ORIGINAL CIVIL.

Before B. R. Tuli, J.

PUNJAB FINANCE PRIVATE LIMITED,—*Petitioner.*
versus
MALHARA SINGH, ETC.,—*Respondents.*

C.O. No. 101 *of* 1971.

May 31, 1973.

Companies Act (I of 1956)—Sections 457 and 643—Companies (Court) Rules (1959)—Rule 139—Whether mandatory or merely directory—Non-compliance of the rule—Whether makes the proceedings taken by the Official Liquidator as void—

Held, that the use of the words 'shall' and 'may' in the two clauses of section 643 of the Companies Act clearly indicates that the rules framed under clause (a) are mandatory while the rules framed under clause (b) are merely directory. It is open to the Supreme Court not to make rules for which provision is made in clause (b) of sub-section (1) of section 643. If the Supreme Court makes the rules with regard to the matters mentioned in clause (b) of section 643(1), those rules cannot be said to be mandatory in character and failure to comply with those rules is not fatal. There is no provision in this Act prescribing that rules shall be framed with regard to the manner in which the application for directions is to be made by the Official Liquidator and who are the parties to whom notice of that application will issue. Section 457 of the Act also does not require that an application should be made to the Court for obtaining the sanction by the Liquidator. It was not necessary for the Supreme Court to make any rules in respect of the manner in which the Official Liquidator is to obtain the sanction of the Court for exercising the powers mentioned in clauses (a) to (e) of sub-section (1) of section 457. Hence rule 139 of Companies (Court) Rules, 1959, in so far as it relates to applications made by the Official Liquidator to the High Court for obtaining sanction to exercise the powers mentioned in clauses (a) to (e) of section 457(1) was not necessary to be framed by the Supreme Court and, if framed, it has to be considered as merely directory and not mandatory. It is only for the guidance of the Official Liquidator and the Court and not that its non-compliance makes a proceeding taken by the Official Liquidator as void or *non est* or that the Court has no jurisdiction to deal with the same.

Claim Petition under section 446(2) *read with section* 468 *of the Companies Act,* 1956, *for recovery of Rs.* 20,318.67.

K. S. Keer, Advocate, *for the petitioner.*

D. R. Nanda, Advocate, *for Respondents* 1 and 3.

JUDGMENT

TULI, J.—The Official Liquidator filed a petition under section 446(2) read with section 468 of the Companies Act for the recovery of Rs. 20,318.67 against the respondents. A preliminary objection has been raised by the respondents that the petition is not maintainable because proper sanction under section 457 of the Companies Act was not accorded by this Court to the Official Liquidator in pursuance of which he could file the present petition. Consequently the following preliminary issue was framed on March 29, 1973:—

> Whether proper sanction under section 457 of the Companies Act was accorded by this Court to the Official Liquidator to file this petition ?

(2) The Official Liquidator examined Shri H. R. Khanna, Assistant, Liquidation Branch of this Court, who stated that the Official Liquidator sent his application, dated May 19, 1971 (Exhibit P. 1) to this Court which was placed before Sandhawalia, J., for orders with the note of the office in which the prayers made by the Official Liquidator were pointed out. The learned Judge sanctioned the application on June 7, 1971, and in accordance with those orders, the Official Liquidator was conveyed the sanction of the Court to the prayers made in his application. The letter sent to the Official Liquidator is Exhibit P. 2, which is signed by Shri Kapur Singh, Deputy Registrar (J). In Cross-examination, the witness admitted that no notice of the Official Liquidator's application was sent to the petitioner on whose petition the winding up order was passed as no suggestion was made in the application of the Official Liquidator that such a notice should be issued. The Official Liquidator had not obtained any fresh sanction for filing of the present petition after the according of sanction by Sandhawalia, J., on June 7, 1971. No evidence has been led on behalf of the respondents.

