suggests is that the land is sold outright for Rs. 500. No terms of a contract beyond this are given in the *pyatpaing*, and admittedly the statement in the report is not legally correct.

In these circumstances I do not consider that the *pyatpaing* can be considered as a document recording the terms of the contract. In my opinion the contents of the *pyatpaing* in the present case do not bar the production of any oral evidence. And if it had debarred such evidence then it would have been fatal to the appellant's case.

I therefore think that no good reason has been made out for interference in this appeal and I would dismiss it with costs.

RUTLEDGE, C.J.—I concur. The appeal is dismissed with costs.

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## APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Carr.*

M. E. MOOLLA and M. E. MOOLLA & SONS, LTD.
*v.*
CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.*

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*Conditions regarding decree to be passed not embodied in the decree cannot be considered by executing Court — Valuation of a secured creditor of his security under Presidency Towns Insolvency Act (III of 1909), s. 12 (2); service of notice of prohibitory order on agent of managing director of a private company whether sufficient — Compromise between adjudicating creditor and debtor no ground for withdrawing adjudication petition — Companies Act (VII of 1913), ss. 162, 163, 174—Grounds for winding up a company.*

*Held*, that an alleged agreement between parties, prior to the passing of the decree and relating to the execution of that decree and not embodied in the decree cannot be entertained by the executing Court.

* Civil First Appeal No. 185 of 1927 and Civil Miscellaneous Appeals Nos. 112, 127, 128, 129 of 1927 from the Original Side.

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*Mulla Ramzan* v. *Maung Po Kaing*, 4 Ran. 118—*followed*.

*Held*, that where a secured creditor gives an estimate of his security, under the provisions of the Presidency Towns Insolvency Act, section 12 (2), the Court will not enquire into its correctness if it is a genuine estimate.

*Held*, that a prohibitory order served on an attorney of the managing director of a private company which had no secretary was duly served, though it was addressed to the secretary of the Company.

*Held*, that where there are other creditors whose consent has not been obtained, the Court cannot allow the petition of adjudication to be withdrawn on the insolvent offering to pay the full amount due by him to the adjudicating creditor, as that might result in a fraudulent preference in favour of one creditor to the detriment of other creditors.

*Held*, that having regard to the facts of the case, the large personal liability of the insolvent, his predominant holding of shares in the Company whose assets are mainly the private property of the insolvent transferred to the Company, it was just and equitable to wind up the Company.

*N. M. Cowasji, Keith, Munshi*—for Appellants.

*Leach, Clarke*—for the Respondent Bank.

*Dhar, Clifton, Campagnac*—for creditors.

RUTLEDGE, C.J., AND CARR, J.—These are a group of appeals from orders on the Original Side adjudicating Mr. Moolla an Insolvent and winding up M. E. Moolla & Sons, Ltd., a private Limited Company of which he is the Managing Director and in which he holds a vast majority of the shares. As the questions in each are intimately connected, we shall deal with them in the same judgment.

Mr. Moolla was possessed of a very large estate of immoveable property, and in about 1920 floated a Company called The Ally Moolla Industrial Corporation, to which he transferred *inter alia* 46 acres of land with a rice mill at Pazundaung, and in which he held a large number of shares both Preference and Ordinary.

Early in 1921 he promoted M. E. Moolla & Sons, Ltd., to which he transferred most of his immoveable property and in which he admittedly holds by far the greater number of shares.

The Ally Moolla Industrial Corporation by an order dated the 11th April 1924 was compulsorily wound up and Mr. J. A. Robin, Chartered Accountant, appointed Official Liquidator. The winding-up has not yet been completed.

We shall now proceed to deal with the individual appeals.

*Civil First Appeal No.* 185 *of* 1927 :—Respondent Bank advanced to the appellants a large sum of money and as security held a mortgage dated the 19th January 1923 over the premises known as No. 7, Merchant Street, Rangoon, and the western half of First Class Suburban Allotment No 31, Rangoon. The Bank had a further security in that 9,900 Preference shares in the Ally Moolla Industrial Corporation were transferred to the names of the Agent and Sub-Agent of the Chartered Bank and the scrip lodged with the Bank. The Bank filed a mortgage suit being Civil Regular No. 360 of 1925 against the appellants and obtained a preliminary decree on the 24th August 1925 for over Rs. 9,00,000. The Bank then applied for a personal decree against the appellants in respect of balance outstanding after the sale of the mortgage property. This was on 15th January 1927. The appellants asked for time to file objections and time was given till 31st January 1927. Objections were not filed by 31st January 1927, but the appellants seem to have verbally pressed the objection that the Bank was not entitled to a personal decree until they had sold the 9,900 shares in the Ally Moolla Industrial Corporation . . . . [Eventually, on the 3rd February 1927 a personal decree for Rs. 3,22,862-9-4 with interest was passed with the consent of the defendants' attorney.]

