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HEALD AND CHARI, JJ.

any, which he paid for it. Such of the respondents as were decree-holders and were allowed to set-off the price against the amount of their decree will of course receive no payment on this account. The balance of the sale proceeds, after payment to such of the respondents as under this order are entitled to payment, will be available for satisfaction of the decrees.

In view of the fact that this litigation has arisen out of appellant's claim to the exclusion of her interest from the attachment and sale, appellant will pay the respondents' costs in all Courts in respect of this suit.

ORIGINAL CIVIL.

Before Mr. Justice Chari.

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June 25.

MANJEEBHAI KHATAW & Co.
v.
JAMAL BROTHERS & Co., LTD.*

Companies Act (VII of 1913), *s.* 163 (1)—*Creditor's demand "under his hand"—Whether demand by advocate of creditor sufficient—Whether statutory right can be exercised by means of an agent.*

In order to make out that a right conferred by statute is to be exercised personally and not by an agent, there must be something in the Act, either by way of express enactment or necessary implication which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. *Held*, that an advocate's notice of demand on behalf of a creditor does not satisfy the requirements of the Indian Companies Act, section 163 (1) and is not a demand "under his hand."

Hyde v. *Johnson*, 2 Bing. N.C. 776; *Jackson Co.* v. *Napier*, 35 Ch.D. 162; *Reg.* v. *Justices of Kent*, L.R. 8 Q.B. 305; *In re Whitley Partners Ltd.*, 32 Ch.D. 337; *Wilson* v. *Wallani*, 5 Ex.D. 155—*referred to.*

N. M. Cowasjee—for Petitioners.

Keith—for Respondents.

CHARI, J.—This is an application by Manjeebhai Khataw & Co. for an order to wind up Jamal

* Civil Miscellaneous No. 87 of 1925.

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Brothers & Co., Ltd. The petition states that Messrs. Jamal Brothers & Co., Ltd., are indebted to the petitioning firm in the sum of Rs. 99,320-14-3. A notice was issued on the 21st of March 1925 demanding the sum of money due to the petitioners and requiring payment within three weeks from the date of service of the latter and notifying that if the payment is not made the petitioners will apply to the High Court to have the Company wound up. This notice was written and signed by Mr. Higginbotham under instructions from his clients, the petitioners. After the filing of the application the necessary notices and advertisements were ordered on the 12th of May, 1925 and the matter was fixed for hearing on the 12th of June, 1925. It was also ordered that the petition should be advertised in the *Rangoon Gazette*, *Rangoon Times*, *The Burma Gazette*, *The Rangoon Samachar* and *The Sun*. The advertisements though ordered on the 12th were not issued till the 29th May, 1925 and the advertisements actually first appeared on the 2nd of June. Two preliminary objections were taken before me in respect of this application. The first objection relates to the form in which the notice of demand was issued. The objection turns on the wording of section 163 of the Indian Companies Act. Section 163 provides that a Company shall be deemed to be unable to pay its debts 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. The objection turns on the

words "a demand under his hand." It is argued that the section contemplates a demand under the hand of the creditor, that is, a demand signed and issued by him personally and the demand by Mr. Higginbotham, as advocate for the creditors, acting on their instructions, is not a demand which satisfies the requirements of the section. Before dealing with this objection I may draw attention to the fact that it is not a fatal one. The grounds for ordering a Company to be wound up are given in section 162 and one of such grounds is the inability of the Company to pay its debts. Section 163 of the Act merely provides when a Company is to be deemed unable to pay its debts and according to that section, besides the ordinary modes of proving the inability of the Company a special rule of evidence is introduced, the effect of which is, that if the notice provided for by clause (1) of section 163 is given and default is made, then the Company is conclusively presumed to be unable to pay its debts. Once a notice is properly given and default is made it is not open to the debtor to show that in spite of the non-payment of the debt he is in a position to pay his debts, as, for example, where on account of a temporary embarrassment he is unable to meet the particular liability, though he has ample assets in his hands. This, to my mind, is the whole effect of section 163 of the Indian Companies Act.

