

purview of the ruling of this Court in *Lajja Prasad v. Debi Prasad* (1). In that case it was held that a person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it was offered to him, because he believes that such price is in excess of the real price, where the belief is entertained and expressed in good faith. This case was followed in *Amir Chand v. Ishar Das* (2); *Bholi Bibi v. Fahima Bibi* (3) and in *Karim Bakhsh v. Khuda Bakhsh* (4). In accordance with these rulings we must hold that the plaintiff has not forfeited his right of pre-emption. Having regard, however, to the fact that he made untrue allegations in his plaint and deposition and also to the fact that the actual price has been found by the lower appellate court to be Rs. 1,500, we are of opinion that he must bear the costs of the litigation.

We accordingly allow the appeal and decree the plaintiff's claim for pre-emption conditional upon his paying Rs. 1,500 within two months from this date. In any event the plaintiff must pay the costs of the respondents in all courts. If the plaintiff fails to pay the purchase money and the costs within the time fixed, the suit will stand dismissed.

Appeal decreed.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

GHISU MAL AND OTHERS (PETITIONERS) v. THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS COMPANY, LIMITED, AND OTHERS (OPPOSITE PARTIES).*

Act No. VI of 1882 (Indian Companies Act), section 169—Company—Winding up—Appeal—Notice of appeal—Limitation.

On the 3rd of December, 1910, the District Judge of Aligarh made an order for the winding up under the supervision of the court of a company called the Shri Baldeo Mills Company, Limited. On the 7th of February, 1911, an application by some of the shareholders to reconsider the winding up order was dismissed. On the 25th of February, 1911, the applicants appealed to the High Court ostensibly against the order of the 7th of February, 1911, but in effect against the winding up order of the 3rd of December, 1910. No notice of this appeal was served on the respondents until at the earliest the 25th of March, 1911.

* First Appeal No. 23 of 1911 from an order of A. Sabonadiere, District Judge of Aligarh, dated the 7th of February, 1911.

(1) (1880) I. L. R., 3 All., 235.
(2) Weekly Notes, 1882, p. 46.

(3) Weekly Notes, 1882, p. 136.
(4) (1882) I. L. R., 16 All., 247.

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Held that the appeal was time-barred in view of section 169 of the Indian Companies Act, 1882. *Ramanappa v. The Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company, Limited* (1), *Lalshminarasayya Setti v. Venkanna Setti* (2), *Wall v. Howard* (3) and *In re Sarawak and Hindustan Banking and Trading Company, Limited* (4) referred to.

THE material facts were as follows :—

On the 3rd of December, 1910, an order was passed directing a company called the Shri Baldeo Mills Company, Limited, to be wound up. That order was duly notified in the Government Gazette. Certain share-holders thereafter applied to the Judge on the 7th of February, 1911, to reconsider and revoke the order, on the ground that they had no notice, and no opportunity was given to them to put forward their objections. The application was refused by an order of the same date. On the 25th of February, 1911, they filed an appeal purporting to be from this order, but mainly directed against the validity of the order for winding up. At the time of filing the appeal in the High Court an order was prayed for and obtained directing notices of filing the appeal to issue under section 169 of the Companies Act. There was no prayer for an order, and no order was made, extending time for service of notice of appeal. The notices were not served till the 25th of March, 1911. On the appeal coming up for hearing:

The official liquidator appeared in person and took a preliminary objection to the hearing of the appeal :—

Although the appeal is, on the face of it, from the order rejecting the application for re-hearing, as a matter of fact, the grounds are directed against the validity of the order of the 3rd of December, directing the company to be wound up. The latter order, not having been appealed against within three weeks from its date, as required by section 169 of the Companies Act, has become final, and no appeal calling that order in question can now be heard. Again, from whichever order the appeal may be deemed to be, notice of it was not served within three weeks from the date of the order. The words "notice is given" in section 169 mean "notice is served;" and the section contemplates that the appeal should be properly filed and notice thereof be served within three weeks from the date of the order appealed against, unless the time is extended

(1) (1898) I. L. R., 23 Mad., 291.

(2) (1901) I. L. R., 25 Mad., 57d.

(3) (1811) I. L. R., 18 All., 215.

(4) (1879) I. L. R., 4 Cal., 704.

by the Court of Appeal. The case of *Wall v. Howard* (1) is an authority for this. In that case the notices were not served till the 7th of June, 1894, and it was held that the notices were not given till that date. It was open to the appellants to pray for an extension of time under section 169, but they did not do so. The requirements of the section are not fulfilled by obtaining an order, within three weeks, directing notices to issue.

Dr. *Tej Bahadur Sapru*, for the appellants, in reply to the preliminary objection :—

The appellants had no notice of the order of the 3rd of December, and so could not appeal within three weeks of that date. A party must have notice of an order before he can appeal from it. At all events we have a right of appeal against the order of the 7th of February; for, under section 169, there is an appeal from any order passed in the course of the winding up.