On the 24th February, 1927, the Bank filed an application for execution and on the 9th March, 1927,

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a prohibitory order was passed attaching 15,348 Ordinary shares belonging to the 1st appellant in the 2nd appellant Company, which were in the custody of the Bank's advocates, Messrs. Ormiston and Leach, in respect of another creditor of the appellants. Then on 6th April 1927, the Bank applied to adjudicate the 1st appellant an insolvent and not until 25th April 1927 did the appellants make the application before us, which is one under Order 21, Rule 2, of the Code of Civil Procedure to record an alleged agreement between Mr. Ormiston, the Bank's advocate, and Mr. Burjorjee, advocate for the appellants. Mr. Burjorjee, in his affidavit in support, states that Mr. Ormiston promised that the Bank would never take any step to have M. E. Moolla adjudicated an insolvent, or to wind up M. E. Moolla & Sons, Ltd., nor take any steps to enforce the personal decree unless for the purpose of obtaining the rateable share of the Bank of any assets realised by any Court belonging to either of the judgment-debtors, and that on the strength of this promise the draft objections were not filed and that Keshavlal would attend before the Court and consent to the personal decree being passed.

[Their Lordships held on the affidavits that there was no such agreement and proceeded :]

We therefore agree with the learned Judge on the Original Side that the appellants have failed to prove any such agreement as that alleged and we are satisfied that the appellant's attorney, Keshavlal, was himself fully aware of what transpired on the 2nd February and was in no way induced to consent to the personal decree though thinking that Mr. Ormiston had made any such promise as Mr. Burjorjee alleges in his affidavit. The application was not in our opinion a *bonâ fide* one, but made with the object of gaining time. We have dealt with this

matter on the facts because it was so dealt with by the learned Judge on the Original Side, and because the facts are of importance in relation to the other appeals on the question as to whether there was any *bonâ fide* dispute as to the fact of the debt being due to the Bank. But we are also of opinion that the application was not one that could be entertained under Order 21, Rule 2, of the Civil Procedure Code or could be dealt with by the executing Court under section 47 of the Code. The case set up is similar to that of *Mulla Ramzan* v. *Maung Po Kaing* (1), and we agree with the decision in that case and with the reasoning on which it is based.

The appeal must therefore be dismissed with costs, ten gold mohurs.

*Civil Miscellaneous Appeal No.* 112 *of* 1927 :—This is an appeal by Mr. Moolla against the order of 7th May 1927 adjudicating him an insolvent, and a complaint is made that the learned Judge acted unreasonably in not granting time to the appellant and in not holding an enquiry to ascertain the value of the shares in The Ally Moolla Industrial Corporation, which the Bank held as security.

[Their Lordships held that as the petitioner, though well known, had to be served by substituted service and had made several efforts for adjournment, one being to go on pilgrimage to Mecca, the Judge on the Original Side was justified in treating the matter as urgent and in disposing of the same on a Saturday.] Their Lordships proceeded :

An objection is urged that the Bank put a fictitious value, namely Re. 1, on the shares held by them as security. The law no doubt requires the decree-holder to value any security in his hands before applying to adjudicate. According to section

(1) (1926) 4 Ran. 118.

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12 (2) of the Presidency Towns Insolvency Act: "If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of his security. In the latter case, he may be admitted a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimable in the same way as if he were an unsecured creditor." And Mr. Chamier (2nd Edition, page 30), states in his notes under this section: "Where, however, a creditor gives an estimate of his security, the Court will not enquire into its correctness if it is a genuine estimate." The Bank's Agent has in fact, valued the shares at the nominal sum of Re. 1, stating that there is no market for the shares, and we are satisfied for the reasons given that the estimate was genuine. Mr. Rahman stated that the Official Assignee had lately sold 100 Ordinary shares for Re. 1 a share and 50 for Rs. 1-1. In our opinion, these sales were not a genuine proof of the market value and were probably merely made in view of the present proceedings. The Court was entitled to accept the statement of the Bank's Agent without requiring any further proof and the accuracy of this valuation, as we have already seen in the previous case, is borne out by the Official Liquidator's evidence that the shares are worth nothing. He is corroborated in this by the affidavit of a partner in Messrs. Mahony & Co., a firm of Stock and Share Brokers of standing.

