

1925
 REFERENCE
 FROM THE
 MUNSIF,
 HABIGANJ,
Re.
 WALMSLEY
 J.

The answer that I propose to the Reference is that the security bonds executed in pursuance of an order of the Court under Order XXXII, rule 6(2) or any other rule or section of the Civil Procedure Code must bear a Court-fee stamp as required by Article 6 of Schedule II of the Court-fees Act, 1870; and they will also be chargeable under the Stamp Act if they are of the kind described in Article 40 or Article 57, but they will not be chargeable under the Stamp Act if they fall under the residuary Article 15.

GREAVES J. I agree.

C. C. GHOSE J. I agree.

B. B. GHOSE J. I agree.

MUKERJI J. I agree.

S. M.

ORIGINAL CIVIL.

Before C. C. Ghose J.

BHAGAT BROTHERS, LTD., *In re.**

1925
 June 11.

Jurisdiction—Company—Voluntary liquidation—Resolution by creditors for appointment of a joint liquidator—No application made to Court for such appointment—Liquidation proceedings carried on jointly—Joint liquidator acts as such and draws remuneration—Application made to Court to confirm and ratify with retrospective effect—Indian Companies Act (VII of 1913) s. 209.

The Court has no jurisdiction to confirm and ratify the appointment of a person under section 209 of the Indian Companies Act (VII of 1913) as a joint liquidator with retrospective effect.

APPLICATION IN CHAMBERS.

This was an application made by Khardah Company, Limited, a creditor of Bhagat Bros. Ltd.

* Application in Original Civil.

(in liquidation) for an order that the appointment of Arthur Frederick Platt Allen purporting to have been made by a resolution of creditors passed at a meeting held on the 4th July 1921 under the provisions of section 209 of the Indian Companies Act as a joint liquidator be confirmed and ratified by the Court and that the said A. F. P. Allen be deemed to have been appointed as such liquidator by the Court as on and from the said 4th July 1921 with remuneration as in the said resolution mentioned.

The facts and circumstances which gave rise to the application are fully stated in the judgment of the Court, and are not repeated here.

Mr. W. W. K. Page, for the petitioners (Khardah Co. Ltd.), applied to Court for sanction of the appointment of Mr. Allen who had already been acting as joint liquidator and had drawn his commission. Referred to section 207 clauses (viii) and (ix) and section 215 of the Indian Companies Act and relied on the following cases:—

Indian Zoedone Company (1), *Sunlight Incandescent Gas Lamp Co.* (2), *In re Allison Johnson and Foster, Ltd.*, (3).

Mr. H. R. Panckridge (with him *Mr. J. Langford James*) appeared for *Mr. A. F. P. Allen* in support of the application.

Mr. Westmacott (for the liquidator *Mr. S. K. Day*) also supported the application.

Mr. Susil C. Sen, (for two of the creditors Ram Kumar Bhagat and Champalal Gunchandlal), opposed the application. Under section 209 the liquidator appointed by the Company had to summon a meeting of creditors and if it was the sense of the meeting that

(1) (1884) 26 Ch. D. 70.

(2) [1900] 2 Ch. 728.

(3) [1904] 2 K. B. 327.

1925

BHAGAT
BROTHERS,
LIMITED,
In re.

a joint liquidator should be appointed, then there must be an application to Court. The Court was not bound to accept the nomination of the creditors but was at liberty to exercise its own discretion. That must be done within 14 days from the date of the meeting. If that was not done, then an application could be made within an extended time provided an extension was obtained. But the order of the Court confirming the appointment was a condition precedent to the liquidator acting as such. There was no provision for validating what was an invalid act. Mr. Allen's appointment was not sanctioned. He was not a liquidator and no sanction could be given to what was void *ab initio*. The cases referred to had no bearing on the present application and the case of *In re Allison Johnson and Foster Limited* (1), when the facts are carefully looked into was an authority against the contention of the applicant.

Mr. W. W. K. Page, in reply: The Court had jurisdiction to validate such an appointment and the order should be made.

Cur. adv. vult.

GHOSE J. This is an application on behalf of Khurda Company, Limited, for an order that the appointment of A. F. P. Allen as joint liquidator with Mr. S. K. Day of the Company known as Bhagat Brothers, Limited, at the same remuneration as the said Mr. S. K. Day is receiving, may be confirmed and ratified by this Court with retrospective effect from the 4th July 1921.