(3) The point for determination is whether rule 139 of the Companies (Court) Rules, 1959 (hereinafter called the rules), is mandatory or merely directory and what is the effect of non-compliance therewith. The rules were framed by the Supreme Court under sections 643(1) and (2) of the Companies Act, 1956, reading as under:—

> "643(1) The Supreme Court, after consulting the High Court,
>
> (a) shall make rules providing for all matters relating to the winding up of companies which, by this Act, are

to be prescribed; and may make rules providing for all such matters as may be prescribed, except those reserved to the Central Government by sub-section (5) of section 503, sub-section (3) of section 550, section 552 and sub-section (3) of section 555 and

(b) may make rules consistent with the Code of Civil Procedure, 1908,

(i) as to the mode of proceedings to be had for winding up a company in High Courts and in Courts subordinate thereto;

(ii) for the voluntary winding up of companies whether by members or by creditors;

(iii) for the holding of meetings of creditors and members in connection with proceedings under section 391 ;

(iv) for giving effect to the provisions of this Act as to the reduction of the capital * *; and

(v) generally for all applications to be made to the Court under the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, the Supreme Court may, by such rules, enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the following matters, that is to say:

(a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories ;

(b) the settling of lists of contributories and the rectifying of the register of members where required and collecting and applying the assets;

(c) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator ;

(d) the making of calls; and

(e) the fixing of a time within which debts and claims shall be proved;

to be exercised or performed by the Official Liquidator or any other liquidator as an officer of the Court, and subject to the control of the Court:

Provided that the liquidator shall not, without the special leave of the Court, rectify the register of members or make any call."

Sub-section (1) of section 643 is in two parts (a) and (b) For the matters mentioned in clause (a), the Supreme Court 'shall' make rules while under clause (b), the Supreme Court 'may' make rules. The use of the words 'shall' and 'may' in these two clauses clearly indicates that the rules framed under clause (a) are mandatory while the rules framed under clause (b) are merely directory. It is open to the Supreme Court not to make rules for which provision is made in clause (b) of sub-section (1) of section 643. It cannot, therefore, be said that if the Supreme Court had made rules with regard to the matters mentioned in clause (b) of section 643(1), those rules are mandatory in character and failure to comply with those rules is fatal to the maintainability of the present petition. Under clause (a) of section 643(1), the rules have to be made providing for all matters relating to the winding up of companies which, by the Companies Act, have been prescribed. There is no provision in this Act prescribing that rules shall be framed with regard to the manner in which the application for directions is to be made by the Official Liquidator and who are the parties to whom notice of that application will issue. Under section 457(1) of the Companies Act, the Official Liquidator, with the sanction of the Court, can exercise the powers mentioned in clauses (a) to (e) thereof. Clause (a) relates to the institution or defence of any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the Company. The present petition is clearly a legal proceeding filed in the name and on behalf of the Company and the sanction of the Court to file the same was necessary to be obtained by the Official Liquidator. As I have said above, there is no provision in the Act expressly providing for rules being made as to the manner of making the application for obtaining the sanction of the Court under section 457(1) and rules for that purpose could be made by the Supreme Court only under clause (b) (v) of sub-section (1) of section 643 which is a general provision as it states that "generally for all applications to be made to the Court under the provisions of this Act." Section 457 does not require that an application should be made to the Court for obtaining this sanction and it can be said that it was not necessary for the Supreme Court to make any rules in respect of the manner in which the Official Liquidator is to obtain the sanction of the Court for exercising the powers mentioned in clauses (a) to (e) of sub-section (1) of section 457. I am, therefore, of the opinion that rule 139 of the rules insofar as it relates to applications made by the Official

Liquidator to the High Court for obtaining sanction to exercise the powers mentioned in clauses (a) to (e) of section 457(1) was not necessary to be framed by the Supreme Court and, if framed, it has to be considered as merely directory and not mandatory. It is only for the guidance of the Official Liquidator and the Court and not that its non-compliance makes a proceeding taken by the Official Liquidator as void or *non est* or that the Court has no jurisdiction to deal with the same. In the present case, the sanction of the High Court was in fact obtained. As the evidence shows, the Official Liquidator sent his application to the office of this Court, which was placed with the office note before Sandhawalia, J., who sanctioned the powers to be exercised by the Official Liquidator. That sanction of this Court was conveyed to the Official Liquidator and on the basis of that sanction he filed the present petition and many others.

