

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

MIR ALI MAHOMED PAT'EL LIQUIDATOR OF THE DHULIA MANUFACTURING COMPANY, LIMITED (ORIGINAL APPLICANT), *v.* BIHA'RILA'L SUKLA'L (ORIGINAL OPPONENT), RESPONDENT.*

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November 26.

Company—Winding up—Suit against manager of company—Company not a party to the suit—Attachment before judgment of company's property—Remedy of liquidator—Appeal—Civil Procedure Code (Act XIV of 1882), Secs. 283, 483, 484, 485, 487-588 and 622—Indian Companies' Act (VI of 1882), Sec. 177.

The Dhulia Manufacturing Company, Limited, carried on business at Dhulia and had its registered office at Bombay. One Ahmad Mahomed was the manager at Dhulia, and he had authority to borrow money and draw *hundis* on behalf of the company. In August, 1894, the directors opened negotiations for the sale of the company's factory to one Háji Umer, and in September, 1894, while the negotiations were pending, a special resolution was passed to wind up the company voluntarily. The resolution was confirmed in October, 1894, and Mir Ali Pátel was appointed liquidator under section 177 of the Indian Companies' Act (VI of 1882). In December, 1894, the liquidator agreed to sell the factory to Háji Umer for the said sum of Rs. 38,000. Under the agreement Háji Umer was to enter into possession of the factory, but the company was to have a lien upon it until the completion of the purchase which was to take place in May, 1895. A month before the date fixed for the completion of the sale one Bihárilál filed a suit in the Court of the First Class Subordinate Judge of Dhulia against Ahmad Mahomed, the manager of the company, in his individual capacity and as manager of the company. His claim was professedly against the company, but he did not make the company, which was then in liquidation, a party to the suit. Subsequently Bihárilál applied for and obtained an order for attachment before judgment of the company's factory at Dhulia. No notice of the application or of the order made on it was given to the liquidator. He at once applied to the Court to raise the attachment, contending that the Court had no power to attach the property of the company which was not a party to the suit. The Court made the company a party and dismissed the liquidator's application, confirming its previous order for attachment. The liquidator appealed to the High Court.

Held, that the order of attachment should be reversed. The intended sale by the liquidator, which was the sole reason for making the order, was not with intent to obstruct any decree that the plaintiff (Bihárilál) might obtain against the company, but was being effected by the liquidator in the course of his duty and in pursuance of a contract entered into long before the suit was instituted. The plaintiff's claim, if established, would be satisfied *pari passu* with the other debts of the company. The plaintiff was not entitled to security for his claim in preference to the other creditors.

It was contended that no appeal lay against the order of the Subordinate Judge, and that the liquidator's sole remedy was by suit under sections 283 and 487 of the Civil Procedure Code (Act XIV of 1882).

* Appeal No. 32 of 1895 from order.

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Held, that the company having been made a party to the suit, the order of attachment was made under section 485 of the Civil Procedure Code and consequently under section 588 an appeal lay from that order. If the company had not been made a party, the High Court would have set aside the order of attachment under section 622 of the Code, as in that case the Subordinate Judge would have had no jurisdiction to make it.

APPEAL from an order passed by Ráo Bahádur Chunilál Máneklál, First Class Subordinate Judge of Dhulia.

The Dhulia Manufacturing Company, Limited, which was registered under the Indian Companies' Act (VI of 1882) had a cotton ginning factory at Dhulia and its registered office at Bombay. The manager of the company at Dhulia was one Ahmad Muhamad, who had full authority to borrow money and draw *hundis* and to do all necessary acts on behalf of the company.

In August, 1894, the directors of the company opened negotiations for the sale of the company's factory at Dhulia to one Háji Umer for Rs. 38,000, and on the 7th September, 1894, while the negotiations were pending, a special resolution was passed to wind up the company voluntarily. The resolution was confirmed on the 6th October, 1894, and in pursuance of it, Mir Ali M. Pátel was appointed liquidator under section 177 of the Indian Companies' Act VI of 1882.

