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DURGA CHOWDHRANI v. JEWAHIR SINGH CHOWDHRI.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson, and Mr. Justice Pigot.

1890 *July* 2.

IN THE MATTER OF THE INDIAN COMPANIES ACT, 1882,

and

IN THE MATTER OF THE GANGES STEAM TUG COMPANY, LIMITED.

EX PARTE THE DELHI AND LONDON BANK, LIMITED.*

Company—Voluntary liquidation—Liquidator, borrowing powers of—Assets—Principal and Agent—Election—Subrogation—Indian Companies Act (VI of 1882), ss. 144 (f), 177 (g).

Case in which it was held that a liquidator of a company being voluntarily wound up had power to borrow for the purposes of the winding up, including the working of steamers and docks, on the credit of the assets of the company, without security written or otherwise, and that the loan in question was within his powers and was in fact made to the company, though the liquidator also made himself personally liable.

Per PETHERAM, C. J.—*Held*, that a person contracting with an agent may look directly to the principal unless by the terms of the contract he has agreed not to do so, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. *Calder* v. *Dobell* (1) referred to.

Per WILSON and PIGOT, JJ.—*Held*, that the realised assets of a company divided among the shareholders in pursuance of a resolution are assets within the meaning of section 144 (*f*) of the Indian Companies Act.

Per PIGOT, J.—*Held*, that if it were necessary to hold so, the principle of *Baroness Wenlock* v. *River Dee Company* (2) would apply to the case.

THIS was an appeal from an order of Norris, J., dismissing the claim of the Delhi and London Bank, Limited, to rank as a

* Original Civil Appeal No. 36 of 1889, against the decree of Mr. Justice Norris, dated the 9th of September 1889.

(1) L. R. 6 C. P., 486. (2) L. R. 19 Q. B. D., 155.

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creditor against the Ganges Steam Tug Company, Limited, then in voluntary liquidation, in respect of the sum of Rs. 11,614-7-6.

The Ganges Steam Tug Company was incorporated as a Limited Liability Company on or about the 28th August 1883, under the provisions of the Indian Companies Act, 1882, and carried on business by one Ramkissen, its Managing Agent and Treasurer, up to the 30th November 1885, as owners of steam-tugs and lessees of two docks situate at Howrah, known as the Commercial and East India Docks.

At an extraordinary general meeting of the company, held on the 30th November 1885, it was duly resolved to wind up the company voluntarily under the provisions of the Indian Companies Act, 1882, and Ramkissen was appointed liquidator; and at a like meeting held on the 18th December 1885, the above resolution was confirmed. By another resolution duly passed by the shareholders on the 24th December 1885, it was (*inter alia*) directed that the fleet of the company should be sold by public auction, and that Ramkissen as liquidator should carry on the working of the Commercial and East India Docks for the purpose of the winding up, and should work the steamers *Pilot* and *Columbus* until they were disposed of. The resolution is set out fully below in the judgment of Mr. Justice Wilson.

On the 21st December 1887 Ramkissen addressed the following letter to the Manager of the Delhi and London Bank:—

"23, STRAND ROAD,

Calcutta, the 21st December 1887.

"THOS. LONGMUIR, ESQ.,

Manager, Delhi and London Bank.

"DEAR SIR,

Will you be so good as to let me know if you will allow me to overdraw to the extent of Rs. 10,000 on account of the Ganges Steam Tug Company, Limited. It will only be for a short time, and I shall be personally responsible for the same. An early reply will oblige.

Yours faithfully,

RAMKISSEN."

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To this letter the Manager replied as follows:—

"THE DELHI AND LONDON BANK, LIMITED.

Calcutta, 21st December 1887.

"BABOO RAMKISSEN, 23, Strand.

"DEAR SIR,

In reply to your letter of date I shall be happy to allow you to overdraw on account of the Ganges Steam Tug Company, Limited, to the extent of Rs. 10,000, and it is understood that you will be personally responsible for the debt.

Yours faithfully,

(Sd.) D. KING,

Deputy Manager."

