
(1920) 08 MAD CK 0041
In the Madras High Court

Gordon Das Chuni Lal Dakuwala

APPELLANT

Vs

T. Sriman Kanthimathinatha Pillai and Another

Kanthimathinatha Pillai and Another Vs Gordon Das
Chuni Lal Dakuwala

RESPONDENT

Date of Decision : 11-08-1920

Acts Referred:

Citation : AIR 1921 Mad 286 : 97 Ind. Cas. 295 : (1926) 24 LW 35

Hon'ble Judges : William Ayling, J; Krishnan, J

Bench : Division Bench

Judgement

ORDER

William Ayling, J.—These appeals arise out of proceedings in the District Court of Tinnevely under Act VI of 1882 in connection with the winding-up of the South Indian Mills Company Limited. The Company in question was floated in 1908 and a compulsory order for its winding-up u/s 129 of the Act was made by the District Court on 21st February, 1913. For practical purposes its assets consisted of the building and the machinery of the Darragh Mills at Quilon which had been purchased by the Company in 1909 for Rs. 2,62,500. The sale price had been largely raised by a mortgage on the said property and the mortgagee in August, 1919, obtained a decree for about 4 1/2 lacs. For one reason or another among which the war and the litigation between the Company and the mortgagee doubtless figured largely, proceedings dragged on and practically nothing was done to realise the Company's assets till 20th February, 1920. On that date, the Official Liquidator wrote to the District Judge intimating that he had received an offer of 5 1/2 lacs for the mills as they stood and recommended its acceptance. After a personal interview with the Official Liquidator the same day, the District Judge passed an order permitting the Official Liquidator to sell at the price offered "conditionally on the offer or giving a valid cheque for Rs. 50,000 by the 21st." The purport of this order was communicated to appellant the same day, apparently verbally; and formal communication in writing was made by a letter

of the Official Liquidator dated 23rd February, 1920. The cheque for Rs. 50,000 was handed to the Official Liquidator on the 20th. A further cheque for Rs. 4,10,000 was given to him on the 24th and paid into Court in discharge of the mortgage-decree. The balance was paid on or before the 28th.

2. On 2nd March, 1920, first respondent, the former manager of the Company, presented a petition in the District Court objecting to the sale to appellant as being for an inadequate price, putting forward an offer from Mr. Ranchod Lal-Amratlall of Ahmedabad for Rs. 7,01,000 and asking that the latter should be accepted, or the property sold by auction.

3. The District Judge after satisfying himself of the bona fides of Mr. Ranchod Lal's offer by taking a deposit from him of the amount specified in the form of cheque, issued notice to all parties (including the Official Liquidator, 2nd respondent, before us; and after a full inquiry passed a further order on 14th April, 1920, cancelling the sale to appellant and directing sale by auction.

4. Against this order, the present appeal is preferred.

5. The above are the essential facts of the case; but paras. 2 to 8 of the District Judge's order contain a fuller statement and indicate clearly the circumstances under which his orders of February 20th and April 14th came to be passed.,

6. We have had the benefit of an exhaustive argument from the learned Vakils on both sides, both as to the merits of the District Judge's first order and as to whether it was competent to him to subsequently cancel it, and direct an auction sale. The learned Advocate-General has contended that he had no power to review it or modify it and that his order of April 14th was without jurisdiction. On the other hand in the course of the hearing Mr. Rangachariar for first respondent has filed an appeal u/s 169 of the Companies Act against the original order of February 20th together with a petition to excuse the delay in presentation and extend the time as provided by the section.

