

view of all the circumstances attending the case and must not give effect to what is only an apparent and not the real state of things. It is only apparently that Rs. 21,000 paid for the properties at the [105] auction sale would represent the value of those properties as obtained by such sale, the real state of things being, as is manifest, this, that the amount was paid in order to satisfy the mortgage debt so as to prevent any further sale in execution of the mortgage decree. What the plaintiff, therefore, is entitled to recover should be calculated not upon the footing of Rs. 21,000 being the value of those properties, but upon the footing of the properties being of the value mentioned in the plaint after making the correction for road and public work cesses as indicated above, and by treating the mortgage debt as having been paid off by the defendants 1st party in consideration of their having obtained the properties of the plaintiff, the amount due to the plaintiff being the difference between the real value of his properties and the liability which they were under and which has been satisfied by the sale of the property.

1903
JUNE 2, 9.
—
APPELLATE
CIVIL.
—
31 C. 95=8
C. W. N. 30.

A decree will be made in favour of the plaintiff in the manner indicated above ; and the parties will recover and bear costs in proportion to their success and failure. The amount recoverable by the plaintiff shall bear interest from the date of the execution sale, but having regard to the previous litigation between the parties the rate ought not to be higher than ten per cent.

—
Appeal allowed in part.

31 C. 106.

[106] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Geidt.

DACCA LOAN OFFICE COMPANY v. ANANDA CHANDRA ROY.*
[24th June, 1903.]

Company—Winding up of a company—Depositor, application by, to wind up company—Parties—The Indian Companies Act (VI of 1882), s. 131.—Creditors and Contributories, application by—Withdrawal of the original petition, effect of—Verification.

When a depositor in a company applies under section 131 of the Indian Companies Act (VI of 1882) for the winding up of the Company, and other creditors and contributories are allowed by the Court to join with him in prosecuting the case, the petition of the depositor should be considered as a joint petition of all the persons allowed to join ; and his withdrawal from the case does not operate as a withdrawal of the whole case.

If the original petition be duly signed and verified, the co-petitioners are not debarred from proceeding with the case for omission to verify their petitions.

APPEAL by Aswini Kumar Mukerji, the opposite party.

One Purna Chandra Chakravarti, a depositor in the Dacca Loan Office Company, Limited, applied to the Civil Court under section 131 of the Indian Companies Act (VI of 1882) for the winding up of the company. On the Court giving a notice under section 30 of the Civil Procedure Code, other share-holders, depositors and contributories of the company put in petitions praying to be made parties to the application by Purna Chandra for the winding up of the company ; and their prayer was granted. Subsequently, Purna Chandra, having been paid up by

* Appeal from Order No. 375 of 1902, against the order of Dwarkanath Mitter, District Judge of Dacca, dated Sept. 22, 1902.

1903
JUNE 24.
APPELLATE
CIVIL.

31 C. 106.

the said Loan Office Company, presented a petition to the District Judge to be allowed to withdraw his case. Thereupon, the said company prayed that under those circumstances the entire proceedings should be dropped.

The District Judge of Dacca held that the petition presented by Purna Chandra should be treated as a joint petition of the creditors and contributories, and their interests being the same, the proceedings could not drop only because Purna Chandra had withdrawn from the case.

[107] Against this order, the opposite party, *viz.*, the Dacca Loan Office Company, Ltd., by its Assistant Secretary, Aswini Kumar Mukerji, appealed to the High Court.

Babu Lal Mohan Das (Babu Upendra Lal Roy with him), for the respondents, took a preliminary objection to the appeal on the ground that no appeal lay, inasmuch as the order of the District Judge was on the same footing as an order admitting a plaint.

Dr. Ashutosh Mookerjee (Babu Priya Nath Sen with him) for the appellant submitted that an appeal did lie under section 169 of the Indian Companies Act. On the merits, it was contended that Purna Chandra was *dominus litis* and he could withdraw the case at his option : see *In re Times Life Assurance and Guarantee Company* (1), *In re Home Assurance Association* (2), *In re Hereford and South Wales Waggon and Engineering Company* (3) and the effect of that withdrawal would be to drop the whole proceeding.

Babu Lal Mohan Das for the respondents submitted that the order of the District Judge was a proper one. In the cases cited by the other side only one petition was filed by a share-holder, and the others only gave notice, and therefore they are distinguishable. In those cases the first petition having been withdrawn there was no other petition before the Court. Under the former practice the petition might be withdrawn on payment of costs ; but now, when a petitioner consents to withdraw, the Court may substitute on the record other share-holders.

Dr. Ashutosh Mookerjee in reply.

BRETT AND GEIDT, JJ. The present appeal is against an order passed under the Indian Companies Act, VI of 1882, and it is preferred under section 169 of that Act. A rule was also granted on the opposite party to show cause why the order complained of should not be set aside. The appeal and the rule have been heard together and will be governed by this judgment.

[108] It seems that Purna Chandra Chakravarti, one of the depositors in the Dacca Loan Office Company, Limited, applied to the Civil Court under section 131 of the Indian Companies Act for the winding up of this company. The ground on which he based his petition was that he was a depositor of more than Rs. 600 in the company : that he had made a demand for Rs. 200, and that it had not been complied with within the time mentioned in the Act. He further stated that the company was in a very embarrassed state, that Rs. 83,000 due to the company had been barred by limitation, and that Rs. 28,000 due to the depositors could not be paid off ; that the company at a meeting had resolved that the depositors must take their own steps to recover the money : and he further stated that, in consequence of the embarrassed state of the company, shares of the value of Rs. 100 had fallen to Rs. 20.

(1) (1869) L. R. 9 Eq. 382.

