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action for redemption does not prevent him from bringing a fresh suit for redemption. *A fortiori* we think that his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption, subject however to this that he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree. But it is not contended by the plaintiff in this suit that the mortgage-debt at that time was less than it is found to be by the Court, and therefore, in permitting the present suit, there would be no violation of the provisions of section 11 of the Civil Procedure Code. We reverse the decree and remand the case for disposal on the merits. The plaintiff must have the costs of the two appeals against the opposing defendants.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914.
August 12.

TULSIDAS LALLUBHAI (ORIGINAL PETITIONER), APPELLANT, *v.* THE BHARAT KHAND COTTON MILL COMPANY, LIMITED (ORIGINAL OPPONENT), RESPONDENT.*

Indian Companies Act (VI of 1882), sections 128, 129—Company—Compulsory winding up—Creditor's petition—Company's inability to pay its debts.

The petitioner, who was an assignee of certain debts due by the defendant Company to its late Secretary and Manager, demanded payment from the Company. The Company refused to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The petitioner thereupon applied to the

* First Appeal No. 31 of 1912.

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Court to compulsorily wind up the affairs of the Company. It was not shown that the Company was unable to pay its debt in full. The lower Court having rejected the application, the petitioner appealed :—

Held, that the application was rightly rejected, for the petitioner's object, in making the application, was to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts.

The principle upon which a Company can be wound up on a creditor's application is simply its inability to pay its just debts. The inability is indicated by its neglect to pay after proper demand made and the lapse of three weeks. Such neglect must be judged by reference to the facts of each particular case. Where the defence is that the debt is disputed all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts.

APPEAL from the decision of B. C. Kennedy, District Judge of Ahmedabad.

This was an application by a creditor to wind up the affairs of a Company.

The defendant Company was at first managed by its then agent Kevaldas. He had, during his management, it was alleged, advanced moneys to the Company, for which three deposit receipts were issued : viz., (1) for Rs. 75,812-8-0 in the name of Bai Dhiraj, wife of Kevaldas ; (2) for Rs. 50,000 in the name of Bai Mangu, daughter-in-law of Kevaldas ; and (3) for Rs. 11,605-2-8 in the name of Kevaldas. The debts due on these receipts were assigned to the petitioner in April 1912. In October of the same year, the petitioner demanded payment of the debts from the Company ; but the Company replied saying that the debts were not genuine.

The petitioner thereupon applied to the District Court at Ahmedabad to have the affairs of the Company wound up.

It was not shown that the Company was unable to pay the debts in question.

The District Judge did not conduct the inquiry but dismissed the application on the following grounds :—

The applicant and Kevaldas who is the moving spirit in this application wish me to read section 129A as if the words were " the Company has failed or omitted to pay ". But the words are " neglected to pay ". The expression " neglected " connotes illegal failure to pay. It is not illegal to refuse to pay a debt which is not due or against which the debtor has a set-off. I think then that where a Company denies the existence of the debt or claims a set-off and for that reason neglects to pay a claim it cannot be said to contravene the duty imposed on it indirectly by section 129. To read the section as the applicant wished me to read it would have very serious consequences. All sorts of fictitious and blackmailing claims might be raised against a Company and payment extorted from it under threat of shattering its credit and impeding its operations by applying to the Court for a winding-up order.

I think then that on the pleadings, the case should not proceed.

The applicant however urges that mere statement by the Company that it does not admit the debt and that it has counterclaims is not sufficient and that I ought to frame issues as to whether that defence is made *mala fide* and whether there is actually any defence to the applicant's claim.

This I think I am not bound to do. It seems to me that I should have to plunge into a very lengthy and purposeless investigation which would, if eventually I held the defence to be *bonâ fide*, have caused the very mischief which this sort of application is intended to cause, namely keeping liquidation proceedings hanging over the Company for an indefinite time and that if I held the defence to be *mala fide* I should simply have removed a question between parties from the cognizance of the ordinary tribunals and enforced a claim by the threat of these special proceedings under the liquidation chapters instead of allowing it to be recovered by the ordinary procedure. This appears to me to be a thoroughly vicious procedure and without authority. I will not adopt it.

If the applicant has a claim against the Company which the Company denies, it is his business to get a decree in the ordinary way in the ordinary Courts.

It is not alleged by the applicant that the Company could not pay this claim if found due. The defence if proved appears good, whether it is true or whether the Company can prove it, is, I think, not a matter for this Court in these proceedings.

The petitioner appealed to the High Court.