Dealing with the objection raised, the argument, as I have stated before, is that the wording of the section requires that the demand must be made under the hand of the creditor. Mr. Higginbotham when he issued the notice and made the demand was undoubtedly acting as the agent of the creditor and the question for decision is whether when the demand is made not under the hand of the

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creditor but under the hand of an advocate as the agent of the creditor, such a demand fulfills the conditions of the section. It is true that the words "under his hand" are peculiar and would seem to imply that the notice must be issued under the hand of the creditor himself but the real question is whether a notice of demand by an agent is not a sufficient notice. There are not many authorities on the point and the earliest case seems to be the case of *Hyde* v. *Johnson* (1). In that case it was decided that the words "signed by the party chargeable thereby" which occurred in the provisions of the Statute of Limitation did not include an acknowledgment by his agent. The ground however on which that case was decided was that, in the statutes of limitation other than the one then in consideration and in several sections of the Statute of Frauds, whenever an acknowledgment by an agent is included such an intention is plainly indicated. It must also be remembered that as that particular statute was dealing with an acknowledgment which deprives the party of the valuable plea of limitation it is only right that the words should be strictly construed not only for the reason given in the judgment but also on the general principles applicable to the construction of statutes. In *Reg.* v. *Justices of Kent* (2), it was held that the Common Law rule that the signature by a person who is authorised to sign another's name must be presumed to be the signature of the authorising person, cannot be restricted unless the statute makes a personal signature indispensable. In the case of *The Whitley Partners Ltd.* (3), which was a case which turned on the construction to be

(1) 2 Bing. N.C. 776. (2) L.R. 8 Q.B. 305, 307.
(3) 32 Ch.D. 337.

placed upon the following words "shall be signed by each subscriber in the presence of and attested by one witness at the least," it was held that a signature by a person verbally authorised on behalf of one of the subscribers was a sufficient signature. In the case of *Jackson Co.* v. *Napier* (1), where an application for registration under the Trade Mark Act of 1883 was made by an agent it was argued that as the rules under the Trade Mark Act, 1883, contain no provision enabling a person to apply for registration by an agent such an application was an invalid application. Sterling, J., in that case says "I take it that subject to certain well-known exceptions every person who is *sui juris* has a right to appoint an agent for any purpose whatever and that he can do so when he is exercising a statutory right no less than when he is exercising any other right." Later on he says "I understand the law to be that in order to make out that a right conferred by statute is to be exercised personally and not by an agent you must have something in the Act, either by way of express enactment or necessary implication which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf." Mr. Keith for the respondents argues that such an intention is expressed by the form of the word used and cites the case *Wilson* v. *Wallani* (2). A trustee under the Bankruptcy Act of 1869 was allowed to disclaim an onerous lease by writing "under the hand of the trustee." It was held in that case that a disclaimer in writing signed by the trustee's solicitor was not a valid disclaimer.

Mr. Cowasjee contends that this provision of the Indian Companies Act must be reasonably construed

(1) 35 Ch.D. 162. (2) 5 Ex.D. 155

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and that if the contention of the respondents' advocate is to prevail, it would mean that a person living in England and having a place of business in Rangoon and conducting that business by an agent under a power of attorney, will have, for the purpose of section 163 of the Act, to send a notice signed by himself all the way from London. It is a maxim in the construction of statutes that a statutory provision should be so construed as not to lead to inconvenience. There is a presumption that the legislature could not have intended anything inconvenient or unreasonable but, at the same time, there is a distinction between the signature of an agent and the signature of an advocate. Where an agent signs on behalf of a principal he signs the principal's name as by his attorney. Thus, John Smith residing in England and carrying on business through his agent James Brown at Rangoon will have his notices signed John Smith by his attorney James Brown, *i.e.*, the notice is issued and the demand made under the hand of the principal though the actual hand which signed his name is not the hand of the agent. By virtue of the authority vested in him as agent he signs the name of the principal and in law the demand must be intended to have been issued under the hand of the principal by the substituted hand of the agent. Does the same reasoning apply when a solicitor issues a notice? The solicitor does not sign the name of the principal but signs his own name.