In pursuance of this agreement Ramkissen drew as liquidator upon the bank for the amount claimed. The payments were made by cheques and were admittedly made in respect of business carried on by Ramkissen as liquidator. The account with the bank through which the money advanced was passed was described as an "account current with Ramkissen, Liquidator, Ganges Steam Tug Company, Limited (in current deposit account)," so that it might be doubtful whether the account was the account of the liquidator or of the company.

The bank claimed payment of the sum of Rs. 11,614-7-6 on account of principal and interest calculated up to the 5th June 1889, and it was stated in an affidavit made by the Manager that they held no security or satisfaction for the debt except the personal guarantee of Ramkissen, who had meanwhile absconded. The bank claimed payment of the debt as part of the expenses of liquidation and in priority to the general creditors of the company.

Mr. Elias Meyer, the liquidator representing those interested in the company, in his affidavit stated that Ramkissen had ample funds at his disposal to enable him to carry on the business of the company, and that no power to pledge the credit of the company was ever given to him; that Ramkissen had expended these funds in a careless and reckless manner; that the loan was to Ramkissen in his individual capacity, upon his personal guarantee

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to repay the same; that the bank did not give credit to the company, but allowed them to overdraw their account on the personal guarantee of Ramkissen; that at the time of such overdrawal the bank held valuable securities of Ramkissen, more than sufficient to cover the debt; and that the company had a large claim against their late liquidator on account of the reckless and negligent manner in which he had carried on the business of the company and expended the company's moneys.

NORRIS, J., held that the bank gave credit to Ramkissen personally, and that there was no reason for the introduction of the equity referred to in *Baroness Wenlock* v. *River Dee Company* (1) by which the lender of money borrowed by a company *ultra vires* is entitled to be subrogated to the rights of creditors of the company paid out of such money, and to recover from the company the amount of their debts or liabilities so paid off, which doctrine had been relied on on behalf of the bank. The bank appealed.

The case originally came on for hearing before PETHERAM, C.J., and PIGOT, J., who directed that the case should be reargued.

Mr. *Evans* (with him Mr. *Gasper*) for the appellants.

Mr. *Pugh* (with him Mr. *Garth*) for the respondents.

Mr. *Evans*.—The real question is, to whom was the money lent; whose credit determined the loan? It was a loan to be repaid by the company. The doctrine of subrogation is applicable to the case; *Baroness Wenlock* v. *River Dee Company* (1). Ramkissen was a surety for the principal debtors; Contract Act (IX of 1872), section 126. The bank are entitled to stand in the place of the creditors, and on that footing to be paid the amount of the advances out of the assets of the company. Section 173 of the Indian Companies Act (VI of 1882) provides for the cases in which a company may be wound up voluntarily. The section is identical with section 129 of the English Act (25 and 26 Vict., c. 89). The consequences which ensue from a voluntary winding up are mentioned in section 177 of the Indian Companies Act, which corresponds with section 133 of the English Act. Section 144 (*b*) and (*f*) of the Indian Companies Act, corresponding with section 95 of the English Act,

(1) L. R. 19 Q. B. D., 155.

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empowers the Official Liquidator to carry on the business of the company so far as may be necessary for the beneficial winding up of the same, and to raise money upon the security of the assets of the company. The case of *Dutton* v. *Marsh* (1) will be relied upon by the other side, but the present case is different as being a case of winding up. All obligations properly incurred by the liquidator must be satisfied and paid up in full; *In re Oak Pits Colliery Co.* (2), *In re Watson, Kipling and Co.* (3), *In re National Arms and Ammunition Co.* (4). If the money was borrowed *ultra vires*, then the doctrine of subrogation applies; *Baroness Wenlock* v. *River Dee Company* (5).

