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tions does not appear to be true. I have no doubt that the applicant knew all through that a special resolution had been passed and confirmed and that an application for the confirmation of the alterations had been made in this Court. But the omission of the applicant to oppose the application for confirmation of the alterations does not affect the matter before me, as it is my duty to recall my invalid order.

A copy of this order will be sent to the Registrar of Joint Stock Companies. The parties will bear their own costs.

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*Before Mr. Justice Iqbal Ahmad*

1936 *September*, 2

HENLEY'S TELEGRAPH WORKS Co. (APPLICANT) *v.* GORAKHPUR ELECTRIC SUPPLY Co., LTD. (OPPOSITE-PARTY)*

*Companies Act (VII of* 1913), *sections* 162(v), 163(i)—*Company unable to pay its debts—Notice of creditor's demand "under his hand"—Who can sign it*—Bona fide *dispute about alleged debt—Petition for winding up*—Bona fides—*Abuse of process of the court—Discretion of court upon petition for winding up.*

The notice of demand contemplated by section 163(i) of the Companies Act must be in strict compliance with the provisions of that clause, and ordinarily the demand "under his hand" must be a demand signed personally by the creditor himself. But where the creditor is a limited liability company it must necessarily act through its officers and authorised agents. So where a demand was signed by the manager of the company, it was *held* that the notice of demand complied with the requirements of section 163(i); the manager must, unless the contrary was proved, be deemed to have the authority to demand and receive payment of debts due to the company and it was not necessary to prove that the company had by a resolution authorised him to demand payment of the debt.

The mere service of a notice of demand by a creditor on a company, which does not pay because it *bona fide* disputes the existence of the debt, does not establish that the company

*Miscellaneous Case No. 450 of 1934.

is unable to pay its debts or entitle the creditor to a winding up order. If a company is solvent and there is a genuine dispute about an alleged debt, the resort by the creditor to the summary proceeding of serving on the company a notice under section 163, and following the same by a petition under section 162(v) for winding up, is ordinarily referable to a desire on the part of the creditor to bring pressure on the company to induce it to pay the alleged debt without having the dispute decided by the civil court in the normal way. An application for winding up in such a case must be regarded as *mala fide* and as being an abuse of the process of the court, and must be dismissed. In the present case, however, the debt was a decree-debt of about Rs.33,000, and although an appeal had been filed it was only to the extent of Rs.5,000, and even that appeal had been dismissed for want of prosecution, and so there was no ground for a *bona fide* dispute.

Clause (i) of section 163 is general in its terms and has application to all sorts of debts, whether a simple money debt, a mortgage debt or a judgment-debt. In the case of a judgment-debt, if execution for the recovery of that debt has been taken out and has remained unsatisfied, the court is, in accordance with clause (ii) of section 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not debarred from making a demand for the payment of the judgment-debt by a notice in accordance with clause (i), without having recourse to execution proceedings; and in such a case if the demand remains unsatisfied for three weeks, the presumption enjoined by section 163 necessarily follows.

Upon a petition for winding up, made under section 162(v) on the ground that the company is unable to pay its debts, the court is not bound to make the order, but has a discretion to make or refuse the order for winding up, after taking into consideration the circumstances of the case.

Mr. *Hazari Lal Kapoor*, for the applicant.

Sir *Wazir Hasan*, Dr. *K. N. Katju*, Dr. *N. P. Asthana* and Messrs. *Gopi Nath Kunzru* and *B. N. Misra*, for the opposite party.

IQBAL AHMAD, J.:—This is an application for the compulsory winding up of the Gorakhpur Electric Supply Company, Limited. The application purports to be an application under section 162(v) of the Companies Act and has been presented by W. T. Henley's

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Telegraph Works Company, hereinafter referred to as the petitioner. The petition is based on the ground that the company is unable to pay its debts.

* * * * *

[In August, 1930, the petitioner had filed a suit in the court of the Subordinate Judge of Allahabad against the company for the recovery of a sum of about Rs.25,000 on account of materials supplied and work done by the petitioner to the company. The suit was decreed on the 27th of November, 1933, for a sum of Rs.25,806 with *pendente lite* and future interest and costs against the company.]