G. S. Rao, with *M. K. Mehta*, for the appellant.

B. J. Desai, with *D. A. Khare*, for the respondent.

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A preliminary objection was raised that no appeal could lie against an order refusing to wind up the affairs of a Company.

Desai, in support of the preliminary objection:—Section 169 of the Indian Companies Act, 1882, provides for appeal from an order passed in the matter of winding-up of a Company. It does not refer to orders refusing to wind up the Company.

Rao:—The appeal is perfectly competent. See *In re Great Britain Mutual Life Assurance Society*[1].

[The Court overruled the preliminary objection.]

Rao:—Before dismissing our petition, the lower Court should have held an inquiry as to whether the contention raised by the Company was *bonâ fide* or not. See *In re King's Cross Industrial Dwellings Company*[2] and *In re Great Britain Mutual Life Assurance Society*[1]; Lindley on Companies, Vol. II, p. 862 (6th Edn.).

Desai was not called upon.

BEAMAN, J.:—The petitioner-appellant is assignee of certain debts alleged to be due by the defendant Company to its late Secretary and Manager, Mr. Kevaldas, and his benamidars, his wife and daughter. The petitioner-appellant gave the Company notice on the 7th of October 1912 and demanded payment. On the 24th of October 1912 the Company replied in a rather vaguely worded letter, the general content of which, however, clearly indicates the line of defence subsequently adopted by the Company. On the 15th of November the petitioner, instead of accepting the Company's challenge and bringing a suit to vindicate the justice of his demand, put in a winding-up petition. This came on before the District Judge, and the Company replied in effect that the alleged demand

[1] (1880) 16 Ch. D. 246. [2] (1870) L. R. 11 Eq. 149.

was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The matter appeared to the learned District Judge to be one of great complexity, and we think that in declining to go into it upon this petition he acted upon sound and correct principle. We are not afforded any assistance by such cases as *In re King's Cross Industrial Dwellings Company*[1] and *In re Great Britain Mutual Life Assurance Society*[2]. The dicta of Jessel, M. R., in the latter case certainly appear to be rather widely and loosely expressed, but in no case could such general dicta be carried further than the facts of the case would warrant. If any general rule is to be laid down at all, it is easily obtained from the Statute law. The principle upon which a Company is to be wound up, for all the purposes with which we are now concerned, is simply its inability to pay its just debts, and that inability is said to be indicated by its neglect to pay after proper demand made and the lapse of three weeks. It is quite clear, however, that any such neglect must be judged by reference to the facts of each particular case, and that, where the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts. In this case it is perfectly clear that the defence, whatever its ultimate result may be, has substance in it, for it is hardly even the petitioner-appellant's case that the Company is unable to pay the debt it owes him. It has been stated here that he expects to obtain all his dues in full in the liquidation. Thus, therefore, it appears that the petitioner's object is to bring the pressure of insolvency proceedings to bear upon the Company in

(1) (1870) L. R. 11 Eq. 149. (2) (1880) 16 Ch. D. 246.

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order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, and this, we are both very strongly of opinion, is one of the worst abuses to which the winding-up sections of our Statute law upon Companies could be perverted. We are clearly of opinion that the learned Judge below was right, and that his order ought to be confirmed and this appeal dismissed with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1914.
August 18.

NATHABHAI TRICAMLAL (ORIGINAL PLAINTIFF), APPLICANT, *v.* RANCHHODLAL RAMJI (ORIGINAL DEFENDANT No. 2), OPPONENT.*

Indian Contract Act (IX of 1872), sections 134, 137—Suit against principal and surety—Removal of principal's name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time—Civil Procedure Code (Act V of 1908), Order IX, Rule 5, Order XXIII, Rule 1.

A suit was brought in 1913 on a promissory note passed in 1912 by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1 : his name was therefore struck out and the suit proceeded against defendant No. 2 alone. The lower Court dismissed the suit on the ground that as the principal was discharged by an act of the creditor (plaintiff) in having his (defendant No. 1's) name struck out, the surety also was thereby discharged. On plaintiff's application under extraordinary jurisdiction :—

Held, reversing the decree and remanding the suit, that the mere omission of the plaintiff to pursue his suit against one of the defendants, with the result that that defendant's name was struck off and the suit dismissed against him under Order IX, Rule 5, of the Civil Procedure Code (Act V of 1908), did not discharge the surety, provided the suit was still in time against the principal.

* Civil Application No. 119 of 1914 under extraordinary jurisdiction.