(4) It has, however, been argued by the learned counsel for the respondents that a Division Bench of the Gujarat High Court in *East India Co.* v. *Official Liquidator and another* (1) has observed that—

> "compliance with these requirements of rule 139 is a condition for the exercise of the power to give directions in regard to sale of the property of the company by the official liquidator. If the condition is not satisfied, the Court cannot exercise the power, or, in other words, the Court could lack power and the purported exercise of the power would be no exercise at all: it would be void and of no effect. This would appear to be the plain inevitable effect of the language used in rule 139 and no authority is needed to support it but we find that there are at least two decisions of high authority where identical approach has been adopted in construing similar statutory enactments."

The learned Judges were of the view that—

> "the Official Liquidator cannot take any steps for sale of the property of the Company without obtaining the directions of the Court, a view which also finds support from section 457, sub-section (3), which prescribes that the exercise by the liquidator, in a winding up by the Court, of the powers conferred by section 457, sub-sections (1) and (2) shall be subject to the control of the Court and

(1) (1970) 40 Comp. cases 297.

the Court has no power to give such directions unless the Official Liquidator takes out a summons for directions, notice of the summons is given to the petitioning creditor and if the petitioning creditor appears, he is heard on the summons. The giving of notice of the summons for directions to the petitioning creditor and affording him an opportunity to be heard are matters of substance and not mere matters of form: as we shall presently point out, they constitute 'essentials of justice."

A little later on page 320 of the report, the learned Judges observed that—

"One main objection which was put forward by the learned Advocate-General against the acceptance of this view was that if an order or decision in breach of *audi alter partem* were held to be void, it would be a nullity for all purposes and even a third party would be entitled to set up its voidness in a collateral proceeding. If, for example, the Brighton constable were content to accept dismissal and his successor made an order regulating public processions under Public Order, 1936, the organisers would be able to attack it on the ground that the predecessor was in law the chief constable and that the successor was not. But this, said the learned Advocate-General, was clearly not the position and the order or decision could not, therefore, be held to be void. This argument, in our opinion, is without force. It proceeds on an assumption that when an order is void, it must be regarded as a nullity of which any person having legitimate interest can take advantage. This assumption is plainly inncorrect. When we speak of voidness, we must remember that there is no such thing as voidness in the absolute sense. Voidness, like most legal concepts, is relative rather than absolute. The question always is, void against whom ? If an order is void only against a particular person, a third party cannot challenge its validity but the person against whom it is void can always set up its voidness in a collateral proceeding, for against him it is void *ab initio* and has never been of any effect: it has always ben a nullity so far as he is concerned: *vide* the decision of the Privy Council in *Durayappah* v. *Fernando* (2). A decision given

(2) (1967) 2 A.C. 337.

in breach of *audi alteram partem* would, therefore, be void as against the party affected, but it would be valid as against the rest of the world."

These observations clearly show that only the petitioning creditor, to whom notice of the application for obtaining sanction was not given, can raise the objection that the order passed in his absence is void or a nullity but against the rest of the world it would be a valid order. In view of this observation even if there was any violation on the part of the Official Liquidator to take out the summons and to have the notice of the summons sent to the petitioning creditor, the order made by Sandhawalia, J., according sanction cannot be said to be void as against the respondents to this petition who are the debtors of the petitioner and not the petitioning creditors.

