

circumstances that the property passed to him exonerated from the liability to support the widow.

In the present case the findings recorded by the Lower Appellate Court make it clear that the sale was not justifiable, and that it had unfairly prejudiced the plaintiff's rights, and that the vendees were not *bond fide* purchasers. It is not necessary for us to consider in any detail the authorities relied upon by the respective parties, as the law is fully crystallized in the judgment of Mr. Justice West.

We accordingly uphold the decrees of the courts below and dismiss the appeal with costs.

A. R.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Mr. Justice Broadway and Mr. Justice Martineau.*

RAM CHAND (DEFENDANT)—*Appellant,*

*versus*

BANK OF UPPER INDIA, LIMITED, DELHI (PLAINTIFF), AND THE DIAMOND JUBILEE FLOUR MILLS COMPANY, LIMITED, DELHI (DEFENDANT),	}	— <i>Respon-</i> <i>dents.</i>
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Civil Appeal No. 459 of 1917.

*Companies in Liquidation—Secured creditor—whether entitled to recover from security principal as well as interest up to date of realisation or only up to date of winding-up order.*

The plaintiff Bank sued the Diamond Jubilee Flour Mills Company in liquidation and one Ram Chand for recovery of Rs. 1,60,914-2-7, due to it under a cash credit loan bond mortgaging certain properties. One of the pleas was that plaintiff was not entitled to any interest after the 24th June 1913, on which date the defendant Flour Mills Company went into liquidation, and the lower Court, accepting this plea, declared that the plaintiff could only recover Rs. 1,52,000 and proportionate costs by sale of the properties hypothecated and must prove for the remainder in the liquidation proceedings.

*Held*, by the High Court that as far as possible the rules of bankruptcy are applicable to liquidation matters. When a

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Company goes into liquidation a secured creditor may realise his security and prove for any balance outstanding. The remaining assets of the Company would in that case only be liable for such principal and interest as was due on the date of the winding-up order. A secured creditor is in the case of a liquidation on the same footing as in that of insolvency proceedings. The property hypothecated is thus liable for the whole claim, principal and interest up to date of realisation, and it is only the liability of the remaining assets that could be affected by the winding-up order.

*In re Joint Stock Discount Company, Warrant Finance Company's Case No. 2* (1), *In re David Lloyd and Company, per Jessel M. R.* (2), and *In re Humber Ironworks and Ship-building Company, Warrant Finance Company's Case No. 2, per Giffard L. J.* (3), followed.

*Shridhan Narayan v. Amaram Govind* (4), *Shridhararayan v. Krishnaji* (5), *Gopi Nath v. Gur Prasad* (6), *Re Wyse, Ex parte Chowksey* (7), and *Lang v. Heptullabhai* (8), referred to; also section 10 (5) of the Provincial Insolvency Act.

*Ram Saran Das v. Basheshar Nath* (9), not followed.

*First appeal from the decree of C. L. Dundas, Esquire, District Judge, Delhi, dated the 31st October 1916, decreeing plaintiff's claim.*

MOTI SAGAR and MUL CHAND, for Appellant.

C. BEVAN-PETMAN, for Plaintiff-Respondent.

The judgment of the Court was delivered by—

BROADWAY, J.—This appeal has arisen out of a suit brought by the Bank of Upper India, Limited, Delhi, against the Diamond Jubilee Flour Mills Company, Limited, Delhi, and one Ram Chand for the recovery of Rs. 1,60,914-2-7 due on account of advances made to the said Flour Mills and secured by a deed referred to as a "cash credit loan bond," dated the 24th September 1901, and executed in favour of the Bank by the said Flour Mills and Ram Chand jointly. The said Flour Mills were in liquidation when the suit was instituted and the Official Liquidator contested the suit alleging that it was premature owing to the fact that it had been brought before the expiry of six months' notice agreed upon in the deed. It was also

(1) (1870) 10 Equity 11.