7. Now dealing first with the merits of the case, I find it impossible to justify the District Judge's order of February 20th. In effect, it sanctioned without due consideration or notice to the owners or persons interested therein the sale of property for a price which in the light of information now available must be held to be very inadequate. We must treat Mr. Ranchod Lal's offer as a genuine one; so much is obvious from the fact that he paid a cheque for the amount into the Court and intimated that it might be taken as his first bid in the event of an auction. This offer was nearly 2 lacs in excess of the price paid by appellant; and it must be taken that the latter was to this extent at least, if not more, below the market value of the property. It is apparent, moreover, on the face of the Judge's own statement of facts that his decision was arrived without any such consideration, as the nature and importance of the question demanded. Section 144 of the Companies Act makes the Official Liquidator's power to sell, whether by auction or private contract, conditional on the sanction of the Court; and this is obviously a sanction to be exercised with judicial discretion having regard to

the interest of the Company and its creditors. Wherever property is authorised to be sold by private contract it is the duty of the Court to satisfy itself that the price fixed is the best that could in human probability be expected to be offered. Unless satisfied of this the only safe and proper course is an auction sale. We have been referred to certain of the rules under the Companies Act regarding the procedure to be adopted; in particular Rules 74 and 80. The former provides that the sanction of the Judge shall be obtained by the Official Liquidator upon application on affidavit and an order in a prescribed form shall be drawn up thereon unless the Judge otherwise directs. Rule 80 provides that no order to the prejudice of contributors or creditors shall be made ex parte on the application of the Official Liquidator. I do not wish to press these rules unduly. Rule 74 was certainly broken and one is forced to the conclusion that it was overlooked by the Judge. The exact scope of Rule 80 may be open to question; I am fully alive to the fact that merely because it subsequently turns out that an order is not the best that could have been made from the point of view of contributors or creditors, it should not necessarily be treated as one to their prejudice and set aside as illegal if it was made ex parte, but taking the broadest possible view of the matter (in the sense of the view which allows most latitude to the Judge) it seems clear that an application to sanction sale of property of this value forming the sole asset of the Company should have been made in due form as required by Rule 74, and that opportunity should have been given to persons interested in the Company to represent anything they had to say about it.

8. How different was the procedure of the District Judge is obvious from his own account in the portion of his second order above referred to. The Official Liquidator, it may be mentioned, was a Vakil without special knowledge of the value of mill property, so that his personal opinion should have carried no particular weight. The Official Liquidator's letter is Ex. Via and it does not appear that any further information of material value was conveyed at the personal interview. In effect Ex. VIa simply sets out appellant's offer and states that it is higher than any yet received and that it is learnt that the mortgagee is not prepared to go higher. On the strength of this letter and a private conversation with the Official Liquidator the Judge sanctioned the sale the same day.

9. One or two facts may be mentioned which the Judge must have had in his mind and without which his conduct would be inexplicable. The mill property had originally been purchased as already stated for Rs. 2,62,000 and although three parties had previously inspected it with a view to purchase, none had offered more than 2 1/2 lacs. An opinion had moreover been expressed by a learned Judge of this Court on an application for transfer of proceedings to Madras that the price of machinery would go down after the War and that the machinery of this mill should be found to have materially deteriorated (Vide Ex. XXXVII). These are considerations worthy of weight; but, on the other hand, the value of existing machinery appears to have been more than correspondingly enhanced by the post-war demand for cotton goods and the practical impossibility of obtaining fresh machinery from England at any price at all. As the Judge says in

his later order (page 28) "I will freely admit that in passing my order of sanction I had no idea how entirely falsified this prophecy had been with regard to the machinery for spinning mills, and if I had known the real stage of the market in this respect, I should not have sanctioned the sale without further inquiry and notice." Speculations as to the probable market value of the mill machinery could furnish no excuse for failure to test their accuracy by the ordinary, process of an auction sale or at any rate public invitation of offers. As the Judge says up to that time "the property had never been advertised, no offers had been invited, nor had there been any attempt to sell it by auction." The offers already received furnished, therefore, no reliable criterion of what might be obtained if proper steps were taken.

10. It will be seen, therefore, that a comparison of appellant's offer with previous offers and the original price paid by the mill furnished a very poor excuse for the Judge's hasty acceptance of appellant's offer. The Judge's subsequent consideration of the question is in very marked contrast to his original sanction; and his conclusion is that "the mills will unquestionably fetch seven lakhs if publicly sold and possibly a good deal more." This conclusion seems warranted by the evidence now on record.

