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June 16.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

D. CONNELL (OPPOSITE PARTY) v. THE HIMALAYA BANK, LD., IN LIQUIDATION (PETITIONER).*

Act No. VI of 1882 *(Indian Companies Act) section* 214—*Company—Winding up—Auditor—Officer of the Company—Misfeasance—Damages—Remoteness of loss—Limitation—Act No. XV of* 1877, *Schedule* II, *Article* 36.

An auditor of a Company to which Act No. VI of 1882 applies, who is duly appointed by a general meeting of the Company and not casually called in as occasion may require, is an officer of the Company within the meaning of section 214 of the above mentioned Act. *In re the London and General Bank, Ld.*, referred to (1).

The compensation which, under section 214 of the Indian Companies Act, 1882, may be assessed against a defaulting director or other officer of a Company, is of the nature of damages: it is therefore necessary that the loss to the Company in respect of which compensation is asked for should be the direct, and not a remote and more or less speculative, consequence of the misfeasance or neglect of duty on the part of the director or other officer of the Company from whom such compensation is sought.

The special proceeding provided for by section 214 of Act No. VI of 1882 is not subject to the limitation prescribed by Article 36 of Schedule II of the Indian Limitation Act, 1877.

This was an appeal from an order under section 214 of the Indian Companies Act, 1882, passed by the District Judge of Saháranpur in the course of the winding up of the Himalaya Bank, Limited, calling upon the appellant, Connell, to repay a sum of Rs. 10,000 to the Official Liquidator of the said Company on behalf of the Company. The appellant had been Auditor to the Bank from 1889 to 1891, being elected to the office at the annual meetings of the Company, and remunerated by a fixed fee for each audit.

It appears that he had no special experience as an auditor and was by profession Secretary to a Brewery Company. Along with the auditor several of the directors of the Company were also proceeded against under section 214 of the Companies Act, and the charge against the directors and the auditor practically was that the former had for a number of years continued to declare and pay dividends when there were no profits out of which dividends were payable and long after the bank had really become insolvent,

*First appeal No. 70 of 1894, from an order of H. B. J. Bateman, Esq., District Judge of Saháranpur, dated the 28th April 1894.

(2) L. R. 1895, 2 Ch. D., 673.

and that the latter, by his negligence or misfeasance in passing accounts and balance sheets which he knew or might have known to be false and misleading, assisted the directors to perpetrate a series of frauds upon the shareholders.

The District Judge found that Connell "was aware of the state of the bank from the date of his first audit, and that he deliberately aided and abetted in the issue of half-yearly balance sheets which he knew to be false. He thereby abetted the illegal payment of dividends. The above is clearly a gross misfeasance and caused loss to the amount of the above dividends." Upon this finding, and upon the finding that Connell as an auditor was an officer of the Company within the meaning of section 214 of the Indian Companies Act, the District Judge made an order against Connell as above described. Connell thereupon appealed to the High Court.

Mr. *A. E. Ryves* for the appellant.

Messrs. *T. Conlan* and *H. Vansittart* for the respondent.

EDGE, *C.J.*, and BANERJI, *J.*—This is an appeal from an order of the District Judge of Saháranpur made in one of six several applications to him to proceed under section 214 of Act No. VI of 1882. The appellant before us was the auditor of the Himalaya Bank from 1888 to 1891. He was appointed at the annual meeting in each year as the auditor of the bank. He received a fixed remuneration for each half-yearly audit, and he was bound to make an audit in conformity with Act No. VI of 1882. In the case of the particular bank no articles of association had been filed with the Registrar under the Act, and consequently table A of the Act applied. The bank had been constituted as a limited company under the prior Act, but for all necessary purposes connected with this case the later Act and the prior Act are to the same effect. The auditor was charged with misfeasance, and the order under appeal was an order directing him to contribute a large sum of money to the assets of the company by way of compensation in respect of the misfeasance found against him. The first application had reference to the dividend which was paid for the half-year ending the 30th of June 1888. The other applications related to the half-years

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respectively succeeding that half-year and terminating on the 31st of December 1890.

The first ground taken in this appeal was that Connell, the appellant, was not an officer of the company within the meaning of section 214 of the Act. It was contended that no one could be an officer of a company within the meaning of that section unless he had control of the business of the company and of the monetary dealings of the company. For that proposition the decision of Mr. Justice Cave and Mr. Justice Collins in *In re the Liberator Permanent Benefit Building Society* (1) was relied upon. In that case those learned Judges, or rather one of them, gave, as an instance of persons who are not officers of the company within the meaning of the corresponding section of the English statute, an auditor. It would appear that in that case the person before the Court was a solicitor. A solicitor, ordinarily speaking, would not be an officer of the company within the meaning of that section, but he might, by the position which he agreed to take up with regard to the company, become an officer of the company. It appears, however, that Mr. Justice Vaughan Williams in December last held that an auditor was an officer of a company within the meaning of the section of the English Statute; and since then one division of the Court of Appeal in England has held, on appeal in that case, that the auditor was an officer of the company within the meaning of section 10 of 53 and 54 Victoria, Chapter 62. The last decision is very curtly reported in the English *Weekly Notes* for 1895, page 74. We have only had any report at length of the decision of the Court of Appeal in that case in the form in which it appears in "The Accountant" for May 4th, 1895, *(In re the London and General Bank, Limited)* (2). The appellant in this case was not an auditor merely called in to ascertain by way of an audit the position of the bank at any particular moment; he was not casually called in on an occasion arising for the services of an auditor, but he was the auditor appointed at the general meetings of the company in accordance with the provisions of Act No. VI. of 1882. In our opinion he was an officer of the company within the