On the 12th November, 1894, the liquidator entered into an agreement with Háji Umer to sell him the factory for the agreed sum of Rs. 38,000. Under the agreement Háji Umer was to be put in possession of the factory, but the company was to have a lien upon it till the 1st May, 1895, on which date the purchase was to be completed.

In January, 1895, Ahmad Mahomed, the manager, drew *hundis* for Rs. 10,000 in favour of Bihárilál Suklál, the opponent. These *hundis* were dishonoured and thereupon Bihárilál filed a suit in the early part of April, 1895, against Ahmad Mahomed in his own capacity and as manager of the company to recover Rs. 10,552-8-0. His claim professedly was against the company, but he did not make the company, which was then in liquidation, a party to the suit.

On the 6th April, although the company was not a party to the suit, the Subordinate Judge on the application of Bihárilál

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made an order under section 485 of the Civil Procedure Code (Act XIV of 1882) attaching before judgment the factory of the company, and the company was prohibited from alienating the factory. Whether or not a notice of the plaintiff's application or of the order made on it was given to the liquidator, was not clear from the record of the case.

The liquidator on the same day applied to the Subordinate Judge to raise the attachment, contending that the Court had no power to attach the property of the company, which was not a party to the suit. On the 8th July the Subordinate Judge made the company a party to the suit, and disallowing the liquidator's objections confirmed his previous order of the 6th April for the attachment of the property. In his judgment the Subordinate Judge treated the company as having been a party throughout.

The liquidator appealed against this order, refusing to raise the attachment.

Russell with *Vishnu K. Bhatavdekar*, for the appellant (liquidator):—The order for attachment was wrong on three grounds. First, the company having gone into voluntary liquidation, no order affecting it could be passed without the leave of the Court—section 212 of the Indian Companies' Act (VI of 1882). The proper Court to apply to in the present case was the High Court, because the company's registered office is at Bombay: see section 130 of the Act. Section 163 of the English Companies' Act is similar to section 212 of the Indian Companies' Act. See also *Buckley on the Companies' Act*, (6th Ed.), p. 396; *In re Thurso New Gas Company* ⁽¹⁾; *Westbury v. Twigg and Co., Limited* ⁽²⁾.

Secondly, under section 484 of the Civil Procedure Code (Act XIV of 1882), the company ought to have been called upon to furnish security before the order for attachment was made, and that not having been done the order is illegal.

Thirdly, the agreement made by the liquidator for the sale of the company's property having been made before the suit was filed, the interest in the property had passed to the intending purchaser. The liquidator should, therefore, be allowed to complete the sale. He will have to account for the proceeds of the sale.

(1) 42 Ch. Div., 486.

(2) (1892) 1 Q. B., 77.

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Branson with *Trimbak R. Kotwal*, for the respondent (plaintiff):—Our claim is a just one and we shall not be able to reap the benefit of our decree if the attachment is removed and the sale completed.

[FARRAN, C. J.:—The liquidator will have the proceeds of the sale in his hands, and you can proceed against him. He is a responsible officer.]

On the merits we contend that the attachment should not be removed. The liquidator should at least be asked to give security.

The Court passed the order for attachment under section 484 of the Code, and an order passed under that section is not appealable under section 588. The liquidator can seek redress under sections 283 and 487 of the Code by instituting a suit.

Russell, in reply:—The order was passed under section 485, and section 588 of the Code gives an appeal against an order passed under that section.

FARRAN, C. J.:—The proceedings in this matter have been so very irregular that it is difficult to ascertain precisely in what position the parties now stand. The Dhulia Manufacturing Company, Limited, was a company registered under the Indian Companies' Act, 1882, which carried on business at Dhulia, but had its registered office at Bombay. In August, 1894, the directors of the company had opened negotiations for the sale of the company's factory at Dhulia to one Haji Umer for Rs. 38,000, and while the negotiations were pending, a special resolution was passed in September, 1894, to wind up the company voluntarily. The resolution was confirmed on the 6th October, 1894, when Mir Ali M. Pátel was appointed its liquidator under section 177 of the Act.

