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by the plaintiffs. Accordingly we allow this application, set aside the order of the court below and direct that the additions prayed for by the plaintiffs be made as against the names of defendants 2 and 3 in the plaint. After the additions have been made the defendants will be given an opportunity to file a fresh written statement.

We make no order as to the costs of this application.

APPELLATE CIVIL

Before Sir John Thom, Chief Justice, and Mr. Justice
Ganga Nath

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MANMOHAN DAS (OPPOSITE PARTY) v. OFFICIAL LIQUIDATORS, LOWER GANGES-JUMNA ELECTRICITY DISTRIBUTING Co., LTD., AND OTHERS
(APPLICANTS)*

Electricity Act (IX of 1910), section 9(2)—“Transfer”—Charge is not a transfer—Debentures creating a charge—Sanction of Government not necessary—“Licensee” includes transferee of the license with the consent of the Government—Transfer of Property Act (IV of 1882), section 54—“Other intangible thing”—License under Electricity Act to supply electrical energy—Transfer does not require a registered instrument.

The execution of a debenture trust deed, and issue of debentures, creating a charge over the undertaking of a company which is a licensee under the Electricity Act do not require the sanction of the Government for their validity under section 9(2) of the Act, although any provisions therein purporting to transfer to the trustees for the debenture holders, or to create any mortgage over, the undertaking or properties of the company would be void for want of such sanction. The charge created being valid, the debenture holders would be entitled to rank as secured creditors in the liquidation proceedings.

A charge over immovable property does not amount to a transfer of the property either *in praesenti* or *in futuro*. A charge, therefore, does not come within the term “transfer” in section 9(2) of the Electricity Act, the provisions of which ought to be strictly construed.

The transfer of a license granted under the Electricity Act to supply electricity can be validly effected without a registered instrument. The words, “other intangible things”, in section 54 of the Transfer of Property Act are intended to embrace

*Appeal No. 1 of 1940, under section 10 of the Letters Patent.

those imponderables which are related to immovable property, such as, for example, a reversionary right, and do not include such things as licenses under the Electricity Act.

A person to whom a license has been transferred with the consent of the Government and who is in fact under that license supplying electricity comes within the term "licensee" as defined in the Electricity Act.

Messrs. *Gopi Nath Kunzru* and *R. N. Gurtu*, for the appellant.

Dr. N. P. Asthana and Messrs. *P. L. Banerji* and *Govind Das*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—This is an appeal under the Letters Patent against the order of ALLSOP, J., in an application by the Official Liquidators of the Lower Ganges-Jumna Electricity Distributing Co., Ltd., (in liquidation). The Official Liquidators in their application invited instructions in regard to the ranking of certain creditors of the company who claimed to be debenture holders.

On the 1st of February, 1931, the Board of Directors of the company passed a resolution to issue debentures. On the 7th of May, 1932, the company executed a debenture trust deed and in pursuance of that trust deed debenture bonds were subsequently issued.

The issue of the debentures was underwritten by the Central Bank of India. The amount of the debentures issued was Rs. three lakhs. The appellant L. Manmohan Das, who was a Director of the company, acquired from the Central Bank about Rs. 2½ lakhs of these debentures. The Central Bank, it is stated, still holds about Rs. 11,000 worth of debentures.

In the winding up proceedings the debenture holders claimed preferential right to payment out of the assets of the company. The learned Judge who disposed of the application has held that the debentures are invalid and that the debenture holders are not entitled to rank as secured creditors. The direction which he gives is as follows: "The Official Liquidators will not give

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preference to the debenture holders but will pay them their share of the assets on account of the debt due to them."

The learned Judge held that the debentures were invalid inasmuch as the company did not obtain the sanction of the Government to their issue in terms of section 9, sub-section (2), of the Electricity Act of 1910. This provision enjoins that the person holding a license to sell electricity under the Act "shall not at any time assign his license or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the Provincial Government."

