1929

GURDAS MAL-RAM CHAND v. GURANDITTA MAL.

stead of 6 *per cent. per annum.* The rule of law is firmly established that total failure of the consideration for the surety's promise of guarantee has the effect of discharging him.

SHADI LAL C.J.

I would accordingly confirm the judgment of the Single Judge, holding that the surety has been discharged from his liability, and dismiss the appeal with costs.

BROADWAY J.

BROADWAY J.—I concur.

N. F. E.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Shadi Lal C. J. and Broadway J.

1929

April 30.

TIKAM CHAND (PLAINTIFF) Appellant

versus

HARISH CHANDRA AND OTHERS (DEFENDANTS) Respondents.

Letters Patent Appeal No. 183 of 1927.

Indian Companies Act, VII of 1913, section 163 (1)—Winding up order—creditor—rights of—Articles of Association—Managing Director's power to borrow—Company's liability.

The Articles of Association of the International Ayurvedic Company, Limited, empowered its Managing Director to borrow money on its behalf, and he borrowed sums of Rs. 5,000 and Rs. 20,000 from the appellant, which were placed in the company's books to the latter's credit. The shareholders acknowledged the receipt of, paid interest on, and confirmed, the said loans taken on behalf of the company by the Managing Director. After suffering heavy losses, the company's condition being moribund and its assets negligible, the appellant as the principal creditor, having served on the company a demand for payment and received no satisfaction, applied for the winding up of the company, relying upon section 163 of the Indian Companies Act. It was con-

1929

TIKAM CHAND
v.
HARISH CHANDRA.

tended by the respondents that the Managing Director might be personally responsible for the advances, but the company could not be held responsible.

Held, that the liability of the company for the payment of the debt had been established.

Held also, that a creditor is *prima facie* entitled *ex debito justitiæ* to an order of winding up, which in the circumstances of the present case should have been granted.

Tulsidas Lallubhai v. *The Bharat Khand Cotton Mills Co., Ltd.* (1) and *The Company* v. *Sri Rameswar Singh* (2), distinguished.

Appeal under clause 10 of the Letters Patent from the judgment of Jai Lal J., dated the 8th October, 1927.

J. L. KAPUR and JAGAN NATH AGGARWAL, for Appellant.

SHAMAIR CHAND, for Respondents.

SHADI LAL C.J.

SHADI LAL C.J.—This appeal arises out of proceedings for the winding up of the International Ayurvedic Company, Limited, which was incorporated in 1918. The appellant, *Rai Bahadur Seth* Tikam Chand, claiming to be a creditor as well as a shareholder of the company, made an application to the District Judge of Delhi for the winding up of the company on two grounds: (1) that the company was unable to pay its debts; and (2) that it was just and equitable that the company should be wound up. The District Judge granted the application and made an order directing that the company be wound up by the Court. On appeal, Jai Lal J. held that there was a *bona fide* dispute as to the claim of *Seth* Tikam Chand to be a creditor of the company, and that it was a fit case in which the lower Court "should have declined to adjudicate upon the matter, and should

(1) (1915) I. L. R. 39 Bom. 47. (2) (1918) 23 Cal. W. N. 844.

1929

TIKAM CHAND v. HARISH CHANDRA.

SHADI LAL C.J.

have directed him to file a regular suit, if so advised, to establish his right as a creditor." As regards *Seth* Tikam Chand's prayer for the winding up of the company on the ground of his being a shareholder, the learned Judge was of the opinion that the District Judge "should have thoroughly investigated the affairs of the company in the presence of the other shareholders, whose wishes should have received due consideration in the matter," and he should then have passed such orders as the facts disclosed might have necessitated. The learned Judge accordingly set aside the order of the District Judge and remanded the case to him, with the direction that he should enquire into the affairs of the company and then make an order in accordance with the evidence produced before him.

The first question, which requires determination is, whether the appellant has established his claim as a creditor of the company. Now, it is conceded that he paid Rs. 5,000 on the 27th July, 1923, and Rs. 20,000 on the 31st July, 1923, to Dilbagh Rai, who was the Managing Director of the company. It is, however, contended that Dilbagh Rai may be personally liable for the repayment of the money, but that the company cannot be held responsible for any advances made to him. But a perusal of the Articles of Association shows that article 112 empowers the Managing Director in clear terms to borrow money on behalf of the company, and it is beyond dispute that Rs. 25,000 was credited to the appellant in the books of the company. On the 21st August, 1923, the Managing Director issued a circular letter to the shareholders informing them that the company had borrowed Rs. 25,000 from the appellant, and on the 9th December, 1923, the shareholders held a meeting at which the loan taken by the Managing Director on

1929

TIKAM CHAND v. HARISH CHANDRA.

