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1869.
Mar. 15.

BANK OF HINDUSTAN, CHINA, AND JAPAN *v.* THE EASTERN FINANCIAL ASSOCIATION LIMITED.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

Indian Companies' Act X. of 1866, *s.* 174.—*Power of Liquidators to compromise under sanction of the Court.*

Under section 174 of the Indian Companies' Act, the Court has power to sanction compromises of calls, debts, and liabilities, before the list of contributories has been settled or the competence of the shareholders has been ascertained,

The Privy Council will be reluctant to interfere with the discretion of Courts having jurisdiction to sanction a compromise by the liquidators of a company winding up under section 174 of the Indian Companies' Act, where all the facts have been placed before the Court in India, and there is no reason to suppose that the proceedings for a compromise have been tainted with fraud.

Ex parte Totty distinguished (1).

In this case their Lordships must assume the validity of the order of the 26th of July 1866, against which no appeal has been presented, and by which the Eastern Financial Association has been ordered to be wound up. This order is the foundation of the proceedings, and assuming its validity, there are two questions raised by the present appeal; first, whether the compromise which was sanctioned by the order of the 26th June 1867 was one which the Court was competent to sanction; and secondly, whether the Court assuming it to have the power ought to have exercised that power under the circumstances of this case.

The words of the 174th section of the Indian Act (2) are that "the liquidators may, with the sanction of the "Court, where a Company is being wound up by the "Court, compromise all calls and liabilities to calls, debts "and liabilities capable of resulting in debts, and all "claims whether present or future, subsisting or supposed "to subsist between the Company and any contributory "or alleged contributory or other debtor or person appre-

Present:—Sir James W. Colvile, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

(1) 1 D. & S., 273; S. C. 6 Jur., N. S., 849.

(2) Act X. of 1866.

"hending liability to the Company, and all questions in "any way relating to or affecting the assets of the com- "pany or the winding up of the company generally "upon such terms as may be agreed upon, with power "for the liquidators to take any security for the discharge of "such debts or liabilities, and to give complete discharges in re- "spect to all or any of such calls, debts, or liabilities." These words are very wide and general, and they are similar to those contained in section 160 of the English Winding-up Act of 1862 (1). It may be conjectured that the great amount of costs and expenses incurred in the winding up of those Companies induced the Legislature to increase the powers of the Court with respect to compromises, in order to the diminishing of the amount of those costs. The words which are to be found in this section, especially the words "liabilities to calls, debts, and liabi- "lities capable of resulting in debts, subsisting or supposed to "subsist," and the words "alleged contributory," plainly show that the compromises intended to be sanctioned might be entered into before the list of contributories had been settled, or the liabilities or competence of the shareholders had been ascertained. It appears to their Lordships that the compromise in question is a compromise with contributories or alleged contributories, and consequently that it is a compromise within the words of the section in question.

The authority of the case of *ex parte Totty* (2) has been much pressed upon the consideration of their Lordships, but the real ground of the decision in that case is explained in the marginal note of the case, which states that, "a Company was "being wound up compulsorily, after an abortive attempt "to wind it up voluntarily, and the official liquidators agreed "with thirty-five shareholders to compromise their liabilities "for a fixed sum, those shareholders insisting as a condition "that the data upon which the compromise was founded "should not be divulged. The compromise was sworn to be "founded upon details of property and circumstances which if "made known would operate detrimentally to the thirty-five "shareholders and to the interests of the Company. The offi-

(1) 24 & 25 Vict., c. 89. (2) 29 L. J. Ch., 702.

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"cial liquidators applied to the Court to sanction the compromise "under that condition, in pursuance of the 19th section of the "Companies' Amendment Act, 21 & 22 Vict., c. 60. Some of "the creditors opposed on the ground of the data not being "stated, and the application was refused with costs; and on ap- "peal the decision was affirmed." But in that case, there was no question as to the liability of the thirty-five share-holders, the question was as to the amount which was likely to be recovered from those thirty-five shareholders, and that, of course, was the question which the Court had to decide when it came to consider whether such a compromise was advisable or not and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions: first, whether these persons who are alleged to be contributories are contributories at all; and, secondly, whether, assuming them to be placed upon the list of contributories, they would be able to pay any, and if any, what proportion of the amount of the calls which might be made upon them?

