

are clear and definite, as in this case they are admitted to be, the Court of its own motion, without waiting for any application to be put in by a party, should adopt the necessary course to give effect to such admitted rights. It is for that reason that I have not referred to section 114 of the Code of Civil Procedure, which gives the power of review. That is also a salutary provision, but having regard to the provisions relating to the procedure contained in order XLVII, it imposes upon a party who is suffering from a mistake the task of taking some fresh independent steps of a technical nature which may lead to some unforeseen difficulty. I think myself that the powers under the sections already referred to are sufficient for a court, and that they should be kept in mind by the lower courts when such controversies arise as have arisen in this matter. It only needs to be added that in all such cases where it is clear to an appellate court that it was open to the first court or any lower court to have taken such steps by way of amendment, the appellate court ought to do what the lower court might have done.

BY THE COURT.—The appeal is allowed with costs in all three courts and it is ordered that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to sale not only the property originally mortgaged to them as specified in the preliminary decree but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record.

*Appeal decreed.*

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

SURAJ BHAN AND OTHERS (DECREE-HOLDERS) v. BOOT AND EQUIPMENT FACTORY, AGRA (JUDGEMENT-DEBTOR) \*

*Act No. VII of 1913 (Indian Companies Act), section 207—Voluntary liquidation—Decree passed against company prior to liquidation—Stay of execution—Jurisdiction.*

A decree had been obtained against a company which subsequent to the passing of the decree went into voluntary liquidation. The decree-holder applied for execution of the decree which was granted by the court of first

\* Second Appeal No. 1027 of 1915, from a decree of D. B. Lyle, District Judge of Agra, dated the 20th of April, 1915, reversing a decree of Abdul Ali, Subordinate Judge of Agra, dated the 15th of February, 1915.

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instance. On appeal the District Judge ordered stay of execution. *Held* that the District Judge had no jurisdiction to stay execution. Under the Indian Companies Act the only court that could stay execution was the High Court.

*Held* further that section 207 of the Indian Companies Act is no bar by itself to the progress of execution unless and until an order has been obtained from a court having jurisdiction under the Companies Act, either for winding up or for stay of proceedings.

THE facts of the case are as follows :—

One Seth Suraj Bhan held a decree against the Boot and Equipment Factory Company, Limited, Agra, a company which was started in 1907, with a nominal capital of Rs. 5 lakhs, divided into 20,000 shares of Rs. 25 each. The registered office of the Company was at Agra, but it was transferred to Calcutta in 1914. The Company resolved voluntarily to be wound up at a special meeting on the 11th of February, 1914, and at a subsequent meeting the resolution was confirmed. Seth Suraj Bhan put his decree into execution and certain properties of the Company were attached. The Subordinate Judge allowed execution to proceed. The liquidator of the Company appealed against that order on the ground that as the Company had gone into voluntary liquidation, the decree held by Seth Suraj Bhan could not be executed by the sale of the attached properties. A cross objection had been filed to the effect that the Company had not properly gone into liquidation and that the liquidator had not been duly appointed, and that the Company had no power to transfer its registered office from Agra to Calcutta. The District Judge of Agra allowed the liquidator's appeal and struck off the execution case. The decree-holder appealed to the High Court.

Babu Piari Lal Banerji, for the appellant :—

The Judge has struck off the execution case on the sole ground that the Company has gone into voluntary liquidation. The Judge has held that the property vests in the non-official liquidator, but there is no statutory provision on the point. The Calcutta High Court has taken the opposite view in the case of *Amrita Lal Kundu v. Anukul Chandra Das* (1). My contention is that when we have a decree and apply for execution it is for the judgement-debtor to show that we cannot execute it. In a case of this nature the only court

which has jurisdiction to arrest execution is the High Court. Moreover, the head office of the Company having been transferred to Calcutta it is the Calcutta High Court that can stay execution.'

Babu *Preo Nath Banerji* (for Babu *Lalit Mohan Banerji*) for the respondent :—

I concede that the transfer of the head office to Calcutta, is illegal. But that does not make the winding-up resolution illegal nor is the appointment of the present liquidator illegal. I submit that there is nothing in the law to make a meeting in Calcutta, illegal when the head office is at Agra. When it is conceded that the appointment of the liquidator is legal, then section 207 of the Indian Companies Act applies and the liquidator has to pay up all the creditors *pari passu*. If execution is allowed to proceed the result would be that this particular creditor would get an unfair advantage over the other creditors and section 207 will be infructuous. If a creditor is not satisfied with what the liquidator is doing he can apply under section 219 or section 215 of the Indian Companies Act.