Mr. *Pugh*.—The cases last cited are distinguishable from the present, and the *Baroness Wenlock's* case (5) does not apply except where there is privity between the person who lends and the person who borrows and the equity arises, which is not the case here. *Dutton* v. *Marsh* (1) is in the respondents' favour. The liquidator had power to summon a general meeting under section 183 of the Indian Companies Act (VI of 1882). He employed a banker for his own convenience. The account was earmarked, so that it could be kept separate. [WILSON, J.—If this were Ramkissen's account and he had authority to borrow, it would be a case of money lent to an undisclosed principal. Section 231 of the Contract Act (IX of 1872) embodies the English law as settled in the case of *Calder* v. *Dobell* (6).] The materials in this case are insufficient, and the bank should have brought a suit.

Mr. *Evans* in reply referred to Lindley on Companies, 5th edition, Book II, Chap. 5, pp. 235-38.

The Court (PETHERAM, C.J., WILSON and PIGOT, JJ.) delivered the following judgments:—

PETHERAM, C.J.—I am of opinion that this appeal must be allowed, and the appellants' claim against the company admitted. I agree with the learned Judge that Ramkissen was, upon the

(1) L. R. 6 Q. B., 361.
(2) L. R. 21 Ch. D., 322.
(3) L. R. 23 Ch. D., 500 (507).
(4) L. R. 28 Ch. D., 474 (481).
(5) L. R. 19 Q. B. D., 155.
(6) L. R. 6 C. P., 486.

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face of the account, the customer of the bank; but I think that whatever was the form of the account, or by whatever machinery the loan was carried out, it has been proved that the account was in fact the account of the company, and that the advance was made to them.

This is not the ordinary case of a liquidator whose only duty is to collect the assets of an insolvent company and to distribute them, but of the liquidator of apparently a solvent company who was to carry on the business for the company for an indefinite term, and for that purpose required and kept a banking account in his own name, but which was used only for the company's business.

It is a well-established law that a person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so; and that, whether he was or was not aware when he made the contract, that the person with whom he was dealing was an agent only. *Calder v. Dobell* (1).

In the present case I think that the bank have shown that the real borrowers of their money were the company, and that the claim must be admitted.

The appellants will get the costs in all the Courts.

WILSON, J.—Two questions arise on this appeal: first, what power had the liquidator to borrow so as to charge the company; secondly, was the loan in question within those powers. By section 144 of the Indian Companies Act (VI of 1882) the liquidator of a company which is being wound up by the Court has power, with the sanction of the Court, amongst other things, "to raise, upon the security of the assets of the company, from time to time, any requisite sum or sums of money (clause *f*)." The forms of orders made under the corresponding section to this in the English Act, collected in Palmer's Precedents, 4th ed., p. 707, show that the borrowing need not be on mortgage or pledge or charge of specific property, but may be on the security of the assets generally. The liquidator of a company being voluntarily wound up—and that is the case with the company before us—

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may, by section 177, sub-section (*g*), without the sanction of the Court, exercise all powers by this Act given to the Official Liquidator, including of course the power of borrowing.

In the present case the right of the liquidator to borrow is strengthened by the facts of the case. The resolution for the voluntary winding up of the company was passed on the 30th November 1885. That resolution was confirmed on the 18th December 1885, and the first liquidator appointed. At another meeting on the 24th December 1885, the shareholders came to the following resolutions :—

"The *Columbus*, *Pilot*, and the Docks should continue working until they are disposed of.

"The meeting considers that the liquidator should arrange terms as to commission with Messrs. Mackenzie, Lyall & Co. If this firm agrees to undertake the sale without charging any commission in the event of the steamers and docks, together with machinery, stores, &c., not being sold, the same should be put up for sale by public auction at an upset price to be fixed by the liquidator. Sale to take place within a month from the first advertisement: liquidator to be at liberty in the meantime to accept offers for private sale of the same.

"Having regard to the facts that there is now in the hands of the liquidator a sum of about Rs. 1,75,000 in cash and in 4 per cent. government securities, this meeting considers that the liquidator should sell off the government securities and declare a dividend of 25 per cent., or Rs. 25 per share, having regard to the fact that the declaration of dividend will leave a sufficient balance in the hands of the liquidator to pay off the whole of the debts of the company."