The facts, shortly stated, are as follows: By an extraordinary resolution passed at a meeting of the shareholders of Bhagat Brothers, Limited, held on the 6th June 1921, it was resolved that the said Company

(1) [1904] 2 K. B. 327.

be wound up voluntarily and that Mr. S. K. Day, Incorporated Accountant, be appointed liquidator. Mr. Day convened a meeting of the creditors of the said Company under the provisions of section 209 of the Indian Companies Act and it was held on the 4th July 1921, when the following resolution was unanimously passed :—“That this meeting is of opinion that Mr. Allen of Messrs. Viney and Thurston be appointed and failing his acceptance, Mr. Smith of Messrs. Norman Hamilton & Co. be appointed co-liquidator with Mr. S. K. Day on the same remuneration as Mr. Day.” Mr. Allen accepted the appointment and thereupon entered upon the duties of joint-liquidator with Mr. Day of the said Company and has since continued so to act. It is stated that by inadvertence on the part of the petitioner and other creditors of the Company no application was made to the Court for the appointment of Mr. Allen, as liquidator jointly with Mr. Day of the said Company, and that the omission to do so was not discovered till the 5th May 1925. By an order made on the 5th September 1921, on the application of Messrs. Day and Allen liquidators of the said Company, a scheme of arrangement for the sale of assets of the Company to one Ramkumar Bhagat in consideration of the payment by the said Ramkumar Bhagat to the liquidators of a sum equivalent to a dividend of 10 per cent. on the amount of all admitted claims and dealing with certain other matters was approved by the Court. It was not then brought to the notice of the Court that no application had been made under the provisions of section 209, sub-clause (2) of the Indian Companies Act for the appointment of Mr. Allen jointly with Mr. Day as liquidator of the above Company. It appears that the liquidation proceedings have been carried on jointly by Messrs. Allen and Day and that the costs of the liquidation of the

1925

 BHAGAT
 BROTHERS,
 LIMITED,
In re.

 GHOSE J.

1925
 BHAGAT
 BROTHERS,
 LIMITED,
In re.
 GHOSE J.

Company up to the present time have amounted to a sum of Rs. 40,392-12-11 including a sum of Rs. 23,000 appropriated and paid out of the assets on account of their remuneration by Messrs. Allen and Day as such liquidators, such sum being received by the liquidators in equal shares. The resolution about the remuneration of the liquidator Mr. Day when he was appointed as such was to the effect that "he should get 2 per cent. on realisations with a minimum fee of Rs. 2,000."

Mr. Allen is desirous of retiring from business in India and he and Mr. Day called a meeting of the creditors of the Company on the 14th May 1925, when it was brought to the notice of the creditors that Mr. Allen had not been appointed by the Court as joint liquidator. At the said meeting a resolution was adopted to the effect that the Khardah Company, Limited, be instructed to make the necessary application to the Court to ratify Mr. Allen's appointment as joint liquidator. The Khardah Company, Limited, have therefore made the present application.

The application was opposed by Mr. Sen on behalf of Messrs. Champalal Gunchandlal, who are creditors of the Company, and he contends that no application under section 209 sub-clause (2) having been made for the appointment of Mr. Allen as liquidator jointly with Mr. Day, the Court has now no jurisdiction to sanction such appointment with retrospective effect.

Formerly, voluntary liquidations were sometimes run through by liquidators nominated by the Directors without regard to the wishes or rights of the creditors and to prevent this state of things happening, section 188 of the English Companies Act, which corresponds to section 209 of the Indian Companies Act was enacted. This section has established a new procedure, giving the creditors greatly extended

powers in regard to the appointment of a liquidator in a voluntary winding up. By this section every liquidator appointed by the Company in a voluntary winding up must within seven days after his appointment "send notice by post to all persons who appear "to him to be creditors of the Company", convening a meeting of creditors for a day not less than 21 days nor more than one month after his appointment and specifying the place and hour and must advertise the notice of the meeting once in the official gazette and once in some local newspaper circulating in the district where the registered office or principal place of business of the Company was situate. At this meeting the creditors are to determine whether an application shall be made to Court for the appointment of any person in place of or jointly with the liquidator appointed by the Company and if the creditors so resolve, an application may be made accordingly to the Court at any time not later than 14 days after the date of the meeting by any creditor appointed for the purpose at the said meeting. Under the Indian Companies Act provision is made that the Court may by order at any time extend the time for making an application such as is hereinbefore referred to for such period as the Court thinks proper. On such an application being made, the practice in England is (and in my opinion it is desirable that the same practice should be followed here) to require an affidavit by the liquidator appointed by the Company proving that the meeting of the creditors was duly convened and an affidavit by the Chairman of the meeting stating the number of creditors present, the total amount of debts owing to them, the number of creditors voting for or against any resolution and the total amount of debts owing to them in each case, and if a resolution for the appointment of a liquidator has

1925

 BHAGAT
 BROTHERS,
 LIMITED,
In re.