11. The Judge's procedure in passing his original order was, therefore, at variance with the spirit and, at least in one respect, the letter of the rules and we have no doubt that it was an injudicious one and one which is calculated if upheld, to inflict injury to the amount of at least 2 lacs on the Company and its creditors.

12. It has, however, been strenuously contended by the learned Advocate-General that, whatever we may think of it, it must be upheld, and the later order now under appeal by him set aside. It is argued that the order of 20th February, 1920, was final; and that the District Judge had no power to modify, cancel or review it. Mr. Rangachari, on the other side, supports the Judge's order dated 14th April, 1920, as warranted both by Section 169 of the Companies Act, and by the inherent power which a Court is said to possess under certain circumstances of reviewing its own order. I do not think it necessary to embark on a discussion of the difficult point involved in either of these contentions. Section 169 is a section by no means easy of construction; as we have been referred to numerous authoritative rulings on the inherent power of review, which are not easy to reconcile but assuming for the sake of argument that the order of 20th February, 1920, was not open to review by the District Judge himself and that his order of 14th April, 1920, was ultra vires, the order of 20th February, 1920, was undoubtedly appealable to this Court u/s 169 of the Act and an appeal has now been filed. The time allowed (3 weeks) has, of course, long expired; but the section gives us the power of extending it, and I think this is eminently a case in which we should exercise that power. The case is one which comes within the spirit of Section 14 of the Limitation Act. First respondent lost no reasonable time in applying to the District Judge to cancel his order and was guilty of no lack of

diligence in prosecuting it. He must be taken to have acted in good faith in his choice of remedy, whatever be the correct view of the competency of the proceedings. He was successful in his application and at an early stage of the hearing before us filed his appeal petition with a separate petition asking for extension of time. I think this latter petition N should be granted and the appeal admitted.

13. Another objection taken by the learned Advocate-General is to the effect that in view of the communication of the District Judge's order and of the payment by appellant of a portion of the sale price as specified therein, the matter should be treated as a completed contract enforceable against the Official Liquidator, as against any private party in accordance with the provisions of the Contract Act. As regards this it is only necessary to remark that the Official Liquidator's offer is contingent on the sanction of the District Judge and that whatever view may be taken of the Judge's power to cancel his sanction, that sanction is certainly liable to appeal to this Court. If, therefore, we consider it as one which we should interfere with we need not be deterred from interfering by any theory of completed and irrevocable contract.

14. We have already discussed the merits of the case and I am clearly of opinion that the District Judge's first order is one which should be set aside. It is unnecessary to discuss the cases quoted before us in which Courts have interfered or refused to interfere with the sales held. None are on all fours with the present case and almost all the cases of refusal relate to cases of subsequent offers after a regular sale. This is a case in which a Judge has hastily and without due consideration accepted a private offer without any attempt to satisfy himself that no better would be forthcoming if due publicity was given; and in which his hasty action is likely to invoice the owner and creditors of the Company in a loss of something like two lacs of rupees. If appellant's contentions be accepted, that loss is irremediable. Such a loss as may be occasioned to appellant by cancellation of the order of 20th February, 1920, can, on the other hand to a large extent, if not entirely, be made good.

15. I would, therefore, in supersession of the District Judge's order of 14th April, 1920, direct that the District Judge's order of 20th February, 1920, be set aside and the property be sold in public auction under the orders and subject to the confirmation of the District Judge. Out of the sale price, Mr. Chuni Lal Dakuwala is entitled to be paid the sum of 5 1/2 lacs with interest thereon at 12 percent, per annum from date of payment by him to date of tender or payment to him. As already stated there is every prospect of the auction-sale price being largely in excess of this figure. But it may be safer to provide for the improbable contingency of the auction-sale being a failure. In such an event Mr. Dakuwala should not be prejudiced more than is unavoidable. I would, therefore, direct that if the auction price does not cover the sum of 5 1/4 lacs with interest as above specified and the costs of the sale the auction should not be confirmed but the sale to Mr. Dakuwala for the price already paid by him shall be confirmed. If

the auction price does exceed the figure above indicated the auction-sale will in the absence of valid objection be confirmed. The auction-sale-proceeds will be applied first to the satisfaction of Mr. Dakuwala's claim above-referred to and to the sale expenses the balance being credited to the Company.