The notice therefore is issued under his hand and not under the hand of the principal. But since the law allows a person to authorise another to do acts which he could do for himself it must be presumed that he could authorise his solicitor to make a demand under the hand of the solicitor which will have the same effect as a demand by the

creditor issued under his own hand unless such a delegation of authority is expressly or by necessary implication prohibited by the statute. It will be noticed that in the case of *Wilson* v. *Wallani*, the learned Judge in his judgment after distinguishing the case of *Reg.* v. *Justices of Kent*, says, "I think that to hold this sufficient would be to modify the language of section 23 by reading for "under his hand," "under his hand or under the hand of his agent." This reasoning shows that the learned Judge was laying stress not on the word "hand" but on the words "his hand" and held that those words were restrictive and could not have meant to include the hand of the agent. If his reasoning is sound a similar reasoning would apply where the words used are "signed by him" as in the case of *The Whitley Partners Ltd.* But in this latter case the learned Lord Justices held that a signature by an agent is sufficient. The person verbally authorised actually signed the name of the subscriber, without even indicating that the signature was made by the agent and not by the principal himself.

It seems to me that the real test to apply is the one indicated in the case of *The Whitley Partners Ltd.*, that is, to see whether is anything in the statute which leads to the conclusion that the ordinary right of every person to do through his agent what he could do himself is expressly or by necessary implication restricted by the statute and (2) whether under the particular circumstances of the case, a notice of demand issued by the advocate under the hand of the advocate can be deemed to be equivalent to a notice of demand issued by the creditor under his own hand, for the purpose of section 163 (1) of the Indian Companies Act. In the Act under consideration there is no express restriction and is

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there no restriction by necessary implication? In favour of the construction contended for by Mr. Cowasjee is the undoubted inconvenience and the presumption that the legislature did not intend anything inconvenient or reasonable. I have already indicated my opinion that if an agent signs the principal's name it would fall within the provisions of the enactment and that particular inconvenience does not arise. The matter stands on a different footing when the solicitor or advocate issues the notice of demand instead of the party himself. There is to begin with the very peculiar words used in the enactment "under his hand" which would seem to exclude any notice issued by any person other than the creditor under his own hand. When an advocate issues a notice of demand on behalf of his client, he certainly acts as the agent of his client, but his authority extends only to the making of demand. He can send a notice under his own hand, as his client's advocate and nothing more. He cannot, unless specially authorised, sign his client's name, nor can a notice under his hand be considered as equivalent to or an efficacious substitute for a notice under the hand of his client. It is not open to Courts to speculate on the intention of the legislature except so far as that intention is expressed in the words of the enactment but in this case it is reasonable to see what the object of the legislature could have been. It is suggested that in all probability that object was to enable the debtor to be quite sure of the authenticity of the notice, and to bind the creditor to the particulars on which he relies. If so, it follows that a notice by a solicitor whose authority is always open to question cannot satisfy the requirements of the Act. Apart from this, this provision of the Act creates for the creditor a privileged position in that

it raises a conclusive presumption of law in his favour that the debtor is unable to pay his debts and shuts out all evidence on the debtor's part to prove the contrary. Where a particular right is created by legislative enactment in favour of one party which is restrictive of the rights of another party the words of the Act must be strictly construed. The party relying upon the provision of the statute will also have to show that he has strictly conformed to the statutory provisions.

After giving due consideration to all the arguments adduced I think that an advocate's notice of demand does not satisfy the requirements of the section. As I have stated above, the case of *Wilson* v. *Wallani* is a direct authority. I have however come to this conclusion with a great deal of hesitation as the point is not free from doubt and as there is a great deal to be said in favour of the arguments adduced on behalf of the petitioner.

The objection, as I have said before, is not a fatal one. It is for the petitioner to decide whether he will withraw his petition or whether he will proceed with it, proving by evidence that the Company is unable to pay its debts [section 163, clause (iii)].

The second objection is that there was not a clear interval of fourteen days between the date when the advertisement appeared and the date fixed for hearing as required by Rule 30 of our Rules. The order to advertise was passed in ample time, and the fault is the petitioner's in paying the charges late. If the petitioner decides to proceed with his petition a fresh date for hearing will be fixed by the Registrar and the petitioner will have to re-advertise his application in the papers mentioned in the Deputy Registrar's order.