After the suit was decreed by the Subordinate Judge, the petitioner served a notice on the company under section 163(i) of the Companies Act on the 12th of July, 1934, demanding payment of a sum of Rs.33,539-14-6, the amount due to the petitioner under the decree. The managing agents sent a reply to this notice on the 3rd of August, 1934, stating that as an appeal had been filed in the High Court the matter was still *sub judice* and the decree in favour of the petitioner had not become final. After the lapse of the statutory period of three weeks the petitioner filed the present application for the winding up of the company on the ground that the company was unable to pay its debts.

The petition for winding up is opposed by the company and by certain alleged debenture holders. It is urged that the company is solvent, is able to pay its debts and the application for winding up has been made with a view "to put pressure upon the company for the realisation of the alleged debt of the applicant" and is not *bona fide*. It is further contended that the debt of the applicant is still disputed, as the appeal has not yet been decided. The validity of the notice under section 163 is also called in question, and lastly it is contended that "the concern of the company not being transferable under the provisions of section 9 of the Electricity Act (1910) without the sanction of the Local Government,

and the company being a company for public utility, the application for its winding up is not maintainable."

Learned counsel for the petitioner maintained that the debentures were not for consideration and were in any case invalid. But at the hearing of the petition, it was agreed that it is unnecessary in the present proceedings to decide the question relating to the genuineness and validity of the debentures. The plea that the petition for winding up could not be maintained in view of the provisions of section 9 of the Electricity Act was also not pressed. The questions that remain for decision, therefore, are:

1. Is the application for the winding up of the company a *bona fide* one, or has it been filed to bring pressure on the company to pay the decretal amount?

2. Is the notice under section 163 of the Companies Act in accordance with law?

3. Is it desirable to wind up the company "considering the objections filed by the company and persons calling themselves debenture holders"?

The fact that the company was, and is, indebted to the petitioner cannot be disputed. The decree passed by the Subordinate Judge against the company has, as already stated, become final with respect to at least a sum of Rs.20,000. The decree awarded *pendente lite* and future interest. The total amount due to the petitioner under the decree, on the date that the petitioner sent the statutory notice to the company, was a sum of about Rs.33,000. As ultimately the valuation of the appeal filed in this Court was reduced to a sum of Rs.5,000, it must be taken for granted that the company was, and is, indebted to the petitioner in a sum of at least about Rs.30,000. The appeal with the reduced valuation was also dismissed for want of prosecution and has not yet been restored. I am therefore bound to proceed on the assumption that the entire decree has become final, and the company is indebted to the petitioner in a sum of at least Rs.35,000. The failure of

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the company to pay the amount due within three weeks of the receipt of the notice, therefore, brings the case within the purview of section 162(v) of the Companies Act, and I am bound to hold that the company is unable to pay its debts. This by itself furnishes a valid ground for an order for the compulsory winding up of the company. But it is contended that the notice sent by the petitioner was not in accordance with law and, therefore, the failure of the company to comply with the notice does not warrant the presumption that the company is unable to pay its debts. In this connection reference is made to the provisions in clause (i) of section 163 that the notice by the creditor must be "a demand under his hand" asking for the payment of the debt. It is said that as the notice in the present case was signed by one Mr. Bland, and there was nothing in the notice to show that Mr. Bland was authorised by some resolution passed by the petitioner company to make the demand and to serve the notice, the notice cannot be deemed to incorporate a demand under the petitioner's hand. It is also pointed out that Mr. Bland was not described in the notice as an officer of the petitioner authorised to demand the payment of the debts due to the petitioner.

In support of this contention reliance has been placed on the decision in *Kureshi* v. *Argus Footwear, Ltd.* (1). It was held in that case that the demand contemplated by section 163(i) of the Act is a demand signed personally by the creditor himself when he is physically able to do so and not by his agent. I agree that the statutory demand under clause (i) of section 163 must be in strict compliance with the provisions of that clause and if those provisions are not literally complied with, the demand, though followed by neglect of the company to pay the debt demanded, cannot be made the basis of a presumption that the company is unable to pay its debts. Clause (i) of section 163 imposes a penal obligation upon

(1) (1931) I.L.R., 9 Ran., 323.

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the company and has therefore to be strictly construed.