(5) Reliance is then placed by the learned counsel for the respondents on the following observations of their Lordships of the Supreme Court in *Smt. Jatan Kanwar Golcha* v. *Golcha Properties P. Ltd. (in liquidation)* (3):—

"Rule 103 (? 139) of the Companies (Court) Rules, 1959 provides for taking out summons for directions not only with reference to the settlement of the list of contributories and the list of creditors, but also the exercise by the official liquidator of all or any of the powers under section 457(1) and any other matter requiring directions of the Court. The exercise of the power under section 457(1)(c) of the Act to sell the immovable and movable property of the company by public auction or private contract would certainly fall within the ambit of the rule. That rule expressly provides for issuing of a notice of the summons to the petitioner on whose petition the order for winding up was made. It is implicit that if the directions which have to be given by the Court would affect any person prejudicially, he must be served with a notice of the summons under the general rule of natural justice and that no order should be made affecting the rights of a party without affording a proper opportunity to it to represent its case. The High Court was thus clearly in error

(3) (1971) 41 Comp. Cases 230.

in not entertaining and deciding the appeal preferred by the appellant who was the owner of the land in which leasehold rights said to have been created by her in favour of the company in liquidation were sought to be sold."

These observations were made in the context that no notice of the application of the Official Liquidator for obtaining the sanction of the Court to sell certain immovable property of the Company in liquidation was given to the person to whom the property belonged. The facts in that case were that the appellant before the Supreme Court had leased out her land to the Company for construction of cinema in 1960. The Company was ordered to be wound up on May 10, 1968, and on July 11, 1969, the Official Liquidator made a report to the Company Judge for sale of the lease hold rights of the Company in the land belonging to the appellant and the structures standing on it. On July 21, 1969, the Company Judge, without hearing any one or issuing notice to the appellant ordered that the lease-hold rights and the structures be auctioned as proposed by the Official Liquidator. The appellant objected to the sale of her property and that the sanction of the Court was void as she was not given any notice. There is no indication in the judgment as to whether the appellant in that case raised the objection that no notice of the application under section 139 was issued to the petitioning creditor. Their Lordships also observed that a person, who was to be prejudicially affected, should have been given notice of the summons under the general rule of natural justice and that no order should be made affecting the rights of a party without affording a proper opportunity to it to represent its case. In that case, the appellant was vitally concerned because the land belonged to her while the structure thereon belonged to the Company in liquidation. It was felt necessary that she should have been heard before the property was ordered to be sold. This judgment is, therefore, clearly distinguishable as it does not decide either of the two points, that the provisions of rule 139 of the Companies (Court) Rules are directory and not mandatory and that non-compliance with the requirements of that rule, does not afford any right to the respondents debtors of the Company in liquidation—to raise the objection that the sanction of the Court had not been properly obtained by the Official Liquidator under section 457(1) of the Act and, therefore, the present petition against them is not maintainable.

(6) The essence of the provision in section 457(1) of the Companies Act is that before exercising the powers mentioned in clauses (a) to (e) thereof, the Official Liquidator must obtain the sanction of the Court. That sanction was obtained by the Official Liquidator. No notice of that application was to be given to the respondents to this petition and, therefore, they cannot object that the notice of that application was not given to the petitioner on whose petition the order for winding-up was made. I, therefore, hold that the sanction accorded by Sandhawalia, J., was in order and the respondents cannot challenge its validity. The preliminary issue is consequently decided in favour of the Official liquidator and against the respondents.

K. S. K.

APPELLATE CIVIL.

Before P. S. Pattar, J.

AJAIB SINGH,—*Appellant.*

versus

MAKHAN SINGH, ETC.,—*Respondents.*

R.S.A. No. 311 of 1966

June 1, 1973.

Punjab Limitation (Custom) Act (I of 1920)—Article 2(b)—Alienation of ancestral property by more than one alienors—Shares of the alienors in the property defined—Declaratory decree avoiding the alienation obtained by collaterals—One of the alienors dying—Suit for possession by the heirs of such alienor on the basis of the declaratory decree-Whether maintainable.

Held, that if there are more than one alienors and their shares in the alienated property are defined, a suit for possession on the death of one of the alienors for possession of his share in the property is maintainable by his heirs on the basis of a declaratory decree already obtained regarding that alienation. The right to sue accrues to such heirs under Article 2(*b*) of Punjab Limitation (Customs) Act, 1920 from the date of the death of the alienor. (Para 8).

Regular Scenod Appeal from the decree of the Court of *Shri H. K. Mehta, Additional District Judge, Amritsar, dated 24th*