It is a matter of admission that the company did not obtain the Provincial Government's permission to issue debentures. It was contended, however, that the debenture trust deed, whilst it might be invalid so far as it purported to convey the company's property to trustees or debenture holders or so far as it purported to create a mortgage over these properties in favour of the debenture holders, yet it was valid and did operate so as to create a valid charge over these properties. This argument was repelled by the learned Judge who held that a charge was a transfer within the meaning of section 9, sub-section (2) of the Electricity Act. In the course of his judgment the learned Judge observes: "I should think, therefore, that a charge, if it is not an immediate transfer, is at least an agreement to transfer when certain contingencies arise. The arguments which apply to charges on immovable property would apply by analogy to charges on other assets. The result is that the creation of a charge is an agreement to transfer property and as such, in my judgment, it is void if the property is an undertaking to which the provisions of the Indian Electricity Act apply."

The learned Judge further repelled an argument advanced on behalf of the debenture holders to the effect that section 9 of the Electricity Act did not apply

to the issue of debentures since in fact the license to distribute electricity had not been transferred to the company. A further contention that the company was not a licensee within the meaning of section 9 of the Electricity Act was also rejected.

The appellant in second appeal advanced the same arguments in support of the validity of the debentures which were considered by the learned Judge against whose order this appeal is directed.

In the view that we take of this case it is immaterial whether the license, which was originally granted to Messrs. P. L. Jaitly & Co., was transferred to the Lower Ganges-Jumna Electricity Distributing Co. Ltd. Nevertheless since the issue has been raised and since we have heard arguments on behalf of the parties interested, we consider that it is our duty to pronounce judicially thereon.

The Lower Ganges-Jumna Electricity Distributing Co., Ltd., was formed for the purpose of acquiring and working a license held by Messrs. P. L. Jaitly & Co. Article 3, sub-section (1), of the Memorandum of Association of the company is as follows: "To acquire from the firm of Messrs. P. L. Jaitly & Co. a license called 'The Bulandshahr and Aligarh Districts Electric License, 1929', granted by the Government of the United Provinces of Agra and Oudh to the said firm of Messrs. P. L. Jaitly & Co. and their assigns under the provisions of section 3(1) of the Indian Electricity Act, 1910, for the distribution of electrical energy within the districts of Bulandshahr and Aligarh excluding the towns of Khurja and Aligarh."

It is not disputed that the transfer of the license to the company was not in fact effected by means of a registered instrument. Indeed it does not appear that there is a single document on the record which could be regarded as in itself a transfer of the license of Messrs. P. L. Jaitly & Co. to the Lower Ganges-Jumna Electricity Distributing Co. It was contended that no

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transfer had been effected since the license could only be transferred by means of a registered instrument in view of the terms of section 54 of the Transfer of Property Act. This contention is in our judgment unsound. Section 54 is one of the sections of chapter III of the Transfer of Property Act. This chapter is headed, "Of sales of immovable property". Sale in the section is defined as a transfer of ownership in exchange for a price paid or promised, or part paid and part promised. Such sale, the section provides, "in the case of tangible immovable property of the value of Rs.100 and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument." As already observed section 54 deals with sales of immovable property. It is apparent in our opinion that the "other intangible thing" referred to in the section is intended to embrace those imponderables which are related to immovable property, such as, for example, a reversionary right. There is nothing in the section or Act to justify the conclusion that all licenses which are intangible things can only be transferred by a registered instrument. Section 6 of the Transfer of Property Act provides: "Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force." Section 9 of the Act enjoins: "A transfer of property may be made without writing in every case in which a writing is not expressly required by law."

There is no law which expressly enjoins that the transfer of a license to sell electricity can be effected only by written or registered document: See *Shri Thakurji v. Dwarika Ram* (1) and *Savitri Devi v. Dwarka Prasad Bhatya* (2). In this view of the law the court has to consider whether there are facts and circumstances sufficient to prove that the license held by Messrs P. L. Jaitly & Co. was in fact transferred by

(1) A.I.R., 1935 Pat. 492.

(2) I.L.R. [1939] All. 275.

that company to the Lower Ganges-Jumna Electricity Distributing Co. Ltd.