 GHOSE J.

1925

BHAGAT
BROTHERS,
LIMITED,
In re.

GHOSE J.

been passed, whether there has been any solicitation on behalf of the person nominated.

On the application being heard, the Court may remove the liquidator appointed by the Company and appoint another person or may appoint some person to act jointly with the liquidator appointed by the Company, or make such other order as, having regard to the interests of the creditors and contributors of the Company, may seem just.

These being the provisions of the law on the subject, Mr. Page, who appeared for the Khardah Company, Limited, has referred me to three cases in support of his application. The first is the case of the *Indian Zoedone Company* (1), where the Court in a case where there was a question whether the sole voluntary liquidator had been properly appointed, confirmed him in the office in order that the question might be quieted. This was a case under sub-section (2) of section 141 of the English Companies Act of 1862 which corresponds with sub-section (8) of section 207 of the Indian Companies Act. In my opinion, looking at the facts of the case referred to, it has no bearing upon the present application. The next case upon which reliance was placed by Mr. Page is that of the *Sunlight Incandescent Gas Lamp Company* (2) where the facts were as follows:—A Company went into voluntary liquidation and two persons B and M were appointed liquidators. B having retired, F was appointed liquidator in his place to act with M. M applied for leave to take certain misfeasance proceedings but was opposed by F and thereupon the Registrar made an order appointing K additional liquidator to act jointly with M and F. Mr. Justice Wright held that section 141 of the English Companies Act of 1862 was sufficiently wide to give

(1) (1884) 26 Ch. D. 70.

(2) [1900] 2 Ch. 728.

the Court power to appoint K in the circumstances set out. In my opinion, this case also has no bearing on the present application. Mr. Page's third case was that of *In re Allison Johnson and Foster Limited* (1) where the facts were as follows :—One Birkenshaw was appointed liquidator in a voluntary winding up. The proceedings at which he was appointed liquidator were set aside as invalid *ab initio* by Mr. Justice Farwell. Birkenshaw thereafter put forward a claim as a creditor for work done and expenses incurred by him while purporting to act as liquidator. The Court (Lord Alverstone C. J., Wills and Kennedy JJ.) held that Birkenshaw was not entitled to be paid anything for services rendered as liquidator, but in so far as any work done by him had been useful to the Company for business purposes unconnected with the voluntary liquidation or had been used by the official liquidator in the subsequent compulsory winding up with full knowledge of the facts, he was entitled to claim reasonable remuneration. This case, as I read it, is against Mr. Page's contention and is an authority in favour of Mr. Sen. To my mind, the decision of the question raised in the present application turns entirely on the provisions of sub-clauses (2) and (3) of section 209 of the Indian Companies Act. No doubt in a proper case I can extend the time for making an application for the appointment of a person as joint liquidator, but I doubt very much whether, having regard to the language of the section, I have power to make such an appointment as is prayed for with retrospective effect from the 4th July 1921. In my view when an application is made under sub-clause (2) of section 209 of the Indian Companies Act, the Court, if I may say so, is not required to register by a formal order the recommendations of the creditors of

1925

 BHAGAT
 BROTHERS,
 LIMITED,
 In re.

 GHOSE J.

(1) [1904] 2 K. B. 327.

1925
 BHAGAT
 BROTHERS,
 LIMITED,
In re.
 GHOSE J.

the Company as to the person to be appointed joint liquidator. The Court may or may not act under sub-clause (3) of section 209 on the resolution of the creditors. The matter is entirely discretionary with the Court and in England no appeal is allowed against the order which the Court may make on such an application (see section 188 of the English Companies Act). It follows, therefore, that till an order is made appointing a person to act as joint liquidator, such person cannot take upon himself the duties of a joint liquidator and therefore the assumption of the duties of a joint liquidator on the part of such a person does not give him any rights whatsoever. The fact that the Court made an order on the 5th September 1921, approving a scheme of arrangement for the sale of the assets of the Company on the application of Messrs. Day and Allen in ignorance of the fact that Mr. Allen had not been appointed liquidator, cannot affect the determination of the question raised on the present application. The proviso to sub-clause (2) does not in my view enable me to make the order prayed for. The conclusion to which I have come is, that I have no jurisdiction to make an appointment such as is prayed for with retrospective effect from the 4th July 1921. I do not propose to deal with the matter relating to questions of remuneration, etc., raised in the affidavit on behalf of Champalal Gunchandlal for in my opinion they do not arise at the present stage.

The result, therefore, is that this application must stand dismissed with costs.

Attorneys for the petitioner : *Pugh & Co.*

Attorneys for the opposite party : *Dutt & Sen.*

A. P. B.