SHADI LAL C.J.

behalf of the company was confirmed, and he was authorised to use the money for the purpose of buying a plot of land for constructing a medical hall required by the company. In January, 1924, the company sent an acknowledgment of the debt to the creditor, and in February, 1924, and again in May, 1924, the company paid interest on the money advanced by him. On the 4th November, 1924, the Directors passed a resolution authorising the Managing Director to utilise the money for other purposes of the company, and another resolution directing him to discharge the debt as soon as possible.

Having regard to the authority conferred by article 112 upon the Managing Director, and to the documentary evidence summarised above, I have no hesitation in holding that the liability of the company for the payment of the debt has been fully established. It is true that a creditor of a solvent company, whose debt is *bona fide* disputed, will be restrained from presenting a petition for the winding up of the company; and to this category belongs the case of *Tulsidas Lallubhai* v. *The Bharat Khand Cotton Mill Company, Limited* (1). Nor can a creditor be allowed to present an application for winding up as a counterblast to an action brought against him by the company to enforce a legal claim. Such an application is made not for the *bona fide* purpose of winding up the company, but for a collateral and sinister object—*vide The Company* v. *Sri Rameshwar Singh* (2). In the present case, however, there is no trace of any *mala fides*, and the object of the creditor is simply to recover his debt out of such assets as may be available. The learned District Judge found, and his finding has not been seriously contested before us, that the company was

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1929

TIKAM CHAND v. HARISH CHANDRA.

SHADI LAL C.J.

in a moribund condition, and that the main assets consisted of the stock of Ayurvedic medicines which were of no value at the time when the application for the winding up was made. The report of the liquidator shows that the company had suffered heavy losses, and that, when the liquidator took charge, the closing balance in the books of the company was only Rs. 26-1-4.

The appellant is undoubtedly the principal creditor of the company; and, before presenting his application for winding up, he had served on the company a demand requiring the company to pay the sum due to him, and the company had, for three weeks thereafter, neglected to pay the same, or to secure a compound for it to the reasonable satisfaction of the creditor—*vide* section 163 (1) of the Indian Companies Act. Indeed, it is not suggested that the company was in a position to pay the debt; and I must, therefore, hold that the appellant, as a creditor of the company, was entitled to make the application for winding up. The proposition of law is indisputable that a creditor is *prima facie* entitled *ex debito justitiæ* to an order of winding up. No ground has been shown why such an order should not be made in this case.

In view of this finding, it is hardly necessary to dwell upon the issue that, apart from the question of the appellant being a creditor of the company, it is just and equitable that the company should be wound up. The report of the liquidator shows that the company does not carry on any business, and possesses little or no assets. The whole substratum of the company is gone, and it is significant that the application for winding up is opposed only by two shareholders, one holding one share and the other ten shares,

1929

TIKAM CHAND
v.
HARISH CHANDRA.

out of the subscribed capital representing 1,037 shares. On this ground also the appellant has made out a strong case for winding up.

For the aforesaid reasons I would accept the appeal; and, setting aside the judgment of the Single Judge, restore that of the District Judge, with costs throughout.

SHADI LAL C.J.

BROADWAY J.—I concur.

BROADWAY J.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Shadi Lal C. J. and Hilton J.

1929

May 16.

MUHAMMAD ALI AKBAR (DEFENDANT) Appellant.

versus

MST. FATIMA BEGAM (PLAINTIFF) Respondent.

Civil Appeal No. 493 of 1925.

Indian Contract Act, IX of 1872, section 23—Ante-nuptial agreement to make the prospective wife a monthly allowance as Kharch-i-pandan *for life—whether enforceable by a Muhammadan wife after leaving her husband without lawful cause—Public policy—proper limits of.*

A Muhammadan wife left her husband's house owing to quarrels with her mother-in-law and then claimed maintenance and an allowance on the basis of an agreement entered into between the parties on the day of their marriage by which the husband promised to pay his wife Rs. 25 per month as *kharch-i-pandan* during his life, in addition to the maintenance to which she was entitled under Muhammadan Law. The District Judge rejected her claim as regards maintenance on the ground that according to Muhammadan Law, the husband is not bound to maintain his wife if she refuses to live with him without lawful cause, but decreed her claim in respect of the *kharch-i-pandan*. The husband alone appealed to the High Court, and contended that the contract as to *kharch-i-pandan* should not be enforced as it