(1) 11, Times L. R., 406. (2) Since reported in L. R., 1895, 2 Ch. D., 673.

meaning of section 214 of the Act; he was not a servant of the directors, but an officer of the company, and an officer who, although he had nothing to do with the management of the company, had most important duties to perform as a paid officer of the company.

The next point taken in the appeal was that the remedy against the appellant was barred by limitation. It was contended that Article 178 of Schedule II of the Indian Limitation Act, 1877, did not apply here. There was the authority of all the High Courts in India to show that that article was only applicable to applications made under the Code of Civil Procedure, of which this was not one, and it was contended that Article 36 of that schedule was the article which must be applied. That contention was based on the authority of a case in the Weekly Reporter in which it was said that a suit was any proceeding instituted in a Court of justice. It is not necessary to consider whether that proposition is correct or not. In our opinion the "suit" of the Indian Limitation Act, 1877, has a specific and limited meaning. It is, according to section 3 of that Act, distinguished from an appeal and an application. In our opinion Article 36 does not apply to this case. It may well be that the Legislature intended not to provide any limitation in cases in which Courts proceeded to enforce the provisions of section 214 of Act No. VI of 1882. The provisions of that section could seldom be put in force if Article 36 of Schedule II of Act No. XV of 1877 applied. The misapplication or misfeasance of that section might not be discovered by the Court until after the lapse of two years from the date of the misapplication or misfeasance. It appears to us that there is good reason why directors, managers and officers of companies registered under Act No. VI of 1882 should not be permitted to plead limitation so as to absolve them from making restitution of moneys misapplied or lost to the company through their misfeasance. It may be that this is not exactly the same view of the law as that entertained by some of the Courts in England in cases under 53 and 54 Vic., Cap. 62, section 10. However, the Statute of Limitations which Judges in England have to apply to those cases is certainly wider in its wording than the articles of the Limitation

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Act which we have to apply in this country. There they did not allow any plea of limitation where the person charged was in the position of a trustee of the company, such as a director; and the cases in which they allowed this plea of limitation to be raised were actions brought against an officer, and not proceedings under 53 and 54 Vic, Cap. 62, section 10. We hold that the proceedings in this case against the appellant under section 214 of Act No. VI of 1882 are not barred by limitation.

The next question is—was Connell guilty of misfeasance within the meaning of the section? In order to decide that point it is necessary to consider what was the state of the bank as it would have appeared to anyone making a careful audit, when he took over the duties of auditor. Its state was this. Its capital had been gone for years. Its reserve fund was pledged as security to another bank. It was keeping on its balance sheets as assets debts which were, some of them, barred by limitation, and others beyond all hope of recovery. As to these debts any auditor who understood and did his duty could have ascertained their nature from a cursory examination of books of the bank. There were debts to a large amount on which no interest had been paid for years, and still that interest kept appearing in the books of the bank as a realizable asset of the company. The debts which were hopelessly bad amounted to lakhs of rupees. The reserve fund, being in Government paper in the hands of another bank as security, had ceased for practical purposes to be a reserve fund. The capital of the bank was gone, and practically the working assets of the bank, and the only working assets which the bank had, consisted of the deposits of such people as had been foolish enough to deposit their money in the bank. What was done at the bank was this. The manager or accountant of the bank prepared a balance sheet which was not in accordance with the form of balance sheet required by Act No. VI of 1882. That balance sheet was submitted to the auditor, and, according to his statement, he checked apparently the totals in that balance sheet with the totals as they appeared in the books of the bank. He did not see that the debts owing to the bank were divided into three classes as required by the balance sheet of Act No. VI