The main question argued in this case, however, was that there was no valid attachment on either Mr. Moolla or the Company. Service of notice was accepted by Mr. S. M. Rahman Chowdhury, referred

to in the argument as "Rahman." The power of attorney is dated the 12th July 1921 and is in favour of three persons, Keshavlal, Rahman and one Cassim Nacooda. It is not a full power, but from a careful perusal, the intention was obviously to make it as full as possible with regard to suits, legal proceeding or any case of whatsoever nature in any Court or public office or tribunal "and generally to do all acts and things for the said Mahomed Ebrahim Moolla in relation to the premises aforesaid as the said M. E. Moolla could do if personally present." It was urged that although this power gave the three persons named power to take any action with regard to the institution, prosecution or defence of a suit, it did not empower them to accept notice for Mr. Moolla in an execution matter. In view of the words quoted, and the whole tenor of the instrument we consider that this argument is unsound and we are of opinion that Mr. Rahman had full power to accept notice for Mr. Moolla. The question of his power to accept on behalf of the Company requires some further consideration. The attachment of the shares was by way of Prohibitory Order. According to Order 21, Rule 46, "(1) In the case of . . . . a share in the capital of a corporation . . . . the attachment shall be made by written order prohibiting . . . . the person in whose name the share may be standing from transferring the same or receiving any dividend thereon . . . . (2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent . . . . to the proper officer of the corporation . . . ."

We may mention that Mr. Moolla as Managing Director gave the three persons above-named an almost identical power on behalf of Moolla & Sons, Ltd.

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The order was sent to the offices of the Company and was received by Mr. Rahman, the attorney of the appellant, who was Managing Director of the Company. A point is made that it was addressed to the Secretary of the Company. The Company, being a private one, had no Secretary. Obviously, in such circumstances, the Managing Director was the proper officer of the Company within the Rule, and, considering the powers entrusted to Mr. Rahman by his power of attorney, he was duly empowered to receive the notice on behalf of Mr. Moolla. If the notice had been sent by registered post to the offices of Company, the Rule would have been sufficiently complied with. We therefore agree with the learned trial Judge in holding that there had been an effective and valid attachment of the shares for twenty-one days and that the appellant had consequently committed an act of insolvency.

A further point has been urged that at the hearing on the Original Side, an offer was made to pay down Rs. 2,00,000 of the debt and give security with regard to the balance if the petition was withdrawn and the respondent Bank was willing to accept this offer if the Court approved. The offer has been renewed before us in a still more complete form, namely to pay the whole amount, and the position taken up by the Bank is the same. The learned Judge declined to allow the petition to be withdrawn on these terms and his reasons, from his reference to another case, seem to be that to permit such a thing when there were other creditors might in fact result in the Court allowing a fraudulent preference in favour of one creditor to the serious detriment of other creditors. There is obviously great force in this argument. If there were no

creditors other than the Bank, we would have had no hesitation in adjourning the matter to give the appellant an opportunity of fulfilling his promise and then allowing the Bank to withdraw its petition. We are in the dark as to the extent of the appellant's indebtedness, for, unfortunately, he has not chosen to file his schedule, but from the proceedings before us in this and the next appeal, we know that he has several other creditors for large amounts (whose consent had not been obtained) . . . . . .

We are consequently unable to accede now, as to do so would *primâ facie* be to allow one creditor to be paid in full and so jeopardise the rights of the other creditors.

For these reasons the appeal must be dismissed with costs ten gold mohurs.

*Civil Miscellaneous Appeal No.* 127 *of* 1927 :—In disposing of this appeal, we shall at the same time dispose of Civil Miscellaneous Appeals Nos. 128 and 129 of 1927, as they are on behalf of creditors who oppose the winding-up of the Company.

In this case the respondent Bank has entered a petition for the winding-up of the appellant Company . . . . The learned Judge on the Original Side ordered the Company to be wound-up and appointed Mr. Hormasji, the Administrator-General and Official Assignee, as Official Liquidator of the Company. Hence this appeal.

The petition of the Bank was that they had obtained a personal decree against the Company on 3rd February 1927 in Civil Regular No. 160 of 1925 for Rs. 3,22,862-4-9 and interest thereon at 6 per cent. per annum from 3rd January 1927, to date of payment or realisation ; that by a demand dated 3rd March 1927, the petitioner required the Company to pay the said sum ; that the demand was served on the Company at

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its registered office on 4th March 1927 and that the sum had not been paid. Section 163 of the Indian Companies Act (1913) states :—

"A company shall be deemed to be unable to pay its debts—(1) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding Rs. 500 then due has served on the company by leaving the same at its registered office a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor ".

And section 162 states :—

"A company may be wound up by the Court . . . . (v) if the company is unable to pay its debts."