16. Costs of all parties in these proceedings should be paid out of the Company's assets.

Krishnan, J.

17. These are appeals u/s 169 of the Indian Companies Act of 1882 against two orders of the District Judge of Tinnevely dated 20th February and 11th April, 1920, passed in the course of the winding-up proceedings of the ; South Indian Mills Co. Ltd. The earlier order is one granting sanction to the Official Liquidator u/s 144(c) of the Act to accept a private offer, Ex. VI, made by Mr. Dakuwala the appellant in A.A.O. Nos. 127 and 128 of 1920, for the purchase of the Darragh Mills at Quilon owned by the Company subject to the condition that a valid cheque for Rs. 50,000 should be given by him by the 21st of February See Ex. VI(b). The appeal C.M.A. 199 of 1920 is against this order and is by two of the share-holders and contributories of the Company, the first appellant being also its Manager. That appeal was filed out of time but the appellants have prayed in C.M.P. No. 1846 of 1920 for excusing the delay. The later order is one by which the District Judge cancelled the sanction he had originally given and set aside the sale to Mr. Dakuwala and directed the sale of the Mill by public auction. Appeals Nos. 127 and 128 of 1920 are against that order and are by Mr. Dakuwala. The appeals have all been heard together. The appeal by the contributories has in fact been filed to enable us to deal with the order granting sanction in case we feel any difficulty in upholding the District Judge's later order cancelling it as within his powers.

18. It may be mentioned at the outset that though Act VI of 1862 has been repealed by Act VII of 1913, Section 284 of the latter Act provided that in winding-up proceedings like the present one which had been commenced before the commencement of that Act, the former Act VI of 1882 is to be applied as if the new Act had not been passed at all. We are, therefore, only concerned with the provisions of Act VI of 1882 and not with those of Act VII of 1913 in the disposal of these appeals.

19. The learned Advocate-General for the respondent in C.M.A. No. 199 of 1920 (Mr. Dakuwala) invited us to dismiss that appeal in limine as barred by limitation and also as one not competent u/s 169 of the Act. As regards limitation I entirely agree with my learned brother for the reasons given by him which I need not repeat that we should exercise the power given to us by Section 169 itself to excuse delay, in the circumstances of this case. The second objection is based on the argument that an order like the one under appeal granting sanction to the Official Liquidator to sell by private sale is not one of the orders falling within Section 169. In this argument the respondent really lands himself in a dilemma

for, if the order granting sanction is not appealable it is not clear how the order revoking that sanction can be appealable and his Appeals Nos. 127 and 128 of 1920 which are against such an order will also have to fail. I am, however, of opinion that both orders fall within the section. I consider that the District Judge exercises a judicial discretion in granting sanction u/s 144 (c) and that he should do so only after hearing parties interested, as great prejudice might otherwise arise of which the present case itself is a clear instance. Under the rules framed by the High Court under the Indian Companies Act, VI of 1882, on 9th April, 1895, to take effect from the 1st of May, 1895, Rule 74 provides that such sanction shall be obtained "upon application of affidavit" and that "an order shall be drawn up thereon unless the Judge shall otherwise direct". Rule 80 provides that "no order to the prejudice of contributories or creditors shall be made ex parte on the application of the Official Liquidator." It is suggested that the Rule 80 does not apply to orders of sanction but only to orders which are ex facie to the prejudice of contributories such as orders to them to pay. I do not see why the rule should be read in this restricted manner, the words being wide enough to cover the present case. An order for sale of a Company's property and an order for the adoption of a particular mode of conducting that sale are both, to my mind orders which may work to the prejudice of the contributories and creditors as they may result in considerable loss to them. It stands to reason that such orders should not be made without notice and there is thus no valid ground to read the Rule 80 as not referring to them. There can be no practical difficulty in giving such notice as Rule 81 enables the Judge to appoint one or more contributories or creditors to represent the whole body of them. An order of sanction u/s 144 Clause (c) seems to me, therefore, to be one having a judicial rather than a purely administrative character and to fall within Section 169. No authority has been cited for excluding them from the purview of the section and I would, therefore, overrule the preliminary objections to the maintainability of C.M.A. No. 199 of 1920.