(2) (1877) 6 Ch. D. 339, 343.

(3) (1870) 5 Ch. Ap. 88, 92.

(4) (1883) I. L. R. 7 Bom. 455.

(5) (1887) I. L. R. 12 Bom. 272

(6) (1912) 15 Indian Cases 860.

(7) (1912) 17 Indian Cases 81.

(8) (1913) I. L. R. 38 Bom. 359.

contended that the Bank was not entitled to any interest accruing after the 24th of June 1913 on which date the Bank went into compulsory liquidation.

Ram Chand filed separate pleas supporting the Official Liquidator in his allegation that the suit was premature, and pleading further that the suit was time-barred, and that he was not personally liable. Further he contended that his land was not chargeable with this claim inasmuch as his liability had been discharged owing to the variation of the original contract in which he was only a *surety*. The Bank in reply traversed these pleas and, as against Ram Chand claimed that he was the principal debtor and not a surety and was also personally liable. The Trial Court framed the following issues :—

“ 1. Can plaintiff demand the amount due without six months' notice in the event of any of the contingencies mentioned in paragraph 2f (b) of the plaint.

2. Have any of these contingencies occurred ?

3. If not, is not the suit liable to dismissal as premature being brought before the expiry of the six months from notice ?

4. Was the plaintiff able to secure his rights by intervening in an application for liquidation, and does this disentitle him to costs ?

5. Is *Lala* Ram Chand liable only as a surety after plaintiff has exhausted his remedy as against defendant 1 ?

6. Is the suit against *Lala* Ram Chand time-barred under Article 132, Limitation Act ?

7. Do the agreements mentioned in paragraph 4 of the plaint discharge *Lala* Ram Chand from liability ?

8. Does *Lala* Ram Chand incur any personal liability beyond that attaching to the land hypothecated ?

9. Is plaintiff debarred from bringing *Lala* Ram Chand's land to sale by suit ?

10. Is the mortgage in contravention of the provisions of section 69, Transfer of Property Act, and therefore void, and can no suit be brought on it ? ”

It was ultimately held that Ram Chand was a principal and not merely a surety, and that he was not personally liable, his liability extending only to the land hypothecated by him; and the

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Bank's suit was decreed against both the Mills and Ram Chand to the extent of the amount claimed together with future interest as agreed in the bond. It was, however, declared that the only amount realizable by sale from the property charged was that due under the bond on the 24th of June 1913, *i.e.*, the sum of Rs. 1,52,000, and proportionate costs, the Bank being directed to prove for the balance in insolvency proceedings, presumably liquidation proceedings being meant. The Mills were rendered liable for the Bank's costs, but Ram Chand was allowed half his costs against the Bank. Against this decree two appeals have been preferred, one, Civil Appeal No. 291 of 1917 by the Bank through Mr. C. Bevan-Petman, and the other, Civil Appeal No. 459 of 1917, by Ram Chand through Mr. Moti Sagar. In the appeal by the Bank the decision of the trial Court that the property hypothecated was only liable to the extent of Rs. 1,52,000 was attacked. In the appeal by Ram Chand all the findings against the appellant were contested. At the hearing, however, only two points were argued; first that on the proper construction of the deed Ram Chand was only a surety, and secondly, that the suit was barred by limitation. The remaining points were specifically dropped by Mr. Moti Sagar. The appeals being against the same decree they will both be disposed of by this judgment and I will first take up Civil Appeal No. 459 of 1917, namely, that by Ram Chand.

It appears that the site on which the buildings belonging to the Diamond Jubilee Flour Mills were constructed belonged to Ram Chand, appellant. Ram Chand was a member of a firm called Ram Chand and Company, which firm were the Managing Agents of the Flour Mills on the date when this cash credit bond was executed. It was alleged that the contract between the executing parties was to advance to the Mills alone a sum not exceeding two lakhs, and that a proper construction of this document showed that Ram Chand only signed it as a surety, he being the owner of the land on which the Mills' premises were situated. The preamble of the deed is to the following effect:—

“ An agreement made at Delhi this twenty-fourth day of September 1901, between the {Diamond Jubilee Flour Mills.