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In this connection it is relevant to refer to the winding up order passed by this Court when it directed that the Lower Ganges-Jumna Electricity Distributing Co. Ltd. be wound up. The Bench which disposed of the application for winding up had to consider the question whether in fact the license had been transferred by Messrs. P. L. Jaitly & Co. to the Lower Ganges-Jumna Electricity Distributing Co. Ltd. After considering the evidence the Bench observed: "In the result we hold that neither the company nor Messrs. P. L. Jaitly & Co. can now challenge the validity of the transfer of the license." Reference in this connection may further be made to the terms of the debenture trust deed. In clause (4) of the deed there is the following representation: "The company has obtained a license from the United Provinces Government under the Indian Electricity Act of 1910 in the name of the company's managing agents Messrs. P. L. Jaitly & Co., for the supply of electrical energy within the districts of Bulandshahr, Aligarh and elsewhere, and in furtherance of the same object has fixed electric poles in earth in the said districts and has also connected the poles with electric wires and other appliances." This trust deed was signed by Mr. P. L. Jaitly and by Messrs. P. L. Jaitly & Co. Mr. Jaitly was a Director of the Lower Ganges-Jumna Electricity Distributing Co. Ltd. and Messrs. P. L. Jaitly & Co. Ltd. were managing agents of that company. Messrs. P. L. Jaitly & Co. Ltd. signed the document as managing agents.

As already observed the Lower Ganges-Jumna Electricity Distributing Co. was formed with the object of obtaining a working license which had been granted by the Government to Messrs. P. L. Jaitly & Co. In accordance with the terms of the agreement between the Government and Messrs. P. L. Jaitly &

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Co. Ltd. an application was made to the Government for the transfer of the license to the company. On the 28th of March, 1931, by a letter of that date the Government's sanction was given. On the 5th of April, 1932, the company through its managing agents addressed a letter to the Chief Engineer, Provincial Government, in which the following passage occurs: "You will note that we made no delay in getting the license transferred to us for which we took due permission from you as well. In the light of this obligation having been fulfilled on our part, and it being in your knowledge, you having had sanctioned the transfer of the said license, no urgency of the transfer of the bulk supply agreement was considered necessary. Transfer of the license was considered to mean the transfer of all the other clauses and agreements and annexures connected with it. And it was taken as such." On the 14th of May, 1932, one week after the debentures were issued, the Directors of the Lower Ganges-Jumna Electricity Distributing Co. Ltd. held a meeting. The following is an excerpt from the minutes of proceedings of the meeting: "The adoption agreement between Messrs. P. L. Jaitly & Co. and the Lower Ganges-Jumna Electricity Distributing Co. Ltd., which was postponed at the last meeting, was again placed before the Directors and it was resolved that in view of the fact that the Government has sanctioned the transfer of the license to the company, who in fact have been working the license, and therefore the transfer has already taken place, it is not necessary now to execute any adoption agreement. As to the consideration for the transfer of the license, Messrs. P. L. Jaitly & Co. are requested to prepare a note for the information of the Board"

Reference may also be made in this connection to an undated letter from P. L. Jaitly & Co. to the Chief Engineer, Provincial Government. This letter is in the following terms: "Please note that the distribution

of electricity in the two districts of Aligarh and Bulandshahr has been handed over to the Lower Ganges-Jumna Electricity Distributing Co. Ltd., and all correspondence in future be kindly addressed to their Resident Engineer, Bulandshahr."

The company had been in fact distributing electricity under the license for a considerable time before the 14th of May, 1932, when the meeting of the Board of Directors above mentioned was held. On the 1st of May, 1930, the company had obtained a certificate under section 103 of the Companies Act and on the 1st of November, 1930, the bulk supply of electricity by the Government to the company commenced.