On the 12th December, 1894, he entered into a general agreement with the purchaser to sell him the factory at Dhulia for the agreed sum of Rs. 38,000. Under the agreement the purchaser was to enter into possession of the factory, but the company was to have a lien upon it until the completion of the purchase which was to take place on the 1st May, 1895.

On or about the 1st April, 1895, Bihárilál Sukhlál commenced a suit in the Court of the First Class Subordinate Judge at Dhulia

to recover a sum of Rs. 10,552-8-0. He made one Ahmad Mahomed the defendant to the suit, professing to sue him in his *own* individual capacity and as manager of the company. His claim professedly was against the company, but he did not make the company, which was then, as we have said, in liquidation, a party to the suit.

A day or two after filing the suit the plaintiff applied under section 483 of the Code to attach before judgment the company's factory at Dhulia, and strange to say, the Subordinate Judge, though the company was not a party to the suit, issued under section 484 a notice to the defendants to show cause why they should not be required to furnish security for the sum of Rs. 11,000, or why, in default, the property specified in the application should not be attached until further order, and conditionally attached the company's factory until further order.

On the 6th April, under section 485, this rule was made absolute, as the defendants did not furnish the required security, and the defendants were prohibited from alienating the factory of the company. It does not appear that notice of this application or of the order made upon it was given to the liquidator of the company, though under section 177 of the Companies' Act he was engaged in winding up its affairs and was charged with the duty of distributing its assets.

On the same 6th April the liquidator of the company applied to raise the attachment. The intending purchaser also made a similar application, but with that we are not concerned here. The application was argued before the Subordinate Judge, when the strange anomaly of attaching the property of the company in a suit to which the company was not a party was pointed out to him. On the 8th of July the Subordinate Judge made the company a party to the suit, and disallowing the liquidator's objections, confirmed his previous order for the attachment of the property. In his judgment the Subordinate Judge treats the company as having been a party throughout, though technically it was not named as such in the heading of the suit. From this order the company through its liquidator has appealed to this Court.

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It is objected that no appeal lies, as the liquidator's remedy is by suit under sections 283 and 487 if he feels himself aggrieved by the order. That no doubt would be so if the company were not a party to the suit, but in that case the strange anomaly which we have pointed out would remain, that property admittedly the company's, and not the property of the defendants, would have been avowedly attached in a suit to which the company was not a party. It is clear that the Subordinate Judge would have no jurisdiction to make such an order, and we should not, under these circumstances, have hesitated to set aside the order under section 622 of the Code. It must, however, we think, be taken that the order has now been made against the company under section 485, and the order is in that case appealable under section 588.

The appeal must, we think, be allowed. The sale which the liquidator proposes to carry out, and which is the sole foundation for the making of the attachment, is clearly not being carried out "with intent to obstruct or delay the execution of the decree which may be passed against the company." It is a sale about to be completed by the liquidator in the course of his duty in winding up the affairs of the company and in pursuance of a contract of sale entered into long before the plaintiff's suit was instituted.

The order is attempted to be supported by the Subordinate Judge on the ground that the liquidator does not admit the plaintiffs' claim, and that, therefore, he will distribute the company's assets under section 177 without regard to it. There is no ground for that supposition. The liquidator will be bound to satisfy the plaintiffs' claim, if he establish it as a debt, *pari passu* with the other debts of the company as he is bound to do under section 177, and there is no reason whatever in this case to suppose that he will not perform his duty. The plaintiff is not entitled to security for his claim in preference to the other creditors of the company. It is unnecessary to consider the other objection made to the order. It will be discharged with costs.

Order discharged with costs