Now the first of these questions, *viz.*, whether they are contributories at all, depends very much upon the time which is to be fixed for the commencement of this winding up. That is a most material point upon which the ultimate determination of the question as to who are the persons liable to be placed upon the list as contributories would depend. All the facts relating to that point are apparent upon the affidavits and upon the orders of the Court itself; for in truth it mainly depends upon the effect which is to be given to the very singular orders which appear to have been made for the winding up of this Company; there having been a winding up order in the first instance, then a proceeding in the nature of a voluntary winding up, then a discharge of the former orders, and then ultimately the order of 1866, which is the foundation of the present proceedings. Now all these matters were perfectly patent to the Court and to all the shareholders; and they gave rise to the doubt which existed as to the date at which the winding up of this Company ought to be considered as commencing.

So also with respect to the competency of the shareholders, the Judges had before them, on the evidence in this case and from their knowledge of the then state of circumstances existing at Bombay, reason to doubt whether the persons who were on the list of contributories, as alleged contributories, would be able to pay any considerable sum, supposing they were ultimately placed upon the list. In the present case, therefore, there was no agreement for secrecy, there was no object in secrecy, there was no attempt at secrecy; everything was brought fairly before the attention of the Court; and consequently in the opinion of their Lordships, the case of *ex parte Totty* cannot be considered an authority inconsistent with the decision at which the Indian Courts have arrived.

That brings us then to the consideration of the second question, *viz.*, whether, assuming that the Court had power to sanction such a compromise, that power was properly exercised in the present case.

Now the power is, as has been already said, one of so wide and extensive a character that it is doubtless one which ought to be exercised with very great caution; but, on the other hand, in accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in India when two Courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with great caution. The fact of the opposition of the present appellants to the proposed compromise was stated to the Court in the affidavit which was filed on the part of the official liquidator. All the creditors had due notice of the intention to bring this question before the Court, and the appellants themselves were heard by counsel in opposition to the order which was proposed to be made for sanctioning the compromise. It appears upon the evidence that all the creditors in Bombay—that is, all the creditors who had

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the best means of forming a judgment upon the question, at all events upon the second of the two questions, *viz.*, the competency of the shareholders assuming them to be placed upon the list—all of these creditors assented to the terms of the compromise. From the first there were only three opponents, and of these, the present appellants, who are themselves a Company under liquidation, alone appear here before their Lordships; and it is stated in the affidavit, and not denied, that the persons concerned in the management of the affairs of this appellant Company, now under liquidation, had sent out orders to Bombay not to accede to any compromise whatever. In addition to this, Mr. Hamilton, one of the official liquidators, states in his affidavit that he, after the retirement of another liquidator, considered himself as bound to act, and that in point of fact he did act, as protector of the interests of the creditors. He says that he has given careful consideration to all the circumstances of the case so far as they bear upon the question of the advisability of this compromise, and that in his judgment there is no doubt that it is one which is very advisable, having regard to the interests of the creditors. He says that all the books of account had been from the first open to the inspection of the creditors, and that some of the principal creditors have in fact for a considerable time retained possession of some of the books and accounts, or copies of them. No question has been raised as to the *bonâ fides* of all or any part of the proceeding which are now before us; all the material circumstances of the case were brought at the time to the attention of the Court, and were matters in respect of which the High Court of Bombay was much more competent to arrive at a satisfactory conclusion than this board can possibly be.

As, therefore, their Lordships have, in the first place, no doubt as to the jurisdiction of the High Court to make the order in question, and in the second, as they see no ground for, controlling the discretion which that Court has exercised in accordance with the wishes of the great bulk of the creditors, their Lordships will feel it their duty humbly to advise Her Majesty that the order of the High Court of Judicature at Bombay ought to be affirmed, and this appeal dismissed with costs.