Company, Limited, and *Lala Ram Chand*, the owner of the land on which its premises are built, *hereafter collectively referred to as the said Company of the one part*; and the Bank of Upper India, Limited, Delhi Branch. \* \* \* \* of the other part.”

In paragraph II it was agreed that—

“The advance shall bear compound interest at eight (8) *per centum per annum* calculated half-yearly, such advances to be repaid by the ‘said Company’ by such recoupments as the ‘said Company’ may make from time to time, provided that the ‘said Company’ shall not borrow any sum from any other person or Banker whatsoever for the purpose of making such recoupments except on the expiry of the six months’ notice hereinafter mentioned. The said Bank shall be entitled to the repayment of all principal and interest due to it on account of such advances on giving six months’ written notice of its desire to close the account, provided that such account may be closed without such notice at any time if the said Company goes into liquidation, stops its Mills’ working, works at a loss or commits breach of any of the terms of this agreement \* \* \* \*”

In paragraph III it is stated that—

“As security for the said advances and interest or any balance thereof that may be due from time to time the said Diamond Jubilee Flour Mills Company, Limited, hereby grants unto the said Bank a first lien on certain property specified including buildings, plant, machinery, tools, furniture, stock in trade, raw materials, etc.”

It then proceeds to recite as follows:—

“And the said *Lala Ram Chand* hereby grants unto the said Bank a first lien free from all encumbrances and charges on the land on which the said Company’s premises are situated.”

Then follow the boundaries.

It was contended that the expression “the said Company” which was declared in the Preamble to refer to the Flour Mills and Ram Chand collectively, has not been strictly employed in that sense throughout the various clauses of the deed, and that therefore it was open to Ram Chand to prove by oral evidence that he was acting merely as a surety when he signed the deed. In this connection attention was drawn to the evidence of a Mr. G. H. Webb at page 71 of the paper-book. This gentleman had been in the employ of the Bank when this contract was entered into. He was examined in 1916 or something like 15 years after the execution of the deed. He was examined on interrogatories and a copy of the deed was shown to him. His evidence is to the effect that Ram Chand was only

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a surety to the extent of the land hypothecated by him. Objection was taken to the admissibility of this evidence by Mr. Petman. Mr. Moti Sagar contended that this evidence having been admitted without objection could not now be objected to in appeal and in support of his contention he cited *Shahzadi Begam v. Secretary of State* (1), in which it was held that it was too late in appeal to object to the admissibility in evidence of a document which had been admitted without objection in the first Court. It seems to me that this authority, is in point, and that the evidence of Mr. Webb must be regarded as admissible at this stage. Mr. Webb's testimony, however, is the only evidence supporting Ram Chand's claim that he was a mere surety. Mr. Petman contended that Mr. Webb's evidence was really worthless. He was a dismissed employee of the Bank (which appears to be correct) and was speaking from memory. After a perusal of this gentleman's evidence it seems to me impossible to accept it as conclusively proving that Ram Chand was merely a surety and not a principal when he executed the cash credit bond in question. The land of which he was the owner, and on which the premises belonging to the Flour Mills stood, had been leased to the Flour Mills by Ram Chand on a 99 years' lease. He was a member of the firm who were the Managing Agents of the Mills and from the correspondence on the record printed at pages 5, 6, 7, 8, 9 and 10 of the printed paper-book, there can be no doubt that Ram Chand was well aware of the real nature of the transaction. He was aware that the Bank was agreeing to advance monies to the Flour Mills on the security of the property belonging to the Mills as well as on the security of the land, of which he was the owner. He himself went into the witness box at the end of the case and has stated that he signed this deed as a surety. He admits, however, that the land belongs to him and not to Ram Chand and Co., and that the Mills used to send a balance sheet to the Bank every year. He admits having signed the document, and that his signature refers to his land only. He, however, states that he did not read the deed and further that he only read it after the suit had been filed. I find it impossible to believe this evidence. The document

