

Privy Council Appeal No. 17 of 1922.

Behari Lal-Bulaki Ram - - - - - *Appellant*

v.

Kundan Lal and another - - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1922.

Present at the Hearing :

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
MR. JUSTICE DUFF.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from an order of the Chief Court of the Punjab made in the matter of the winding-up of the Diamond Jubilee Flour Mills Company, and reversing an order of the Additional District Judge at Delhi.

In the course of the proceedings in the Chief Court a point was raised which the Judge thought it unnecessary to decide, but which in their Lordships' view should be decided. It was contended on behalf of the creditor objecting to the order in question, that the Additional District Judge had no jurisdiction, and that all orders made in the winding-up of a Company must be made by the District Judge. Their Lordships think that this is not so.

When this matter began, the Indian Companies Act of 1882 was in force, but as it progressed the existing Act, being the Indian Companies Act, 1913, came into operation. For this purpose, however, the two Acts are so similar that no distinction need be made.

It is not disputed that under the Act the District Court has jurisdiction, the only question is whether that jurisdiction is confined to the District Judge or can be exercised also by an Additional District Judge.

This matter appears to be settled by the Punjab Courts Act, 1888, which by Section 6 provides as follows :—

“ The following sections shall be added to the Punjab Courts Act, 1884, namely :—

- 75.—(1) When the business pending before any Divisional Court consisting of one Judge, or before the Court of any District Judge, requires the aid of an Additional Judge for its speedy disposal, the local government may appoint to the Court an Additional Divisional Judge or an Additional District Judge, as the case may be.
- (2) An Additional Judge so appointed shall discharge any of the functions of a Divisional Judge or District Judge, as the case may be, which the Divisional Judge or District Judge may assign to him, and shall, as regards the discharge of those functions and subject to the provisions of the next following sub-section, be deemed, for the purposes of this Act, to be a Divisional Judge or District Judge”

There is no doubt that the District Judge had assigned to the Additional District Judge all the functions of supervising this liquidation. He discharged these functions apparently without any objection for a considerable time and made many orders; and no point was taken till this appeal was made at an advanced stage of the liquidation. He had jurisdiction, and the question which remains to be decided is the propriety of the order which he made.

The facts of the case are these. The Company was insolvent; it had as a large secured creditor the Bank of Upper India, which was also in liquidation. The Company was ordered to be wound up on the 31st July, 1914. On the 16th September, 1916, the official liquidator with the sanction of the Judge let the Mills to the present appellants, for a term of three years from 1st January, 1917, at a rent of Rs. 16,000 per annum. In the lease it was provided that if the lessor at any time proposed to sell he should give a six months' notice, and pay Rs. 5,000 by way of compensation: and if the lessees wanted to put an end to the lease, they could take similar action.

On the 12th June, 1917, a notice in accordance with the lease lastly mentioned was given with the sanction of the Court, informing the lessees that it was proposed to sell and giving them notice to quit on the 31st December. When the liquidator of the Bank knew of this, he protested against the action of the liquidator of the Company, who thereupon entered into negotiations with the lessees for a withdrawal of the notice. The latter found themselves in a strong position. Having regard to what afterwards happened, it was probably to their interest that the lease should stand. On the other hand, if the lessors were hesitating and did not want to pay the Rs. 5,000 fine, firm action on the part of the lessees might extract very favourable terms. In the end, the liquidator arranged with the lessees that he should be allowed to withdraw the notice upon terms that he gave up his power of terminating the lease, and on certain other terms favourable to the lessees.

The Bank, while welcoming the withdrawal of the notice, protested against any alteration of the terms of the lease ; and then the matter came before the Judge. He noted the following order made on the 8th October, 1917 :—

“ It is not my intention to sell the Mills at present. In the present state of the money market it would be a foolish proceeding. Under para. 6 of the lease, notice can only be given when there is an intention to sell. There being no intention to sell, the notice already given should be and has to be treated void.”

On the 19th the liquidator of the Company and the lessees came before the Judge, and he, considering the proposal in view of the interests of the Company, agreed with some variation to the terms which the liquidator had provisionally made, the important term being that the liquidator lost his power of putting an end to the lease. For some reason the Judge did not have the order finally drawn up, or the agreement registered, but thought it might wait for a month.

The liquidator of the Bank now changed his view. He had a report from an expert to the effect that no better time than the present could be chosen for the disposal of the property, provided it could be sold free from the incumbrance of occupancy, and he went on to suggest a sale, and as his suggestion was not accepted, to file a formal petition on 1st January, 1918. To this the liquidator of the Company made a reply, and the Judge thereupon made this order on the 21st January :—

“ I think before I decide definitely as to the sale of the Mills there should be some indication of what price is likely to be realised by the sale of the Mills. Is there likely to be any purchaser ? At the same time, I quite realise that the Bank as a secured creditor is not receiving what it should from its security. The income from its security is being diverted to the payment of unsecured creditors, which to me does not appear quite equitable.