of 1882. The inference which we draw is that this auditor practically did nothing except have before him the balance sheet which had been prepared and check off in a most cursory manner the totals of the balance sheet with the totals in the books of the bank. That he ever examined, as he certified, the books of accounts of the bank, as a proper auditor should and would have done, we do not believe. It is said on his behalf that he was not a skilled auditor. That, no doubt, is true. He was secretary and accountant to a Brewery Company. Probably he knew little or nothing about the duties of an auditor or the provisions of Act No. VI of 1882. His ignorance in our opinion would not excuse him in proceeding under section 214 of Act No. VI of 1882. He accepted the office of auditor and the remuneration attached to that office, although it was small, and he undertook to perform duties which, not only in the interests of the company, but in the interests of the creditors of the company and in the interests of the investing public, it was necessary should be performed carefully and properly. His duties were defined by Act No. VI of 1882. In one sense, in our opinion, he never performed any part of those duties. It is true he signed a balance sheet, and he signed a certificate each half-year; but each half-year's balance sheet was false, as he must have discovered had he taken the slightest pains to perform the duties of an auditor. In our opinion this auditor was guilty of misfeasance, and grave misfeasance, within the meaning of section 214 of Act No. VI of 1832. However, that is not sufficient to make him liable under section 214. An auditor can only be made liable under section 214, if he has been guilty of misfeasance in his office, and if the natural and proximate result of that misfeasance was that loss to the company ensued. Compensation under section 214 is of the nature of damages, and in civil proceedings under that section to obtain compensation for misfeasance of an officer it must be shown in our opinion that in consequence of that misfeasance a particular loss or losses was or were suffered by the company. What happened in this case was that the dividend for each half-year was actually paid and distributed by the directors of the Company one, two or three months before the audit for that half-year, and

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before any balance sheet had been signed or any certificate given in respect of that half-year by the auditor. It cannot be said, for example, that the dividend paid by the directors for the half-year ending the 30th of June 1888 was paid in consequence of any audit or any balance sheet or any certificate of this auditor for that half-year. It is contended by Mr. *Conlan* that the bank suffered a loss in this way. He said that if the auditor had done his duty and had shown on a proper balance sheet that the bank was insolvent, the directors would have been obliged to close the doors of the bank, or to take steps for the reconstitution of the bank, and that they could not have paid any dividends for the succeeding half-years. He also contended that if a true balance sheet had been made by the auditor, that balance sheet would not have been passed by the shareholders at the general meeting and the dividends already paid would not have been confirmed. On the latter point, to take it first, all that need be said is that, if these dividends could not be recovered, they were already lost before the balance sheet for that half-year was certified by the auditor. If they could be recovered there would have been no loss. It is not shown here that any attempt has been made by the liquidator to recover the dividends paid to the shareholders during those years, and for all we know no loss may have been sustained. To deal with the other branch of the argument, it appears to us that it is based upon grounds far too speculative to be adopted by a Court of justice in awarding damages. We do not know what the result might have been on the action of the directors in future half-years if this auditor had done his duty and represented and certified that the bank was insolvent. If we were to speculate on that matter, looking at the proceedings of the directors and the way in which this bank was managed, we might possibly conclude that if the auditor presented a true statement of the affairs of the bank to the directors he would cease to be auditor and the bank would not close its doors. This, however, is merely a matter of speculation. The loss of dividends in succeeding half-years was not the immediate consequence of the breach of duty of the auditor in this case. It was also contended by Mr. *Conlan* that the bank

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suffered a loss in this way. Mr. *Conlan* contended that the auditor had conspired with the directors to give these untrue certificates and to pass these false balance sheets, and, being a party to that conspiracy, which, Mr. *Conlan* argued, extended over several years, his misfeasance had in fact caused loss. Although we think that the auditor neglected every duty which he was bound to perform as auditor, we see no evidence in this case that he was a party to any conspiracy with the directors or any one. His remuneration was small. He was ignorant of his duties, and he did not perform them, and there we think the case ended so far as he was concerned.

We hold that it is not proved that any loss was suffered by this bank in consequence of the misfeasance of its auditor. We accordingly allow this appeal and set aside the order of the Court below, but without costs.

Appeal decreed.

FULL BENCH.

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June 19.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt, and Mr. Justice Aikman.

SHEO NATH SINGH (JUDGMENT-DEBTOR) *v.* RAM DIN SINGH AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code, sections 562, 588, 591—*Order—Appeal—Conditions under which an order passed in the course of a suit may be questioned in appeal from the decree in the suit.*

An order made under the Code of Civil Procedure from which an appeal is given under s. 588 of that Code may be questioned under s. 591 in an appeal from the decree in the suit if the ground of objection is stated in the memorandum of appeal, although no appeal from such order has been preferred under s. 588. So *held* by the Full Bench, following *Rameshar Singh* v. *Sheodin Singh* (1), *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi* (2) distinguished.

Held by Edge, C.J., and Aikman, J., that section 591 of the Code of Civil Procedure does not enable an appellant to avoid limitation by coming up under s. 591 when the only ground of appeal is an order made under s. 562. Section 591 contemplates two things—there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591.

THE facts of this case are thus stated by the Court of first appeal:—"Ram Din Singh and others obtained a decree for

* Appeal No. 17 of 1894 under s. 10 of the Letters Patent from a judgment of Mr. Justice Banerji, dated the 2nd February 1894.

(1) I. L. R., 12 All. 510. (2) B. L. R., 17 All. 112.