itself appears to me to be perfectly clear, and under it Ram Chand hypothecated his land to the Bank not as a surety but as a principal, and I would hold accordingly. In this view of the case, Ram Chand being a principal and not a surety, the question whether any act or acts on the part of the Bank discharged him does not arise, and it is therefore not necessary to discuss Mr. Moti Sagar's arguments on this point.

The second point taken by the learned Advocate for the appellant was that the suit was barred by limitation. It was contended that a breach of the conditions entered in the deed took place before April 1902, and that as the suit was not brought till the 20th April 1914 it was barred under Article 132. In support of this the balance sheet for the year ending 30th April 1902, printed at pages 50 and 51 of the paper book, was referred to. There on the debtor's side is entered an item of Rs. 16,248-14-6 as "other loans as drafts not enumerated above." Next an entry, dated the 27th of January 1902, printed at page 3 of the paper-book was referred to as showing that the Flour Mills had, to the knowledge of the Bank, incurred a loan of Rs. 5,000 from another source which had been paid into the Bank. Reliance was placed on *Sham Sundar v. Abdul Ahad* (1) and *Sital Chand v. Hyder Mallar* (2) as authorities for the proposition that time commences to run from the date of the first default. With these authorities I am in accord. The question is, however, whether the item of Rs. 5,000 referred to has been shown to have been a loan. The entry at page 3 shows that a *hundi* was discounted by the Bank for Rs. 5,000, the *hundi* being drawn on Radha Kishen-Hazari Lal, Meerut. As pointed out by the learned District Judge it has not been shown that this amounted to a borrowing from the Meerut firm. The Mills may have been due this amount from Radha Kishen-Hazari Lal at Meerut for goods supplied, and this transaction may have been nothing more than the ordinary trade method of adjusting mutual accounts and purchases. In my opinion it has not been proved that the Flour Mills borrowed this or any other sums, for payment to the Bank, and that there-

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(1) 71 P. R. 1915.

(2) (1896) I. L. R. 24 Cal. 281.

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fore no breach of the covenant not to borrow from any other person has taken place, and I therefore am of opinion that the suit is not barred by time.

The other points raised in the grounds of appeal having been dropped by Mr. Moti Sagar, in my view of the questions referred to above, Ram Chand's appeal fails and should be dismissed with costs.

I now turn to the appeal by the Bank, Civil Appeal No. 291 of 1917. Mr. Moti Sagar raised a preliminary objection to the effect that the appeal was bad, in that it had been filed by the Bank of Upper India, which Bank had gone into liquidation, and that therefore it was only the Official Liquidator who could appeal. This contention was not supported by any affidavit or other proof, and Mr. Petman informed the Court that prior to the institution of the appeal he had corresponded with the Agent of the Bank. In these circumstances this objection must be overruled.

The point for determination in this appeal is whether the District Judge is right in declaring that the Bank can only recover Rs. 1,52,000 and proportionate costs by sale of the properties hypothecated, and must prove for the remainder in the liquidation proceedings. Mr. Petman contended that the Bank being a secured creditor was not bound to prove for any portion of its claim in the liquidation proceedings. He contended that the rules relating to insolvency proceedings were applicable to liquidations and in support referred to *Lindley on Companies*; *In re Joint Stock Discount Company, Warrant Finance Company's Case, No. 2* (1), in which it was held that a secured creditor cannot be deprived of his security until he has been paid in full the principal, interest, and costs due thereon; *In re David Lloyd & Company* (2), where it was held by Jessel, M. R., that as a rule a mortgagee has a right to realize his security; and *In re Humber Ironworks and Ship-building Company, Warrant Finance Company's Case No. 2*, (3), where Sir G. M. Gifford, L. J., held that the creditor proves in the winding-up as in bankruptcy, for whatever the amount of the principal and interest up to a

(1) (1870) 10 Equity 11.

