ORIGINAL CIVIL.

Before Panckridge J.

1930

July 30; *Aug.* 4.

In re JÂNBÂZÂR MÂNNÂ ESTATE, LIMITED.*

Company—Winding-up—Company unable to pay debts—Statutory demand —Registered office—"Just and equitable"—Deadlock—Indian Companies Act (VII of 1913), ss. 72, 162 (v), (vi), 163 (i), 166.

The statutory demand under section 163 (*i*) of the Indian Companies Act is a highly formal and important document and the provisions of the Act as to its service must be strictly observed.

Japan Cotton Trading Co., Ltd. v. *Jajodia Cotton Mills, Ltd.* (1) followed.

The notice of demand must be served at the registered office.

In order to change the registered office, it is not sufficient to pass a resolution to that effect; the change must be notified to the Registrar of Joint Stock Companies.

In re *Fortune Copper Mining Company* (2) distinguished.

To show that it is "just and equitable" that a company should be wound up it must be shown that the substratum of the company has gone or that a deadlock has arisen in the sense that it is impossible for the company to carry out the objects for which it was formed.

In re *Yenidje Tobacco Company, Limited* (3), In re *American Pioneer Leather Company, Limited* (4) and *Loch* v. *John Blackwood, Limited* (5) distinguished.

Where there is a *bona fide* dispute as to the claim of a creditor, the claim cannot be a ground for winding-up, within the meaning of section 162 (*v*) of the Indian Companies Act.

CREDITORS' PETITION.

The facts of the case are fully set out in the judgment.

S. C. Roy for the applicants. The statutory notice was served at the address to which the company had resolved to move the registered office, and it was received by the secretary. Section 72 indicates that it is sufficient that a resolution has been passed. Failure to notify the change may

*Application under section 166, Indian Companies Act.

(1) (1926) I. L. R. 54 Calc. 345.
(2) (1870) L. R. 10 Eq. 390.
(3) [1916] 2 Ch. 426.
(4) [1918] 1 Ch. 556.
(5) [1924] A. C. 783.

involve the company in the payment of a fine, but that does not affect the service of a notice at the new address.

The solicitor's bill had been taxed and there cannot be any dispute about the claim. Surendra's claim is admitted and is contained in the memorandum of the company. It is clear that the company is unable to pay its debts and is evading payment. This is a clear case for winding-up.

J. C. Sett for Rabindradeb Manna and Satindradeb Manna, claiming to represent the company. Ever since the formation of the company the directors have been fighting with each other and the objects of the company have not been carried out. That is a good reason for winding-up. See *Loch* v. *John Blackwood, Limited* (1).

In this case there is a complete deadlock and it is just and equitable that the company should be wound up. In the case of a private company it is sufficient to show grounds which would justify a dissolution of partnership. *In re Yenidje Tobacco Company, Limited* (2) and *In re American Pioneer Leather Company, Limited* (3).

W. W. K. Page (with him *N. C. Chatterjee*) for the contributories. Where a company has no registered office or the registered office has been demolished, service of the statutory notice or a winding-up petition at the unregistered office may be good, but in this case the registered office is in existence and in fact two of the directors reside there. That distinguishes *Re The British and Foreign Gas Generating Apparatus Company (Limited)* (4) and *In re Fortune Copper Mining Company* (5). Section 163 (*i*) of the Indian Companies Act does not provide for any alternative mode of service.

(1) [1924] A. C. 783.
(2) [1916] 2 Ch. 426.
(3) [1918] 1 Ch. 556.
(4) (1865) 13 W. R. (Eng.) 649.
(5) (1870) L. R. 10 Eq. 390.

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In this case the petition for winding-up has been presented for the purpose of recovering a disputed debt and thereby stifling the company. Where the petition is not *bona fide* the Court should stay all proceedings. See *In re A. Company* (1) and *In re Gold Hill Mines* (2).

The Court will not wind up this company unless it be shown that the substratum of the company has disappeared, or that it is not reasonably practicable to carry on the business of the company upon the terms on which it was intended it should be carried on. See *Re Furriers Alliance (Lim.)* (3) and *In re Yenidje Tobacco Company, Limited* (4).

S. M. Bose (with him *P. C. Ghose*) for Nagendradeb Manna and Kshitindradeb Manna, also claiming to represent the company, supported the contributories and opposed the winding-up.