20. On the view above stated it is not material to decide in this case the somewhat difficult and much discussed question whether the District Judge himself had jurisdiction to cancel his previous sanction; for whether he had power or not w? certainly have power to consider in appeal the legality and propriety of that order. The facts regard in, the making of that order have been very fully stated by the District Judge in his order of the 14th April and again in my learned brother's judgment and I need not repeat them. Those facts are not disputed at all before us, but the learned Advocate-General for Mr. Dakuwala contended that as the sanction was actually granted by the District Judge and communicated to his client and as he had acted upon it by first giving a cheque for Rs. 50,000 and then again another for 4 lacs and odd and finally one for the balance and as the liquidator had received these moneys and utilized them in part for pay. ing off the mortgage-decree-debt on the Darragh Mills, his client's purchase should not be set aside except for fraud or improper conduct on hispartandas that has been expressly negatived by the District Judge his sale

should not be set aside at all. He contends that the fact that it is now shown that the property was worth more and that there are persons who are prepared to pay more for it is no ground at all for setting aside the purchase which according to him is a completed and executed contract. It may, however, be observed that the contract is still in part in an executory stage as the deed of conveyance necessary to transfer the Mill to Mr. Dakuwala has not yet been executed and registered and possession of the property has not been given to him yet. Whether that would make any material difference in the principle to be applied or not, it seems to me where a man depends for the validity of his contract of purchase on a sanction granted which in law is subject to be set aside in appeal and possibly in review also, he cannot plead that he has carried out his part in bar of the Court's power to deal with that sanction. He must be deemed to have taken the risk of the sanction being set aside for good cause shown and of his purchase failing in consequence.

21. In the present case briefly put, the sanction was granted by the District judge very hastily in ignorance of the real price of the mill and without a proper application as required by the rules being made for it and what is most important without any kind of notice to the respondents who are the persons interested as owners of the mill. When such a sanction is proved to work serious prejudice to those persons as has been amply proved in this case it seems clear to me that it cannot be supported. If the sanction and the sale to Mr. Dakuwala are confirmed the contributories and creditors of the Company stand to lose nearly 2 lacs of rupees and perhaps much more as the District Judge has found, a finding which is clearly correct. The principle contended for by the Advocate-General cannot be applied to a case where the sanction has been granted without notice to the parties interested and I am, therefore, not following him in his discussion of the English Law and referring to the cases he has referred to in support of it as all those cases refer to sales properly held after due notice. He has cited no case of a sanction granted by a Court for a private sale without notice to parties being upheld when it is shown to work to their prejudice. In fact the principle stated in the case of *The Bolivar* (1916) 2 A.C. 203, would, I think, apply to such a case. The sanction in this case must, therefore, be revoked whether we do it in appeal ourselves or whether the District Judge had power to do it himself as he has done and with the revocation of sanction, the sale to Mr. Dakuwala must also fail.