(2) (1877) 6 Ch. D. 380, 343.

(3) (1870) 5 Ch. Ap. 88, 92.



particular date may be ; but that is for the purpose of convenience in the administration of the winding-up, and does not and is not intended to affect any other rights which the creditor may have, and does not amount to an appropriation in any shape or form.

Mr. Petman then referred to section 16 (5) of the Provincial Insolvency Act and pointed out that the power of any secured creditor to realize or otherwise deal with his security is specially reserved under the Bankruptcy laws, and in further support of his contention he referred to—

*Shridhan Narayan v. Atmaram Govind* (1).

*Shridhan Narayan v. Krishnaji* (2).

*Gopi Nath v. Gur Prasad* (3).

*Re Wyse, Ex parte Chowksey* (4).

*Lang v. Heptullabhai* (5).

It is not necessary to discuss these authorities as in my opinion the position is perfectly clear. As far as possible the rules of bankruptcy have been held applicable to liquidation matters. When a Company goes into liquidation a secured creditor may realize his security and prove for any balance there may be outstanding. If he realises his security and has to prove for a balance, the remaining assets of the Company would only be liable for such principal and interest as was due on the date of the winding-up order. A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. He may if he chooses disregard the liquidation proceedings and proceed against his security and that is the position taken up by the Bank in the present case.

Mr. Moti Sagar referred to *Ram Saran v. Basheshar Nath* (6) where it was held that the—

“ liability created by a mortgage can be and is affected by the winding-up of the mortgagor Company so far at least that interest subsequent to the order of winding-up does not continue to be a charge on the assets. For interest subsequent to the winding-up order until payment the general rule is that they only receive interest after all debts have been paid in full. ”

(1) (1888) I. L. R. 7 Bom. 455.

(2) (1887) I. L. R. 12 Bom. 272.

(3) (1912) 15 Indian Cases 860.

(4) (1912) 17 Indian Cases 31.

(5) (1918) I. L. R. 38 Bom. 859.

(6) 55 P. W. R. 1907.

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The correctness of this proposition was strenuously attacked by Mr. Petman, and it certainly seems to me open to doubt as I am of opinion that a secured creditor can, if he chooses, realise his security and recover therefrom the whole of his principal as well as the interest up to the date of the realisation. The property hypothecated would thus be liable for the whole claim and it is only the liability of the remaining assets that could be affected by the winding-up order. The present case is only concerned with the liability of the hypothecated or mortgaged properties and it seems to me that these properties are liable to be sold in satisfaction of the entire claim and not merely for the amount due on the date of the winding-up order. It was also contended that interest was not claimable after the winding-up order as the property of a Company in liquidation vested in the official liquidator, and that therefore in the present case the equity of redemption vested in the official liquidator of the flour mills on the date of the winding-up order. Doubtless the property did so vest—but the official liquidator is in no better position than the flour mills. He can redeem the property by paying up all the monies secured by the deed in question. He cannot force the secured creditor to take less than the amount due at the date of redemption. The property is charged with the monies due according to the terms of the hypothec and continues to be so charged until such monies have been paid up in full according to those terms.

In any event it is perfectly clear that the portion of the hypothecated property belonging to Ram Chand, *i.e.*, the land, was not, and could not be, affected by the fact that the flour mills went into liquidation. In my opinion therefore this appeal must be accepted with costs and the Bank must be given a decree for the whole amount of the claim together with future interest as agreed till realisation, recoverable from the entire property hypothecated under the deed, and I would order accordingly.

*Ram Chand's Appeal dismissed.*

*Banks appeal accepted.*

MARTINEAU J.,—I concur.