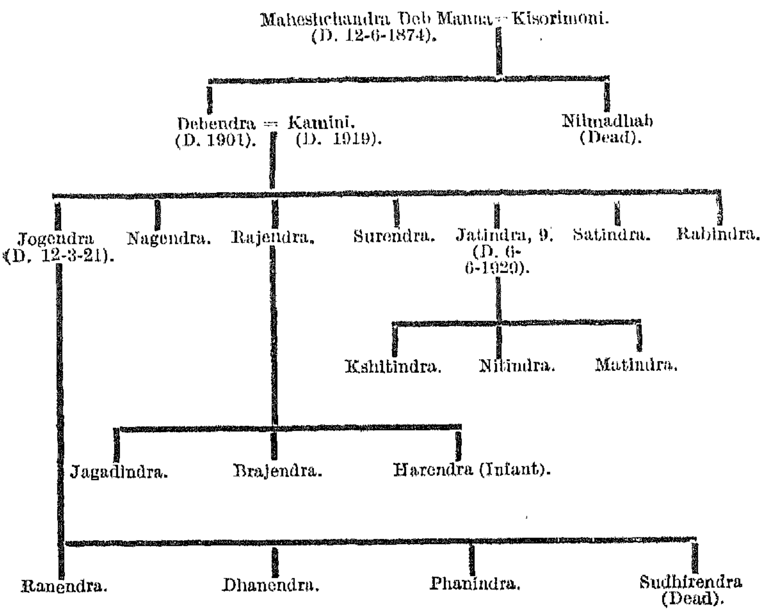
Cur. adv. vult.

PANCKRIDGE J. This is an application under section 166 of the Indian Companies Act, 1913, praying that the Jânbâzâr Mânnâ Estate, Limited, be wound up by the Court. It is a joint petition presented by two alleged creditors, Messrs. K. K. Dutt & Co., a firm of attorneys, and one Surendradeb Manna of No. 2, Taliganj Circular Road. The grounds on which the order is sought are: (1) that the company is unable to pay its debts and (2) that it is just and equitable that the company should be wound up.

The company is a private company and it is necessary to state briefly the circumstances which led to its formation. These are set out in some detail in a case, *Sudhirendra Deb Manna* v. *Ranendra Deb Manna* (5), where will be found the judgments of Costello J. sitting as Judge of first instance and also of Rankin C. J. and C. C. Ghose J. dismissing an appeal against the decision of Costello J.

(1) [1894] 2 Ch. 349.
(2) (1883) 23 Ch. D. 210, 215.
(3) (1906) 51 Sol. J. 172, 173.
(4) [1916] 2 Ch. 426, 435.
(5) (1930) 51 C. L. J. 364.

A pedigree of the Manna family has been tendered in this application and I incorporate it in my judgment :—



Long and bitter family disputes arose concerning the administration and distribution of the estates of Mahesh and Debendra, and, in 1915, Rabindra instituted a partition suit on the Original Side of this Court, asking for the administration and partition of those estates. After a fruitless reference to arbitration, a consent decree was made on January 6th, 1922. The terms of settlement are thus summarized in the judgment of Rankin C. J.

The main outline of the terms of settlement was as follows: that the properties left by Mahesh and the properties left by Debendra were to be treated as one joint estate, Sudhirendra and his three brothers being between them entitled to a 1-7th share thereof; that the parties were all to lease out their interest in the properties set out in the schedule for 99 years, at a monthly rent of Rs. 770 to a joint stock company in process of formation to be called the Jânbâzâr Mânnâ Estate Company, Limited, this company to have a capital of Rs. 1,40,000, divided into 1,400 shares of Rs. 100 each, the shares to be allotted to each of the parties in proportion to his interest in the joint estate. The company was to carry on the worship of the *Thakurani* through the heirs of Debendra, the *pâlâs* being of two years' duration. The company was also to pay off money which had been raised for the payment of a certain legacy. The company was further to pay certain of the parties sums which were due to them by the joint estate at the date of Jogendra's death.

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In accordance with these terms, the company was duly incorporated as a private company, its registered office being until recently at No. 25, Padmapukur Road.

Among the objects of the company, as set out in the memorandum of association, is the following:—

(K) To pay, as soon as possible, the sum of Rs. 8,753-14-6, Rs. 713-11-3 and Rs. 984-9-3 and Rs. 198-8 together with interest hereinafter mentioned, to Surendradeb Manna, Jatindradeb Manna, Rabindradeb Manna and Jogendradeb Manna, respectively, pursuant to the said decree, dated 6th June, 1922, in suit No. 372 of 1915. The sum of Rs. 984-9-3 payable to Rabindradeb Manna is to carry interest at the rate of 3½ *per cent. per annum* from the date of the marriage of Rabindradeb Manna until repayment. If the amounts due to the said parties be not paid within three years from the date of the said decree, the company is to pay interest at 6 *per cent.* thereon until repayment.

The hope that the compromise would put an end to the family disputes has not been fulfilled. In 1928, Sudhirendra, who had then attained majority, filed the suit to which I have referred, for the purpose of setting aside the consent decree. That suit was dismissed with costs by Costello J., whose decision was, on February 19th of this year, upheld on appeal.