It is apparent from the correspondence and the minutes of Directors' meetings that one of the reasons why no formal agreement for the transfer of the license by Messrs. P. L. Jaitly & Co. to the Lower Ganges-Jumna Electricity Distributing Co. Ltd. was drawn up, was the inability of the Directors of the company and Messrs. P. L. Jaitly & Co. to come to an agreement in regard to the consideration for the transfer. Under clause 16 of the prospectus issued by the company the company was to acquire the license on payment of all outlays incurred by Messrs. P. L. Jaitly & Co. in working the license up to the date of the transfer. The parties could not agree upon what was a fair sum to allow to Messrs. P. L. Jaitly & Co. for the license. That the license was in fact transferred is not in doubt. The Board of Directors passed a resolution that the license had been transferred. Mr. P. L. Jaitly as a Director was present at the meeting when that resolution was passed. The company represented to the Government through Messrs. P. L. Jaitly & Co., their managing agents, that the license had been transferred. The company represented to the debenture holders that the license had been transferred and the debenture trust deed was signed by P. L. Jaitly as Director of the Lower Ganges-Jumna Electricity

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Distributing Co. Ltd., and by Messrs. P. L. Jaitly & Co. as managing agents. The evidence that the license was in fact transferred is overwhelming and we hold accordingly.

It was maintained for the appellant that even if the license had been transferred to the company the company was not a licensee within the meaning of section 9, subsection (2) of the Electricity Act and therefore was not required to take the sanction of the Government before transferring or mortgaging any part of the undertaking. There is no force in this contention. "Licensee" is defined in the Act as "Any person licensed under part II to supply energy". Clearly a person to whom a license has been transferred with the consent of the Government and who is in fact under that license selling electricity is a person licensed under part II to supply energy.

The position, therefore, at the time of the execution of the debenture trust deed was that the Lower Ganges-Jumna Electricity Distributing Co. Ltd. was a licensee under the Electricity Act and was prohibited by the provisions of section 9 from transferring any part of its undertaking without the consent of the Government. The debenture trust deed transfers the whole undertaking including the license to trustees for the debenture holders. It also purports to create a mortgage over the entire property then existing and future of the company. It further purports to create a charge over that property. So far as the deed is intended to operate as transfer of the properties to the trustees for the debenture holders it is void in view of the provisions of section 9, subsection (2). Similarly it is void in so far as it purports to create a mortgage. Section 58 of the Transfer of Property Act defines a mortgage as a "transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan." It was maintained, however, that the debenture trust deed was valid in so far

as it purported to create a charge. It was alleged that an omnibus deed of this sort might be invalid in regard to some of its provisions and yet valid in regard to others. In support of this contention reliance was placed on the decision of the Privy Council in the case of *Bank of Australasia v. Breillat* (1). In that case the Board was considering certain acts of the Directors which it was contended were *ultra vires*. In the course of their judgment it is observed: "Then, if the money was borrowed *bona fide* by the Directors, for the purposes of the partnership and within the limits of their authority, and was advanced *bona fide* by the appellants for those purposes, and applied to the legitimate purposes of the partnership, all of which facts, for the reasons already alleged, we consider as proved; can the liability to repay the money be discharged, because to the engagement to repay, are adjoined other engagements by the Directors, some of which we will assume to have been *ultra vires*? From *Pigot's* case (2) to the latest authorities it has always been held that when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot." On the authority of this decision we hold that provided a charge is not a transfer, as the learned Judge whose decision is challenged in appeal has held, the debenture trust deed which includes specific provisions creating a charge and the debenture bonds issued in pursuance of the same create a valid charge on the property which entitled the appellant and other debenture holders to rank as secured creditors in the winding up of the company.

Section 9, sub-section (2) of the Electricity Act prohibits clearly the transfer of the undertaking or any part

(1) (1847) 6 Moo. P. C. 152(201).

(2)

6 Coke's Rep. 26.

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thereof by the license holders. In our judgment in no sense of the term can a charge be regarded as a transfer either *in praesenti* or *in futuro*. The debtor does not transfer the property or any interest in the property to the charge-holder. It was contended that the policy of the Act is clear, namely to prevent license holders burdening their property with secured debts. We do not agree that this was the policy of the Government. Be that as it may, the provision refers to *transfers* "by sale, mortgage, lease, exchange or otherwise." In our view this provision ought to be strictly construed and not in such a manner as to hamper business transactions of companies engaged in the important work of supplying the public with electricity. There is no warrant in our judgment for going beyond the plain words of the section. "Charge" is defined in section 100 of the Transfer of Property Act as follows: "Where immovable property of one person is by act of parties or by operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." "Charge" is "less than mortgage". A mortgage is something less than the transfer of property and it appears that had the legislature intended to prevent an electrical undertaking charging its property in order to raise money for the purpose of carrying on its business it would have made specific provision to that effect.