Then, as to the question of notice. Section 169 does not expressly lay down that notice is to be served within three weeks. Had that been the intention of the Legislature, it would have distinctly said so. Section 169 says that notice is to be given within three weeks. If that be held tantamount to service of notice then great hardship will result; for, in the majority of cases, even with the greatest promptitude on the appellant's part notice may not be served within the prescribed time on respondents, share-holders, living in different parts of the country. All that the appellant can do is to get an order within time for the issue of notices; he can have no hand in the service of those notices. It is sufficient compliance with the requirements of the section if notices are "ordered to be given" within the prescribed time. The cases do not lay down that "given" means "served." In the case in *I. L. R.*, 18 All., the order which could be appealed against was that of the 30th of April, 1894; and the appeal was filed on the 2nd of June, 1894. There the appeal itself was filed more than three weeks after the date of the order complained of; and it was not necessary to decide any other point. The present question did not, therefore, arise in that case. In the case of

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Lakshminarasayya v. Venkanna (1) there are some observations in my favour at p. 579 of the report, although the point was not expressly decided. He further cited *Ramanappa v. The Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company, Limited* (2) and *In re Sarawak and Hindustan Banking and Trading Company, Limited* (3).

KNOX and PIGGOTT JJ. :—The appeal before us is on the face of it an appeal against the order of the District Judge, dated the 7th of February, 1911. The order in question is an order refusing to revoke an order passed by him on the 3rd of December, 1910, which order was for the winding up of a company known as Shri Baldeo Mills Company, Limited, Hathras. A preliminary objection is taken by the Official Liquidator to the hearing of this appeal on the ground that the appeal is time-barred. The objection sets out two grounds on which the plea of limitation is pressed. The first is that the order winding up the company was passed on the 3rd of December, 1910, and has become final. Section 169 of the Indian Companies Act, while allowing appeals from any order or decision in the matter of winding up of a company, provides further that no appeal will be heard unless notice of the same is given within three weeks after the order complained of has been made in the manner in which notices of appeal are ordinarily given under the Code of Civil Procedure unless such time is extended by the court of appeal. Secondly, even if the appeal be taken to be against the order, dated the 7th of February, 1911, it is still out of time. The memorandum of appeal was presented within three weeks from the 7th of February, 1911, but notice was not given until long after three weeks had passed. In our opinion the preliminary objection is a good one and prevails. We were referred to several cases by the learned advocate for the appellants, namely, *Ramanappa v. The Official Liquidator Bellary Brucepetta Stock and Loan Transacting Company, Limited* (2), *Lakshminarasayya Setti v. Venkanna Setti* (1), *R. Wall v. J. E. Howard* (4), *In re Sarawak and Hindustan Banking and Trading Company, Limited* (3). We have considered all these cases, and in our

(1) (1901) I. L. R., 25 Mad., 576.

(2) (1898) I. L. R., 22 Mad., 291.

(3) (1879) I. L. R., 4 Cal., 704.

(4) (1896) I. L. R., 18 All., 215.

opinion the position taken up in all these cases are against the appellants. The appeal is beyond time and is dismissed with costs. Separate sets of costs will be allowed in case of the Official Liquidator, respondents Nos. 4 and 5 and respondent No. 33.

Appeal dismissed.

Before Mr. Justice Kuramat Husain and Mr. Justice Chamier.

DUTTA AND OTHERS (DEFENDANTS) *v.* KHEDU (PLAINTIFF).*

Civil Procedure Code (1908), sections 99, 107; schedule II—Arbitration—Appellate court, powers of—Reference once made unaffected by death of party.

An application for a reference to arbitration under schedule II to the Code of Civil Procedure, 1908, may be made to an appellate court as well as to a court of original jurisdiction, and the court is bound to accept and act upon such application if made by all the parties interested in the appeal. When an application for arbitration has been made, it will not lapse by reason of the death of one of the parties; but if the right to sue survives, the arbitration must be proceeded with after substitution of the representatives of the deceased party. *Perumalla Satyanarayana v. Perumalla Venkata Rangayya* (1) referred to.

IN this case when the suit was in appeal before the lower appellate court (District Judge of Benares) all the parties interested applied for a reference to arbitration under the second schedule to the Code of Civil Procedure, 1908. The Judge however rejected the application holding that the powers conferred by the second schedule to the Code were not exercisable by an appellate court.

Babu Piari Lal Banerji, for the appellant :—

The order of the lower court cancelling the reference to arbitration is illegal. An appellate court can refer a case to arbitration. The learned Judge has held that the law dealing with arbitration no longer forms part of the Civil Procedure Code, as the second schedule cannot be said to be a part of the Code. This reasoning is not sound.

Munshi Haribans Sahai for the respondent :—

The lower court says that under section 2, clauses (1) and (18) of the Civil Procedure Code, 'Code' includes 'rules' and 'rules' mean 'rules and forms contained in the first schedule or made under section 122 or 125.' Therefore the second schedule is

* Second Appeal No. 788 of 1910 from a decree of G. A. Paterson, District Judge of Benares, dated the 17th of March 1910, confirming a decree of Kesari Narain Chand, additional Munsif of Benares, dated the 28th of November, 1909.

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