This petition was presented on January 16th. The creditors K. K. Dutt & Co. claim, in respect of a sum of Rs. 1,894-14, the balance of a taxed bill of costs in respect of professional services rendered to the company. The creditor Surendradeb Manna claims, in respect of the Rs. 8,753-14-6, due under the consent decree and payable in terms of object (K) appearing in the memorandum. Both creditors claim to have given statutory notices in terms of section 163 (i) of the Companies Act.

The present position of the company is peculiar. It is not denied, as far as I understand, that, up to April of this year, Rabindra was the managing director and Satindra the secretary. These two gentlemen support Surendra; and Mr. Sett also appears on behalf of the company, as he claims, to support the petition. He can, however, only represent the company if Rabindra and Satindra are still managing director and secretary respectively. Mr. S. M. Bose also claims to represent the company and oppose the application, as it is claimed that, on April 11th, 1930, a general meeting was validly held and a resolution passed removing Rabindra and Satindra and appointing Nagendra and Kshitindra in their places.

I have not been asked to decide whether this resolution is valid. The application is also opposed by Mr. Page on behalf of Ranendra and other share-holders.

I will now proceed to deal with the allegation that the company is unable to pay its debts. The petitioners claim the benefit of the presumption created by section 163 (*i*).

The statutory demands are dated April 5th, 1930, and are addressed to the company at No. 2, Circular Road, Taliganj, Calcutta. Their receipt is evidenced by an endorsement by Satindra of the same date, a time when he was admittedly the company's secretary.

The objection is taken that they do not come within the sub-section, since the registered office is not at Taliganj, but at Padmapukur Road. The facts with regard to this are that, in January, 1929, owing to certain difficulties raised by Kshitindra, the owner of No. 25, the records and books of the company were removed from Padmapukur Road to Taliganj. From the correspondence, it appears that no exception was taken to this by any share-holder. Yet the fact remains that no notification of the change was given to the Registrar of Joint Stock Companies until April 14th, 1930.

Now, as pointed out by Rankin C. J. in *Japan Cotton Trading Co., Ltd.* v. *Jajodia Cotton Mills, Ltd.* (1), the statutory notice is a highly formal and important document and it would appear to follow that the provisions of the Act as to its service upon the company must be strictly observed. I have been referred to *In re Fortune Copper Mining Company* (2), where it was held that when the company's registered office had been demolished, service of a

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winding-up petition on the secretary and two directors at the company's *de facto* place of business was sufficient. However, the facts with which I have to deal are different. No. 25 was not only still standing on April 5th, but Ranendra and Kshitindra were still residing there. I find myself unable to accept Mr. S. C. Roy's contention that section 72 shows that a resolution to change the registered office is sufficient, and that the only effect of failure to notify the change is to render the company liable to fine under sub-section (*3*). It is difficult to avoid the conclusion that, in this case, the omission to serve the statutory notice at No. 25 was deliberate. In any event, in my opinion, there was, in the circumstances of the case on April 5th, still a registered office at No. 25, Padmapukur Road, to which all communications and notices might be addressed and no situation had arisen to excuse service of the statutory notice at that address. I, therefore, hold that the petitioners are not entitled to rely on the presumption afforded by section 163 (*i*) of the Companies Act.

This, however, is not the conclusion of the matter since the petitioners are entitled to show *aliunde* that the company is unable to pay its debts, and I suppose that failure to pay an undisputed debt would be as a rule conclusive evidence of this.

Mr. Page, however, maintains that neither debt is undisputed. With regard to the debt of K. K. Dutt & Co. he does not question the fact or the conclusiveness of the taxation, but he points to allegations in the affidavits used in opposition to the application to the effect that, while acting for the company, the firm has drawn large sums from the company and that, owing to the obstructive attitude adopted by the former secretary, Satindra, in collusion with the petitioners, the other share-holders have not been able to go into the accounts and are, therefore, not in a position to admit the attorneys' claim. In reply, an affidavit by the cashier of the firm has been used, alleging an adjustment of March

31st, 1930, made with the secretary, Satindra, at which all sums paid on any account whatever to the firm were taken into consideration and the balance now claimed settled. Mr. S. C. Roy describes this so called denial of the firm's claim as evasive, and I myself do not consider it to be wholly satisfactory. There are, however, certain aspects of the situation that compel me to view the claim with some degree of suspicion. Both petitioners appear through one of the partners, it is said, with what truth I know not, really the sole partner, of the attorneys' firm. I certainly have never known of a case where a solicitor of a company has joined with an alleged creditor who is also his client in presenting a winding-up petition. Again I do not understand why there is nothing on oath from any member of the firm, the petition is verified by a clerk and the affidavit in reply is by the firm's cashier. It would, to my mind, have been far more satisfactory had the allegations as to the debt been supported by the oath or solemn affirmation of a member of the firm, and had the firm itself been represented in the proceedings by an entirely independent attorney.