In the result we hold that while the debenture trust deed of the 7th of May, 1932, so far as it is intended to operate as a conveyance to the trustees for the debenture holders and so far as it is intended to create a mortgage over the property is invalid, the deed validly creates a charge over the property covered by the deed. We further hold that the debenture bonds also create a charge over that property and that the debenture holders are entitled to be ranked as "secured creditors", the debt of the company being secured over the said

property. It is necessary to refer briefly to the argument advanced on behalf of Messrs. P. L. Jaitly & Co. to the effect that the debenture deed was invalid for any purpose in respect that the debenture holders had not advanced the money agreed to be advanced in consideration of the execution of the deed. As already observed the deed provided for the issue of Rupees three lakhs of debentures and the Central Bank underwrote the entire issue. It is abundantly clear that the Central Bank did in fact disburse this amount of money on the execution of the deed according to the instructions of the Lower Ganges-Jumna Electricity Distributing Co. Ltd. In the Liquidators' report is included a copy of the letter from the company written by Messrs. P. L. Jaitly & Co., managing agents, directing the payment of three lakhs of rupees to certain persons. On the back of this letter there is the endorsement "Received rupees three lakhs only from the Central Bank of India, Ltd., Lucknow, as per details on the face.

"For Lower Ganges-Jumna Electricity Distributing Co. Ltd., for P. L. Jaitly & Co.

(Sd.) P. L. Jaitly & Co., Managing Agents."

It is also clear from the Liquidators' report that the payments referred to in the above letter were entered as having been made in the books of the company which were under the control of the managing agents, Messrs. P. L. Jaitly & Co. The argument that the debentures are bad because no consideration passed must fail.

It was contended for Messrs. P. L. Jaitly & Co. that the debenture holders were not entitled to "have their debentures declared valid in the winding up proceedings. There is no force in this argument. The Liquidators sought the instructions of the Court as to how these debenture holders should be ranked. This they were entitled to do.

It was further contended that L. Manmohan Das was not entitled to prefer this appeal in respect that he

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was an unregistered debenture holder and did not appear as trustee for the debenture holders. There is no force in this argument as the transfer of the property of the company to the trustees, as we have held, is invalid. It is not in dispute that L. Manmohan Das does in fact hold debenture bonds which were transferred to him by the Central Bank. He is therefore a creditor of the company and entitled to maintain this appeal.

In the result we set aside the direction of the learned Judge whose order is challenged that the Liquidators will not give preference to the debenture holders but will pay them their share of the assets on account of the debt due to them. We hold that the debenture holders have a charge over the assets and property covered by the debenture trust deed of the 7th of May, 1932, and as such are secured creditors and entitled to preferential ranking. The appellant is entitled to his costs out of the assets of the company.

Before Mr. Justice Ismail and Mr. Justice Verma

JAGANNATH PRASAD AND OTHERS (DEFENDANTS) v.
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Transfer of Property Act (IV of 1882), sections 74 (old), 92 (new)—Subrogation—Puisne mortgagee paying off prior mortgagee's decree, after sale on that decree but before confirmation—Civil Procedure Code, order XXXIV, rule 5—Law prior to the amendment of 1929 same as now—Equitable claim to reimbursement—Contract Act (IX of 1872), section 69—Hindu law—Minors—Joint family consisting of minors—Guardian appointed for the minors—Guardianship ceases automatically when one of the minors becomes major, who thereupon becomes karta—Alienation of joint family property—Legal necessity—Marriage expenses—Reasonable amount—Limitation Act (IX of 1908), article 44—Does not apply to an erstwhile minor who as a defendant questions a transfer made by his guardian—Interest—Reduction to a reasonable rate.

*First Appeal No. 208 of 1932, from a decree of S. M. Mir, Civil Judge of Meerut, dated the 7th of September, 1931.