

## ORIGINAL CIVIL.

Before Lord-Williams J.

1936

Nov. 25.

*In re* RAJBARI ICE FACTORY, LTD.

*Company—Voluntary winding-up—Execution, Stay of—Attachment, Effect of.*

Where a company is being wound up voluntarily, the general practice of the Court is to grant an order staying execution of decrees against the company, except in very special circumstances.

*Anglo-Baltic and Mediterranean Bank v. Barber and Company* (1) relied on.

*Armorduct Manufacturing Company, Limited v. General Incandescent Company, Limited* (2) distinguished.

A distinction must be drawn between a seizure under the English writ of *feri facias* and an attachment under the Indian law. An attachment, which has not yet been completed by sale, cannot be treated as if the execution had been completed before the commencement of the winding-up, without statutory provision to that effect, analogous to the provisions of s. 268 of the English Companies Act, 1929.

APPLICATION by a creditor.

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

*H. Banarji* for the applicant. The object of liquidation of a company is the distribution of the assets *pari passu* among the creditors. The fact that the winding-up is voluntary cannot affect the position and ordinarily there should be stay of execution of decrees against the company. Otherwise, the object of the winding-up would be defeated.

*N. C. Chatterjee* and *J. C. Maitra* for the attaching creditors. Under s. 215 of the Indian Companies Act, the liquidator or a creditor may apply to Court for stay of execution of decrees. The onus of proving valid grounds for such stay of execution is on the applicant. In this case no special grounds have been shown entitling the applicant to

(1) [1924] 2 K. B. 410.

(2) [1911] 2 K. B. 143.

a stay. Further, in this case, execution has been practically completed by attachment and by virtue of it the attaching creditors have secured some valuable rights, which should not be defeated by a stay of execution at this stage. Compare s. 268 of the English Companies Act, 1929. On principle, no distinction should be made between a seizure under the English writ of *feri facias* and an attachment under the Indian law. For an attachment creates a lien or charge in favour of the creditor. *Gummidelli Anantapadmanabhaswami v. Official Receiver of Secunderabad* (1). In that case Lord Thankerton pointed out that in the case of *Frederick Peacock v. Madan Gopal* (2), the opinion expressed by the Judicial Committee in the case of *Suraj Bunsî Koer v. Sheo Persad Singh* (3) was not considered, and reserved their opinion as to the soundness of the Calcutta case.

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Rajbari Ice  
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*S. Banerji* for the liquidator. Where a judgment is recovered against a company, in voluntary winding-up, the invariable practice of the Court is to stay execution, unless there are exceptional circumstances which would make the Court exercise its discretion otherwise. *Anglo-Baltic and Mediterranean Bank v. Barber and Company* (4).

*H. Banarji* in reply. Under s. 64 of the Civil Procedure Code, an attachment does not create any charge on attached property, as is the effect of a seizure under the English writ of *feri facias*. In India, the attaching creditor has only the limited right of having the property in *custodia legis*; and the attachment operates as a prohibitory order against private alienation. *Frederick Peacock v. Madan Gopal* (2) was correctly decided, as is clearly indicated by the case of *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (5).

(1) (1933) I. L. R. 56 Mad. 405 (414); (3) (1879) I. L. R. 5 Cal. 148;  
L. R. 60 I. A. 167 (174-5). L. R. 6 I. A. 88.

(2) (1902) I. L. R. 29 Cal. 428. (4) [1924] 2 K. B. 410.

(5) (1916) I. L. R. 44 Cal. 662; L. R. 44 I. A. 72.

In re  
*Rajbari Ice  
Factory, Ltd.*

LORT-WILLIAMS J. The petitioner is a creditor of the Rajbari Ice Factory, Ltd., now in voluntary liquidation.

She says that the company is indebted to her to the extent of Rs. 16,120-4-9. Her husband is the managing director. She asks that the company may be wound up by the Court or under the supervision of the Court, and that all legal proceedings against the company may be stayed.

The company is insolvent, and on October 27, 1936, a resolution was passed for voluntarily winding it up.

The whole of the assets of the company have been attached. They have been advertised for sale in the Court of the First Subordinate Judge at Faridpur in execution of a decree for Rs. 18,302-5-6 obtained by Amaresh Chandra Lahiri and others.

The decree-holder opposes the petition on the ground that the effect of this attachment is such that it ought to be allowed to prevail over the interests of other creditors.

The sale has not yet taken place because of the *interim* stay granted by this Court. The question I have to decide is whether I ought to exercise my discretion in this matter in favour of the general body of creditors and order a further stay of the execution proceedings.

The general practice with regard to staying executions where there is a voluntary liquidation has been described by Scrutton L. J. in *Anglo-Baltic and Mediterranean Bank v. Barber and Company* (1). He states the general practice to be to grant an order staying execution for the reason that the execution,

(1) [1924] 2 K. B. 410, 418.

if allowed, would necessarily interfere with the distribution of the assets *pari passu*, and that it was only in very special circumstances that the Court would depart from that general practice, such as, for instance, where the judgment-creditor had been induced by a false pretext on the part of the company to postpone the execution, as was the case in *Armorduct Manufacturing Company, Limited v. General Incandescent Company, Limited* (1).

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There are no special circumstances in the present case.

Section 268 (1) of the English Companies Act, 1929, provides :—

Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding-up of the company unless he has completed the execution or attachment before the commencement of the winding-up,

and sub-s. (2) provides :—

For the purposes of this section, and execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver.

There is no such provision in the Indian Companies Act.

I am satisfied that a distinction must be drawn between a seizure under the English writ of *feri facias* and an attachment under the Indian law, as has been made in the present case.

In my opinion, such an attachment, which has not been yet completed by sale, cannot be treated as if the execution had been completed before the commencement of the winding-up, without statutory provision to that effect analogous to the provision of s. 268 of the English Companies Act, 1929.

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I am informed that the debt owing to the decree-holder was for monies lent to this company, and that the petitioner's debt is also for monies similarly lent at a later period. Whether the petitioner's is a valid debt will be decided in the winding-up. Besides the claims of these two alleged creditors there are a number of smaller claims.

It is, therefore, clearly in the interests of the whole body of creditors that the value of this factory should be realised in the liquidation proceedings and the assets of the company divided among the creditors *pari passu* and in view of the circumstances and the doubts which have been thrown upon the genuineness of the petitioner's claim by the decree-holder, I think it preferable that the company should be wound up by the Court.

I accordingly admit the petition, and appoint as provisional liquidator the gentleman who has already been appointed in the voluntary liquidation.

I stay all legal proceedings against the company, including the execution proceedings which I have referred to.

Advertisements will be published in the "Calcutta Gazette", the "Statesman" and the "Amrita Bazar Patrika".

Costs of all parties to this application will come out of the assets. Certified for counsel. The liquidator's costs will be as between attorney and client. The decree-holder will have liberty to add the costs of the suit and of the execution proceedings to his claim.

Attorney for petitioner: *B. K. Chatteraj.*

Attorneys for respondents: *Mukherji & Lahiri;*  
*P. Mallik.*