But the demand in the present case was, in my judgment, a demand under the petitioner's hand. The petitioner is a limited liability company, and must necessarily act through its officers and authorised agents. A demand under the hand of its manager must therefore be deemed to be a demand under its hand. The notice sent by the petitioner company was on a printed form used by the petitioner company for its letters. The name of the petitioner company was mentioned at the bottom of the notice. Then followed the signature of Mr. Bland, and thereafter the word "creditor" was typed. The office or the post that Mr. Bland held in the petitioner company was not mentioned in the typed portion of the notice. But on the printed form Mr. Bland is described as "manager for India". The plea taken in the written statement filed by the company as regards the invalidity of the notice was that the notice was "not in accordance with law". No indication was given in the written statement as to in what respects the notice did not comply with the provisions of law. It was, however, suggested either before or at the time of the settlement of issues that as there was nothing to show who Mr. Bland was, the notice was invalid. The petitioner then filed an affidavit of one Mr. Pilcher that Mr. Bland is the manager for India of the petitioner company, and that by an oversight below his signature the words "manager for India" were not typed. The affidavit was filed in this Court on the 19th of August, 1935, and neither the counsel for the company nor the counsel for the debenture holders made any request then or thereafter for Mr. Pilcher being summoned with a view to being cross-examined as regards the allegations contained in his affidavit.

The facts stated above lead to the irresistible conclusion that Mr. Bland is the manager of the petitioner company and is, in the ordinary course of his duties, entitled to demand the debts due to the petitioner. The

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demand made by him by means of a written notice must therefore be deemed to be a demand by the petitioner company under its hand.

The argument that in the absence of proof of the fact that the petitioner company by its resolution authorised Mr. Bland to demand the payment of the debt appears to me to be without substance. No plea to this effect was taken in the written statement, or foreshadowed in the examination-in-chief of Mr. P. L. Jaitly. Throughout the period that the petition remained pending in this Court, there was never a whisper that in the absence of a resolution authorising somebody to demand the debt due to the petitioner the notice could not be deemed to be valid. In the course of his argument Sir *Wazir Hasan* for the first time raised this plea. As I have remarked above, the manager of a company must, unless the contrary is proved, be deemed to have the authority to demand and receive payment of the debts due to the company of which he is the manager, and this presumption must hold good in the present case. The plea of the company about the invalidity of the notice must, therefore, be overruled.

It was strongly pressed upon me that there still was a *bona fide* dispute about the debt alleged to be due to the petitioner and the petitioner was therefore not entitled to get an order for the winding up of the company. If I was satisfied that this argument was well founded, I would have had no hesitation in rejecting the contention of the petitioner based on the provisions of section 163(i) of the Companies Act. There is abundant authority for the proposition that the mere service of a notice by a creditor on a solvent company does not entitle the creditor to a winding up order if the company *bona fide* disputes the existence of the debt; vide *Cadiz Waterworks Company* v. *Barnett*

(1), *In re London and Paris Banking Corporation* (2), *Tulsidas Lallubhai* v. *Bharat Khand Cotton Mill Co.* (3), *The Company* v. *Sir Rameswar Singh* (4) and *Satyarazu* v. *Guntur Mills* (5). The reason for this rule is obvious. If a company is solvent and there is a genuine dispute about an alleged debt, the resort by the creditor to the summary proceeding of serving on the company a notice under section 163, and following the same by petition for winding up, is ordinarily referrable to a desire on the part of the creditor to bring pressure on the company in order to induce the company to pay the debt, without having the dispute settled by the civil court, by which court the dispute ought to be ordinarily settled. To make an order for winding up in such a case would deprive the company of its right to have the question between it and the petitioning creditor decided in the normal way by the civil court constituted for the purpose, and this would be opposed to public policy. An application for winding up in such a case must therefore be regarded as a vehicle of oppression and an abuse of the process of the court and be dismissed.

But the principles enunciated above have no application to the case before me. Far from there being a *bona fide* dispute about the debt alleged to be due to the petitioner, the denial by the company of its liability is *mala fide*. Mr. Jaitly, the managing agent of the company, went on evading payment of the debt for about two years by holding out false promises and unfounded assertions as regards a counter claim against the petitioner. The question of the indebtedness of the company then formed the subject of a suit and, after contest, the suit was decreed, and the decree, as already stated, has become final. What then is the nature of the dispute about the existence of the debt I fail to appreciate. Under the circumstances I cannot but interpret the

(1) (1874-5) L.R., 19 Eq., 182. (2) (1874-5) L.R., 19 Eq., 444.
(3) (1914) I.L.R., 39 Bom., 47. (4) (1918) 23 C.W.N., 844 (857).
(5) (1924) I.L.R., 48 Mad., 207.

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denial by the company of the existence of the debt as dishonest. It would further appear, from the facts to be presently stated, that the company is insolvent. There is, therefore, no escape from the conclusion that all the requirements of section 163(i) are satisfied in the case before me, and I am bound to presume that the company is unable to pay its debt.