Reference has been made to another matter. It is not denied that the particular member of the firm, who now represents them, has purchased Satindra's share in the estate at a court sale, and it is further alleged that clients of the firm have advanced money on the security of the shares of Satindra, Rabindra and Surendra. The lease to the company contemplated by the terms of settlement has never been executed, but if it were to be executed it would appear, from the concluding passage in the judgment of the Chief Justice to which I have referred, to be at least arguable that it will have priority over assignments made and charges created in the meantime. It is clear that this danger would be effectively countered by the winding up of the company and Mr. Page, therefore, argues that the application, as far as the attorneys are concerned, is brought for the purpose of stifling the company and

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not of enforcing the debt. I am not prepared to say that there is no foundation for this suggestion and, taking the situation as a whole, I have come to the conclusion that there is a *bona fide* dispute as to the attorney's claim, which can, therefore, not be a ground for an order for compulsory winding-up.

The claim of Surendradeb Manna has really not been seriously pressed. Indeed, it is clear that it raises more than one point of difficulty. In so far as it is based on the consent decree of 1922, it is hard to see how it can be a debt due from the company which did not then exist. I also consider it highly doubtful, to put it at its lowest, whether the fact that its payment finds a place among the objects for which the company was incorporated is sufficient to make it a debt upon the non-payment of which an application to wind up can properly be grounded. Mr. Page also indicates that if it is a debt there are questions of limitation to be considered.

This being so, I hold that the petitioners have not succeeded in showing that the company is unable to pay its debts within the meaning of section 162 (*v*) of the Act.

It remains to be considered whether it has been shown that it is just and equitable that the company should be wound up within the meaning of sub-section (*vi*).

I am in no position to say what would have been the most satisfactory way of dealing with the partition suit, but it is now reasonably evident that the formation of the family company has not proved a successful solution, but that of itself is no reason for winding-up.

To bring the company within the "just and "equitable" clause, it must, I think, in this case, be shown that the substratum of the company has gone, or that a deadlock has arisen in the sense that it is now impossible for the company to carry out the objects for which it was formed. The substratum of the company—namely, the Mânnâ Estate—is still in existence and it is not denied that the company has been in possession of it for some years past. As regards the deadlock, it is significant that the party in the family feud represented by Surendra raised no such contention as long as the offices of managing director and secretary were filled by two of its members.

My attention has been drawn to certain reported cases on the subject of deadlock. In *In re Yenidje Tobacco Company, Limited* (1), a private company, formed for commercial purposes, consisted of only two directors and share-holders with equal voting power. The two members fell out and relations became so strained that they would not speak to one another. The court of appeal affirmed the order of Astbury J. to wind up the company on the ground that a complete deadlock existed. The differences between a trading company of two members and a non-trading company of several members are so obvious that I do not see how that case can have any bearing on the one before me. In *In re American Pioneer Leather Company, Limited* (2), there was this distinguishing feature, that it was expressly provided by the Articles that if one of the three share-holders offered to sell his holding to the other two and they refused to purchase, such share-holder might have the company wound up, the other share-holders undertaking to consent to an order for that purpose if necessary.

At first sight, the decision of the Judicial Committee in *Loch* v. *John Blackwood, Limited* (3) seems to be more in point, for there the company was established as a public company to carry on the business of a testator and divide the profits in accordance with the provisions of his will. When the petition to wind up was presented, the directorate had held office for many years and had also a preponderating voting power. The directors had, however, omitted to hold general meetings, to submit accounts, or to recommend a dividend and the

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Judicial Committee considered that, in the circumstances, the confidence of the petitioning share-holders not only in the policy but also in the probity of the directors had been justifiably shaken, and that they were entitled to the order prayed. In this case, it is not even admitted that the appointment of directors on April 11th is valid, nor has it been shown that since that date the "new" directors have misconducted themselves. It is conceded that one party or the other holds a majority of the shares and it seems to me that, although this is a private company and the transfer of shares restricted in the first instance to members of the family or their representatives, the ordinary principle of company law must be observed, namely, that the dissatisfied share-holders' remedy is to obtain a majority in favour of their views and through such majority elect a new directorate. The practical difficulties may be considerable, but this does not, in my opinion, entitle them to the order asked for. I find that the grounds, on which the winding-up order is sought, have not been established and I dismiss the petition, but in the peculiar circumstances of the case I make no order as to costs.

Petition dismissed.

Attorney for petitioners: *A. K. Dutt.*

Attorneys for company: *H. K. Dutt, R. K. Bose.*

Attorney for contributories: *R. K. Bose.*

S. M.