Babu *Piari Lal Banerji* was not heard in reply.

PIGGOTT, J.—This is an appeal by the decree-holders in an execution case. The judgement-debtor is a company registered under the Indian Companies Act (Act VII of 1913). For purposes of this appeal we may take it that this Company has gone into voluntary liquidation. The court of first instance held that this circumstance afforded no reason for staying execution of the decree; but this decision has been reversed by the District Judge on appeal. In the Indian Companies Act (No. VII of 1913), there is no statutory provision as to stay of suits or other legal proceedings in the case of a company which has gone into voluntary liquidation, corresponding to the provisions of section 171 of the Act, with regard to the consequences of a winding up order. The learned District Judge points out that it would be open to the present decree-holders to obtain a winding-up order and assumes that this circumstance is in itself sufficient to deprive them of their remedy by way of execution. We have been referred to the provisions of section 297, clause (1), of the Act. It is there

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laid down that one of the consequences which ensues on the voluntary winding up of a company is that its assets shall be applied in satisfaction of all its liabilities *pari passu*. These words lay down a direction for the guidance of the liquidator and confer certain rights on all the creditors. The question, however, is on whom does the burden lie under the circumstances now before us of moving the court which has jurisdiction under the Indian Companies Act, to take action with a view to enforcing these provisions? Undoubtedly the liquidator, or any other creditor dissatisfied with the action taken by the present decree-holders, would be entitled to move the court having jurisdiction under the Companies Act; but the mere existence of this provision in section 207, clause (1), does not seem to operate in itself as a statutory bar to the progress of the execution proceedings, unless and until an order has been obtained from a court having jurisdiction under the Companies Act, either for winding up, or for stay of proceedings. The practical importance of the above considerations seems to be illustrated by the facts of the present case. The debtor company purports to have gone into voluntary liquidation, and it has at the same time taken certain steps, the object of which would seem to be, to leave it doubtful whether the court which would have jurisdiction over the affairs of this particular company under section 3 of Act VII of 1913, should be this Court or the Calcutta High Court. In argument it was conceded before us that this Court would have jurisdiction; but there has been no formal application to this Court by the liquidator or by any other person concerned in the affairs of this Company, which would have the effect of binding such applicant to an admission that this Court was the proper court to exercise jurisdiction. It seems to me therefore under the circumstances that the proper order to pass is one setting aside the order of the District Judge and returning the execution case to the court of first instance, with directions to proceed with the execution, unless and until those proceedings are brought to a close by a winding-up order, or by some order of a competent court exercising jurisdiction under Act No. VII of 1913.

WALSH, J.—I agree. I think the judgement of the District Judge wholly missed the point. There is an express stay in

the case of a compulsory winding-up order. That is obviously to prevent a conflict between two courts in two distinct proceedings dealing with the same subject matter. But in spite of the stay provided by section 171, leave of the court may still be obtained under it on certain terms to continue legal proceedings. That shows that whether a proceeding is to be allowed to continue or not is a matter for the consideration of the court having jurisdiction over winding-up. If the decision of the learned District Judge were to stand, the result would be to give to the district court, or the court from which the decree was obtained, jurisdiction to determine questions arising in a winding-up which the Legislature has entrusted to the court of the place where the company has its registered office. To my mind in a voluntary winding-up before the company itself can obtain a stay it must apply to the court in which the winding-up would take place if it were compulsory. That is obviously the appropriate court to determine any question between the company or its liquidator and any other person.

BY THE COURT.—The appeal is allowed, the decree of the lower appellate court is set aside and the execution proceedings are remanded to the court of first instance, through the lower appellate court, to be proceeded with subject to the remarks contained in the order of the Court. The appellants will get their costs in all three courts.

*Appeal decreed.*

*Before Sir Henry Richards, Knight, Chief Justice and Justice, Sir Pramada Charan Banerji.*

KUNWAR SEN AND OTHERS (PLAINTIFFS) v. DARBARI LAL AND OTHERS (DEFENDANTS)\*.

*Mortgage—Mortgagee in possession Equity of redemption—Adverse possession while period of redemption is running—Suit to redeem by a person whose name is recorded in revenue papers.*

*Held that a person could not acquire a title, by adverse possession, to land which was the subject of a usufructuary mortgage, and therefore in the possession of the mortgagees, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the*

\* Second Appeal No. 1885 of 1914, from a decree of G. C. Badhwar, District Judge of Mainpuri, dated the 15th of August, 1914, confirming a decree of Ladi Prasad, Subordinate Judge of Mainpuri, dated the 27th of September, 1913.

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