(2) (1871) L. R. 12 Eq. 59.

(3) (1874) L. R. 17 Eq. 423.

His petition was presented on the 14th of April 1902, and between the 24th of April and 14th of May, a number of other persons, shareholders, depositors, and contributories, put in petitions asking the Court to make them parties to the petition presented by Purna Chandra Chakravarti for the winding up of the Company. No formal order appears to have been passed on these petitions, but the petitioners appear to have been allowed to join in the petition. The secretary to the company appeared to oppose the petition and was joined by some of the share-holders. Other share-holders and depositors also put in objections to the petition.

1903
JUNE 24.
—
APPELLATE
CIVIL.
—
31 C. 106.

Subsequently, Purna Chandra Chakravarti was paid the amount he had deposited, with interest, and came to an arrangement with the Company, and put in a petition to the District Judge applying to be allowed to withdraw the petition.

The Judge, on the 22nd of September 1902, passed an order which is the order now appealed against. He held that, though Purna himself might withdraw from the prosecution of the petition, the case should proceed at the instance of the other creditors and contributories who had filed applications for permission to join with him in the petition.

A preliminary objection was taken to the appeal on the ground, that as the order of the District Judge is on the same [109] footing as an order admitting a plaint, there is no appeal. We however, think that the order is one coming within the purview of section 169 of the Act, and we disallow the objection.

In support of the appeal it has been contended that as the petition was presented by Purna Chandra Chakravarti and the case was instituted at his instance, and as he, after receiving the amount of his deposit, had followed the only course open to him, and had withdrawn from the case, the District Judge erred in law in holding that the suit could proceed at the instance of other contributories and depositors after his withdrawal; and, in support of this view, the rulings in the English cases of *In re Times Life Assurance and Guarantee Company* (1), *In re Home Assurance Association* (2), and *In re Hereford and South Wales Waggon and Engineering Company* (3), were relied on as laying down the rule obtaining in England. This was the rule under the English Companies Act of 1862 before its amendment.

The rule laid down in those cases has, however, been superseded by the rule passed after the enactment of the amending Act of 1890, and the present practice in England appears to be, that when a petitioner consents to withdraw his petition, the Court may substitute as petitioner any creditor or contributory who, in its opinion, would have a right to present a petition and who is desirous of doing so.

It has been contended that as section 131 of the Indian Companies Act (Act VI of 1882) corresponds with section 82 of the English Act of 1862, the practice in this country must follow that which obtained in England under that Act. We cannot however accept that argument as sound. The amending Act of 1890 in no way alters the provisions of section 82 of the Act of 1862, and we can see no objection to the adoption in this country of the rule of practice which has been passed since the amending Act of 1890 was enacted, and which rule is, in our opinion, equally suited to proceedings taken for the winding up of companies in this country as in England.

(1) (1869) L. R. 9 Eq. 382.

(3) (1874) L. R. 17 Eq. 423.

(2) (1871) L. R. 12 Eq. 59.

1903
JUNE 24.
—
APPELLATE
CIVIL.
—
31 C. 106.

So far then as authority goes, we are of opinion that the order of the District Judge should be supported.

[110] It has however been further contended that the persons who now claim a right to continue the proceedings have failed in drawing up their petition to comply with the provisions of the Rules passed by this Court on the 5th of July 1866, under section 169 of the Indian Companies Act (X of 1866) which was then in force. Rule 4 provides that every such petition shall be verified, and the petitions of the persons in question bear no verification. The rules in question appear to have been duly published in the Calcutta Gazette of the 4th of August 1866 at pages 1023 and 1049. It seems however doubtful whether these rules have in fact ever been in force in the District Courts, or whether the attention of the presiding officers of those Courts has ever been drawn to them. Accepting, however, that the rules are binding on the District Courts, we find that in this case the original petition of Purna Chandra Chakravarti was duly signed and verified, and as the other petitions were in our opinion applications to be added as co-petitioners in that petition, in which the petitioners were equally interested with Purna Chandra in securing the winding up of the company, we do not think that the omission on the part of the petitioners to have their petitions verified can be taken as sufficient to bar them from proceeding with the present case. We may further observe that the point was not taken in the Court below where the omission if any, might possibly have been rectified.

We are therefore not prepared to differ from the view taken by the lower Court that under the circumstances of the present case the petition presented by Purna Chandra Chakravarti should be considered as a joint petition of all the persons who applied to be allowed to join with him in prosecuting it : and such being the case, we think that the Judge was right in holding that the withdrawal of Purna Chandra Chakravarti cannot be taken to operate as a withdrawal of the whole case. We think that there is authority to support the view taken by the lower Court, and there is nothing in the law in this country inconsistent with that view : and we accordingly dismiss the appeal with costs.

The rule connected with the appeal is discharged.

Appeal dismissed.

31 C. 111=7 C. W. N. 688.

[111] APPELLATE CIVIL

Before Mr. Justice Banerjee and Mr. Justice Pargiter.

RAMESHWAR PROSAD SINGH v. LACHMI PROSAD SINGH.*

[5th, 6th, 7th, 8th, 11th, 12th and 15th May, 1903.]

Hindu Law—Mitakshara—Will, construction of—Intention of testator—Voidability of restrictions and qualifications imposed—Bequest—Trust—Right of suit—Limitation—Doubtful right—Compromise.

When from the terms of a will taken as a whole, the intention of the testator to bequeath an estate of inheritance is manifest, the mere fact of some of the restrictions and qualifications imposed by the will being void does not affect the validity of the estate conveyed by it.

* Appeal from Original Decrees No. 286 of 1899, against the decrees of Lal Gopal Sen, Additional Subordinate Judge of Bhagalpore, dated May 22, 1899.