“ I direct that the Official Liquidator advertise the sale of the Mills and invite offers. Report in a month.”

The liquidator sent out the advertisement, and various tenders came in, one ultimately going as high as Rs. 220,000, but all these tenders were subject to the condition that possession of the Mills should be made over at an early date ; and in particular the highest tender required possession within a month “ free from all disputes.”

These conditions rendered all the tenders useless. The lessees were under the original lease entitled to six months' notice ; under the amended arrangement, they were entitled to stay if they desired till the 1st January, 1920. It might be possible to upset the subsequent arrangement as it had never been formally completed, and possibly the order of the Judge, whenever it was drawn up, might be appealed from. But any purchaser wishing to get free from this amended arrangement would see a prospect of certain litigation in front of him.

The business position had either been all along, or had by this time become, different from that which the Judge had conceived it to be, when he put aside the idea of a sale altogether. Money

might be scarce, but the war had made the importation of machinery into India impracticable, there was a great demand for machinery, and there were likely to be several competitors for the Mills, but only on terms that they could get immediate or early use of the machinery. In this state of things the lessees had got the whip hand. Eventually, the Judge came to this conclusion, which he stated in the judgment of the 28th February as follows :—

“ Looking at the case from all these points of view, I think the best course will be to give the lessees an option of purchase before taking any definite line. Are they prepared to make a reasonable and fair offer for the Mills ? If so, I will consider the offer and then decide.”

Thereupon the lessees offered Rs. 150,000. The Judge said : “ Make it Rs. 175,000,” and they did. Some creditors then said that the property was worth from 2½ to 3 lakhs of rupees, and they would like a public auction. The Judge pointed out that possession could not in any circumstances be given till the expiry of six months, and that it was possible that the possession might be indefinitely postponed if the lessees insisted on their rights, and he adjourned the matter to see whether in that state of things anybody would make a better offer.

On the 15th March he had a further sitting, but no one came forward to make any offer on the terms indicated, and he, therefore, approved and sanctioned the sale to the lessees for Rs. 175,000. It is from this order that the appeal was made to the Chief Court.

The learned Judge of the Chief Court in dealing with the case expressed himself in somewhat severe terms as to the unwisdom of the withdrawal of the six months' notice, which would have enabled a sale at the beginning of 1918, and of the subsequent concession made to the lessees. It was not unreasonable that he should make these comments, but after all, these matters were past cure, and what he had to determine was whether *rebus sic stantibus* the sale to the lessees which the Judge of first instance had effected was the best thing that could be done. He proceeded to complain of the action of the Judge in explaining to possible purchasers the conditions under which they would have to purchase, and said that the mode of explanation was unduly deterrent. But again, in their Lordships' opinion, the learned Judge of the Chief Court failed to face the facts. However unfortunate they were, there they were. No one suggested that it was a mistake to have a sale at all, and if there was to be a sale, it could only be on terms that the purchaser must take the property with all the burdens of the lease, and the further burden of any subsequent rights which the lessees had obtained. If the learned Judge in the Chief Court had put this question before himself, their Lordships think he would never have quashed the decision of the Judge of first instance, and this decision their Lordships think must be restored.

There remains a question which has given their Lordships some trouble, the question of costs. The appellants, the lessees

who had been made parties to the proceedings in the Chief Court, were entitled to come to His Majesty in Council and have the erroneous decision of that Court reversed. The party who procured that erroneous decision was a creditor, or rather, for he also was in liquidation, the receiver of that creditor's estate. He has not appeared to support the order which he obtained, and in an ordinary case he ought to pay the costs of the appeal to His Majesty, if there is any estate out of which they could be paid.

But there are special circumstances. The appellants must have been aware for some time that no appearance was going to be entered for the respondents, and being in a position to bring on the case *ex parte*, they appear to have greatly delayed before bringing it on. The decision of the Chief Court was dated the 31st July, 1918, and this case was not set down for hearing till the 26th May, 1922. During almost all that time the appellants were in the following position. If for commercial reasons it suited them to accept the order of the Chief Court to hold the premises during the remainder of their lease, and then get out of what might by reason of changes in commerce be a bad bargain, they were in a position to do so by abandoning their appeal. If, on the other hand, it suited them, as apparently it has suited them, to re-establish their sale, they had only to bring their case to a hearing.

In these circumstances, there is no hardship in making them bear their costs of the appeal to His Majesty.

Their Lordships will, therefore, humbly recommend His Majesty that this appeal should be allowed, that the order of the Chief Court should be discharged, and that the order of the Additional District Judge at Delhi should be restored, and that there be no costs of this appeal.

In the Privy Council.

BEHARI LAL-BULAKI RAM

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KUNDAN LAL AND ANOTHER.

DELIVERED BY LORD PHILLIMORE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.
1922.