation to its affairs. Such an order may be made *ex parte*, and the person to be examined has, as a rule, no right to object to his being examined. In such cases the Court, making

(1) L. R., 6 Ch., 104.
(2) 12 Ch. D., 77.
(3) 19 Ch. D., 118.
(4) 15 Ch. D., 139.

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the examination order, considers beforehand (since it is an *ex-parte* order) whether it is just and beneficial to make it, and often imposes limits and conditions upon the person applying for it.

For these reasons I consider that the order made on the 19th of July last was not warranted by the English authorities and ought not to have been made in the form in which it has been drawn up. When I made the order, I made it in terms of the petition. The order as drawn up goes beyond these terms, but I do not think that I ought to have made the order even in the terms of the petition. Although I consider that, for the reasons I have given, there was no necessity for an application such as that made on the 19th of July at all, and that a summons taken out in accordance with the practice in England, or a rule applied for on notice, would have been sufficient, I am not prepared to say that it was not open to the applicants to ask for preliminary leave to institute proceedings under section 214. I shall not, therefore, discharge the order of the 19th July, but amend it by ordering that the petitioners be at liberty to take proceedings under section 214 in respect of the matters referred to in their petition. Such an order determines nothing against the liquidators, and is such as can be properly made *ex parte*. It should not be served on the liquidators. Though the practice in England is, as I have shown, well established to take out a summons in the Supreme Court, or, in other Courts, a rule upon notice in cases like the present, each founded upon proper materials, the practice in this Court is not equally uniform, and there is no rule to guide practitioners. Petitions in some cases have been presented, and in others summonses have been taken out. I cannot, therefore, say that a petition in the present instance was erroneous. I shall, therefore, now simply accept it and set it down for hearing in chambers on some future day.

I would at the same time point out that where it is sought to make an officer of a company liable for misapplication of the funds of a company, or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits. The position taken up by the petitioners

in the 7th paragraph of their affidavit is, in my opinion, quite untenable. They say "if all the matters are allowed to be disclosed on affidavits, the principal object of the enquiry would be frustrated. The various points upon which the liquidators, and other persons whose evidence is important, have to be examined, and the facts which have to be proved, would become known to them, which, under the circumstances of this case, should not be allowed to be done."

In *Stringer's case*(1), Selwyn, L. J., in pointing out why the Courts should not decline the exercise of the summary jurisdiction given by the Companies Act, uses the following words. (His Lordship here quoted the words, p. 484, and the observations of Giffard, L. J., in the same case, p. 494.) These observations show the spirit in which proceedings under the sections in question (as in all other litigation in British Courts) should be conducted, openly and fairly with full notice to the persons charged of the facts and circumstances upon which the petitioners rely, and of the points and grounds upon which they propose to rest their case. I must, therefore, direct that they support their application by affidavit or affidavits. This or these will be answered by the liquidators, and the case will then come on in chambers and be heard much as though it were a suit. This is in accordance with the 96th rule under the Companies Act. That and rule 10 of the High Court Rules seem to show that a summons rather than a rule upon notice is the proper procedure in such a case as this. A petition is more properly presented when the direction of the Court is sought upon admitted facts, than when a hostile order is applied for upon disputed materials.

The order, then, will be that the order of the 19th July be varied by substituting, for the words "that an enquiry be held in chambers on Thursday, the 2nd day of August next, at 10-30 A. M., into the conduct of," the words "that the petitioners be at liberty to take steps under section 214 of the Companies Act to determine the liability (if any) of." The petition will be accepted and referred to chambers. The hearing of it will be fixed by the

(1) L. R., 4 Ch., 475.

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Judge in chambers after the filing of the affidavits. The petitioners must pay the costs of this rule.

Attorneys for the petitioners:—Messrs. *Pestanji, Rustim, and Kola.*

Attorneys for the liquidators:—Messrs. *Craigie, Lynch, and Owen.*

Attorneys for the English creditors:—Messrs. *Turner and Hemming.*

ORIGINAL CIVIL.

Before Mr. Justice Starling.

1893. *September* 23.

JAGANNA'TH RA'MJI, PETITIONER.*

Guardian and ward—Minor—Power of Court to appoint guardian of person and estate of a minor—Power of guardian to sell minor's property.

The power of the Court of Chancery to appoint guardians to infants, whether such infants have property or not, is possessed by the High Court.

Quœre whether a guardian appointed by the Court (except under some special Act) has any authority to sell the property of his ward unless the express sanction of the Court is given.

IN chambers.

The petitioner presented his petition praying that he might be appointed guardian of the person and property of his two minor sons Dámodar Jagannáth and Bháskar Jagaṇnáth, and that he might be empowered to mortgage certain family property.

The petition stated that he and his two minor sons were joint in food, worship and estate, and resided together in Bombay; that they were possessed of certain ancestral immoveable property described in the schedule to the petition; that the petitioner had incurred costs, amounting to about Rs. 800, in a suit which was still pending; that he was indebted to various persons and had no moveable property wherewith to pay the said debt; that the creditors were pressing for payment, and that unless paid they would file suits to the detriment of the family. He further stated that subject to the sanction of the Court he had con-

*Miscellaneous No. 770.