22. A good deal of argument was addressed to us on the question whether the District Judge had himself power to revoke his order. Mr. Rangachariar for the contributories claimed for him such a power u/s 169 of the Act and failing that under his inherent powers as a Court of Justice. The claim u/s 169 is based on the word "re-hearings" which occurs in it. The section seems to have been modelled on Section 124 of the English Companies Act of 1862, when re-hearings by the same Judge was a recognised practice in the Chancery Courts before the passing of the Judicature Act of 1873. In India re-hearings by the same Court existed only in cases when ex parte decrees and dismissals for default and abatement by death of parties were set aside or when a review was

granted, Mr. Rangachariar contends that "re-hearing" means a rehearing by the trial Judge himself and is in the nature of a review of his order whereas the Advocate-General argues that it refers to the hearing of the appeal which he says is itself a re-hearing of the case. It is a difficult question to decide what kind of re-hearing the section really refers to and the difficulty is enhanced by the provision in it that re-hearings and appeals are to be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction. The section refers to re-hearings and appeals as distinct and different proceedings and in the latter part it says no such re-hearing and appeal shall be heard without notice." These would seem to suggest that the re-hearing is not a proceeding in appeal but one in the original Court itself. But under the section the procedure to be adopted for re-hearing is that prescribed for appeals and the Appellate Court alone has power to excuse delay. These provisions, on the other hand, seem to point that there-hearing is "a proceeding in appeal. Section 169 is repeated in the new Act as Section 202 without any further explanation. No authority has been cited to us on the construction of this section or of the corresponding English Section 124. As I have already pointed out it is not necessary for the disposal of the appeals before us to decide this difficult question what the term "re hearing" means and I am not, therefore, deciding it. I may, however, say that I am inclined to agree with Mr. Rangachariar that if the section does not apply to the present case we must hold on the principle stated in the case of *The Bolivai* 2 P. Cas. 175 above referred to, that the District Judge had an inherent power to recall his order passed without notice and without hearing parties, to correct the serious injustice done to them. The cases cited by the Advocate-General, viz., *Ananthiraju Chetty v. Appu Hegade* 53 Ind. Cas. 56 and *Gadi Neelaveni v. Marappareddigari Narayana Reddi* 53 Ind. Cas. 847 are not applicable. The former refers to review of an order or decree properly passed by the Court and the latter to the setting aside of an ex parte decree or order made under the C.P.C. where there is an express provision for it in Order IX, Rule 13. Those cases are, therefore, clearly distinguishable.

23. In the result the sanction granted by the District Judge to the Liquidator on the 20th of February fails and along with it the sale to Mr. Dakuwala also fails, as without proper sanction the Liquidator had no power to sell. In these circumstances Mr. Dakuwala is, of course, entitled to be re-paid all moneys paid by him to the liquidator in pursuance of his contract and as the transaction is failing through no default of his, I agree that he should be saved from loss resulting from his money having been locked up by allowing him full interest on his advance from the date of payment upto the date of re-payment or tender to him. The District Judge has allowed 12 percent per annum and though that rate is a fairly high one it has not been objected to and I adopt it. A difficulty, however, has arisen in directing a refund to him at once as the bulk of the money paid by him has been paid out to the mortgagee decree-holder and cannot be recovered and the Company has no sufficient ready money to pay him in full. The

mill must, therefore, be sold as soon as possible and out of the sale-proceeds he must be paid his money in full.

24. A sale by public auction after due notice in the public press seems to me to be the best method to adopt and I, therefore, agree with my learned brother's order regarding it and regarding the payment of the sale-proceeds. The date of the auction must be fixed afresh by the District Judge as early as possible. As Mr. Ranchod Lal's offer of Rs. 7 lacs one thousand is still subsisting; I do not apprehend that the bidding at the public auction will be for less than that amount. However, as my learned brother desires to provide for the contingency of that offer being withdrawn and of the bids not reaching a proper figure, I agree with him that the auction-sale should not be confirmed unless the price offered is sufficient to pay all the expenses of the sale and the amount refundable to Mr. Dakuwala and that in that case Mr. Dakuwala's offer of 5 1/4 lacs should be accepted. I also agree as to the order of costs made by him.