There is yet another argument that has been advanced by Sir *Wazir Hasan* in bar of the petitioner's application. He contends that as the debt due to the petitioner company, on its own showing, is a judgment-debt, the case comes within the purview of clause (ii) and not clause (i) of section 163. It may be conceded that all the three clauses of section 163 are mutually exclusive of each other, but it does not follow from this that clause (i) of the section does not apply to a judgment-debt. Clause (i) is general in its terms and has application to all sorts of debts, be it a simple money debt, a mortgage debt or a judgment-debt. In the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the court is, in accordance with clause (ii) of section 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not debarred from making a demand for the payment of the judgment-debt by a notice in accordance with clause (i) without having recourse to execution proceedings. In such a case if this demand remains unsatisfied for three weeks, the presumption enjoined by section 163 necessarily follows.

It would thus appear that the company is unable to pay its debts. This fact, however, does not necessarily entitle the petitioner to an order for the winding up of the company, as the discretion to pass such an order, even in the case of the inability of a company to pay its debts, is by section 162 vested in the court. I have, therefore, given most anxious consideration to the question whether or not I should order the company to be wound up. In considering this question I have

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always kept in view the fact that an order for the compulsory winding up of a company is a very extreme step to take and that such an order ought not to be lightly passed. But on a consideration of all the circumstances I have been forced to the conclusion that there is no other alternative left but to order the winding up of the company, and to dismiss the present application would be unjust to the petitioner.

* * * * *

From the very inception of the company Mr. Jaitly utilised the concern solely for his benefit. The purchase of a large number of shares by him was without consideration and the outcome of deliberate fraud. He abused his position as the Chairman of the Directors' meeting to practically rule out the resolution calling upon him to deposit the amount in his hands with the Imperial Bank of India. The company has been carrying on its business for a period of about eight years and during this period a dividend of annas four per share was paid only once to the shareholders. No dividend has thereafter been paid. In accordance with the rules under the Electricity Act spare parts had to be maintained in the power house. This was not done and Jaitly was prosecuted and convicted for the same. The Electrical Inspector to Government complained more than once about the unsatisfactory condition of the engine in the power house, and the provisional official liquidators have reported that, unless a large sum is invested forthwith, a breakdown is imminent and the whole of the town of Gorakhpur will be thrown into darkness. The unsecured creditors have not been paid a pice and their demands always fell on deaf ears. The managing agent himself has been declared an insolvent. These being the facts, I find it impossible to come to any other conclusion but that the company ought to be compulsorily wound up. I realise that mere misconduct of Directors or of managing agents or the fact that the business of the company has not resulted in profit is not

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*per se* a ground for winding up, but the cumulative effect of the facts stated above does demonstrate that the company is insolvent; that its affairs have been mismanaged from the very outset; that debts have been recklessly incurred and never paid; that the machinery requisite for uninterrupted supply of electricity has not been provided for; that the provisions of the Companies Act as regards the maintenance and publication of true balance sheets have been deliberately contravened, and the information necessary to keep the shareholders cognizant of the true state of affairs has been studiously concealed from them all through. I, therefore, hold that the petitioner is entitled to succeed. Accordingly I order that the company be compulsorily wound up.

## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom and Mr. Justice Rachhpal Singh*

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*September*, 7

HARISH CHANDRA (APPLICANT) *v.* KAVINDRA NARAIN SINHA AND OTHERS (OPPOSITE-PARTIES)*

*Companies Act (VII of 1913), section 85(3)—Director acting in contravention of section and being liable to fine—Whether an "offence"—Court for trial of such offence—Whether High Court can take cognizance of and try such offence—Companies Act, section 3—Jurisdiction—Criminal Procedure Code, sections 29, 194—Letters Patent, clauses 16, 17—Original Criminal Jurisdiction.*

Contraventions of the provisions of the Companies Act which have been made punishable with fine, e.g. section 85(3), are "offences".

The High Court has no jurisdiction itself to take cognizance, in the first instance, of any such offence and to try it and impose the fines prescribed by the provisions of the Companies Act. If the case was committed to the High Court under section 194(1) of the Criminal Procedure Code, or proceedings were started on an application of the Advocate-General under section 194(2), or were transferred to it under section 526, then the High Court would have jurisdiction to try the

*Miscellaneous Case No. 435 of 1936.