It was urged that the learned Judge should have adjourned the matter under section 170 (1) as there was an appeal pending in the matter of the adjustment of the personal decree, that is the matter which we have disposed of in the first of this series of appeals. The learned Judge had already decided this matter and held that there was no substance in it and in our judgment above we have upheld his decision. As there was no stay, he was under no obligation to question his own decision and adjourn the matter. It is then further urged that he disregarded the wishes of the majority of the creditors and did not carry out the spirit of section 174 of the Companies Act, which states that the Court may as to all matters relating to the winding-up have regard to the wishes of the creditors or contributors as proved to it by any sufficient evidence and it is urged that he should have given time to the various creditors to put forward their objections to the winding-up, and, to show that the Company was solvent, a number of affidavits have been filed (most of them dated 18th June 1927) all stating the amount of the appellants' indebtedness to them and most of them asking for time to formulate their objections. As the

application was recorded to be advertised on 9th April 1927, it would seem that they had ample time to instruct their advocates as to what their objections were and from the proceedings it seems clear that their advocates did state those objections. We have had an opportunity of hearing the advocates for the creditors during this appeal . . . .

There is a great preponderance of creditors in favour of the winding-up. We may here say that for the reasons already given, we are of opinion that there was no *bonâ fide* dispute as to the amount of appellant's debt. Various English cases have been cited to show that where there was an offer of payment of a debt, the Court granted time, but we do not think that these cases are of much assistance in deciding a case like the present, though no doubt they might be of great assistance were this a public commercial company. But here we have a case of a man with large estates, who has transferred these estates to a private limited company in which he holds, according to the learned trial Judge, admittedly 90 per cent. of the shares, over which as Managing Director up till the winding-up order he had complete control. He admittedly has great liabilities, as has the Company, and he has been adjudicated an insolvent. We take judicial notice of the fact, which has not been mentioned in argument, that there is a decree of this Court against him for about Rs. 17,00,000. It is on appeal to His Majesty in Council and if not reversed will go to swell appreciably his liabilities. Taking all the circumstances of the case into consideration, we are of opinion that reading section 163 (i) with section 162 (v), the learned Judge was right in ordering the Company to be wound-up and in consideration of the peculiar facts of this case and of Mr. Moolla's great liabilities and his predominant

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holding of shares in the Company, whose assets consist of Mr. Moolla's estates transferred to the Company, it is also under section 162 (vi) just and equitable that the Company should be wound-up.

Messrs. Keith and Campagnac complain of the appointment of the Administrator-General and Official Assignee as Liquidator and suggest that there may be a conflict of interest between Mr. Moolla's creditors and the creditors of the Company and that the learned Judge ignored the wishes of the creditors, as the respondent Bank suggested as Liquidator a gentleman with intimate knowledge of the real property market in Rangoon. On this point, Mr. Leach, on behalf of the Bank, states that though he did suggest this gentleman as liquidator to the trial Court, he is satisfied with the appointment made and leaves the matter entirely to the Court. Mr. Dhar, on the other hand, for his clients and on behalf of Mr. Clifton, strongly supports the appointment of the Official Assignee and asks that the discretion of the learned trial Judge should not be interfered with and relies on a decision of a Bench of the late Chief Court in *Noble* v. *Bank of Burma* (1), where Sir Charles Fox held that the appointment of a liquidator was a matter purely in the discretion of the trial Court and that that decision should not be interfered with, except under very special circumstances.

We are in full agreement with the trial Judge that in the peculiar circumstances of the case, Mr. Hormasji is the most suitable person to be Official Liquidator of the Company. As Official Assignee, he is the representative of Mr. Moolla and consequently the great bulk of the shares in the Company are vested in him. He is an officer of great experience and with the highest reputation for integrity and we

(1) C. M. Ap. No. 81 of 1912.

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think that his appointment will eliminate opportunities of obstructing the proper and efficient liquidation of the Company's affairs. At any rate, we are satisfied that it will afford the several creditors an opportunity of having their debts discharged.

For these reasons, we confirm the order appealed against. The appeals are accordingly dismissed.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Darwood.*

## MAUNG HLA MAUNG
*v.*
## MA ON KIN.*

1927

*Aug.* 13.

Res judicata, *doctrine of—Specific enactment and not general principle—Criminal Procedure Code (Act V of 1898), s 488—Previous dismissal whether a bar to fresh application.*

*Held*, that *res judicata* does not bar any proceedings by general principle but only by specific enactments and that dismissal for default of a formal application under section 488, Criminal Procedure Code, would not bar a fresh application.

*Ma Su* v. *Paul Sassoon*, 1 U.B.R. (1892-96) 64—*referred to.*

*Po So* v. *Ma Kyin Ma*, 4 L.B.R. 337—*followed.*

DARWOOD, J.—The petitioner has been ordered to pay maintenance at the rate of Rs. 20 per month for each of his two sons who are eight and seven years old respectively now. He complains of the order on two grounds: one is that it is in the nature of *res judicata* by virtue of the result of a similar application which was filed on the 10th January 1925 and was dismissed for default. The case of *Ma Su* v. *Paul Sassoon* (1), is no doubt an

* Criminal Revision No. 310B of 1927.

(1) 1 U.B.R. (1892-96) 64.