From these resolutions it would seem that the shareholders directed the liquidator to continue working two steamers and some docks, and provided him with no working capital to work with, leaving apparently no alternative, in case the current receipts should at any time be insufficient to carry on with, except borrowing. This is strong evidence to show that they authorised him to borrow. I think it clear, then, that the liquidator had power to borrow for the purposes of the winding up, including the working of the steamers and the docks, on the credit of the assets of the company.

The second question is, did he do so. He certainly borrowed the sum in question. He borrowed it for the purposes of the company and applied it to those purposes. Did he borrow on the

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credit of the assets of the company? His letter of the 21st December 1887, to the manager of the claimant bank, was—

"Will you be so good as to let me know if you will allow me to overdraw to the extent of Rs. 10,000 on account of the Ganges Steam Tug Company, Limited. It will only be for a short time, and I will be personally responsible for the same." And the answer was—"I shall be happy to allow you to overdraw on account of the Ganges Steam Tug Company, Limited, to the extent of Rs. 10,000, and it is understood that you will be personally responsible for the debt." I think this was a borrowing on the credit of the company so far as the liquidator could charge it, that is, on the credit of the assets, though the liquidator also made himself personally liable; and I do not think any difficulty arises from the fact that the money advanced was passed through an account with the bank, the heading of which is ambiguous, so that it might be doubted whether it was primarily the account of the company or of the liquidator: it was certainly an account of the moneys of the company.

That there were at the time of the loan assets of the company liable to be charged, and that there are such still, is, I think, clear, for the 25 per cent. divided amongst the shareholders, under the resolution of the 24th December 1885, is part of the assets and available to satisfy creditors.

I think the appeal should be allowed and the claim admitted with costs in both Courts.

PIGOT, J.—I am of opinion, as I was at the close of the first argument in this case, that this appeal should be allowed and the claim admitted.

As to the question whether the loan was in fact made to the company, and that both the bank and the liquidator so intended, I have been throughout unable to see how any doubt could exist upon it. The letters seem to me to show that it was, and was intended by both parties to be, such a loan, fortified by the personal liability of Ramkissen.

No question arises as to the fact that the money was borrowed and was applied to pay debts incurred in the working of the business of the company, the carrying on of which by the liquidator was expressly authorised by the Company: nor is there anything

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to show that the business, so far as it was carried on by the liquidator, was not carried on legitimately for the purposes of the winding up.

A question was raised in the first argument (not, I think, in the second) as to the power of a liquidator to pledge, as security for a loan contracted by him, not merely realised assets of the company, but even the liability of members of the company for calls; such liability being, it was argued, assets of the company within the meaning of the section.

The facts of the present case do not give rise to such a question; for the realised assets of the company, divided among the shareholders in pursuance of the resolution referred to by him, stand on a different footing from the liability to calls on shares in the company, and are in any case, I think, assets within the meaning of the section.

It is not necessary to determine the question whether the principle of *Baroness Wenlock's* case applies to the present. But I may say that had it been necessary, I should myself have been prepared to hold that that case did apply.

Appeal allowed.

Attorneys for the appellants: Messrs. *Morgan & Co.*

Attorneys for the respondents: Messrs. *Gregory & Jones.*

A. A. C.

REFERENCE FROM THE BOARD OF REVENUE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot, and Mr. Justice O'Kinealy.

IN THE MATTER OF QUEEN-EMPRESS *v.* TRAILAKYA NATH BARAL.*

1890. *July*, 30.

Stamp Act (*I of* 1879), *ss.* 3 (10), 61—*Instruments "duly stamped"*—*Rule* 5 (*b*) *of the rules made by the Governor-General in Council under Notification No.* 1288 *of* 3*rd March* 1882.

The absence of the certificate required by rule 5 (*b*) of the rules, dated 3rd March 1882, issued by the Governor-General in Council under

*Reference from the Board of Revenue under section 46 of the Indian Stamp Act, made by K. G. Gupta, Esq., Secretary, Revenue Board, dated the 7th of July 1890.