

murders and the part played by the appellants, it would not be justified in imposing the lesser sentence. We see no good reasons for differing from the High Court and interfering with the sentence.

For the reasons given above, the appeal fails and is dismissed.

Appeal dismissed.

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State of Bombay

S. K. Das J.

THE OFFICIAL LIQUIDATORS,
U. P. UNION BANK LTD.

v.

SHRI RAMESHWAR NATH AGGARWAL
(P. B. GAJENDRAGADKAR, K. SUBBA RAO and
J. C. SHAH, JJ.)

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November 10

Company Law—Winding up of Bank—Landlord's claim for rent of bank premises after order of winding up—Official Liquidators calling upon Landlord to take possession of the premises and not using the same for the purposes of winding up—Landlord refusing to take possession—Whether Official Liquidators liable—Indian Companies Act, 1913 (VII of 1913), ss. 193, 230, 230(3)—Company Rules framed by the Allahabad High Court r. 97 (Proviso).

The U. P. Union Bank was in occupation of a building belonging to the respondent as a tenant. After the passing of the winding up order of the bank the Official Liquidators removed the offices of the bank from the premises and called upon the respondent landlord to take possession thereof. The respondent refused to do so as part of the premises was occupied by some trespassers. Thereafter the Official Liquidators did not do any business in the building in connection with the winding up of the bank. The respondent claimed the entire rent from the date of the winding up order up to the date on which the Official Liquidators would give him vacant possession of the premises. The High Court held that in view of the proviso to r. 97 of the Rules framed by the High Court under the Companies Act the respondent was entitled to recover the entire rent claimed by him and not pro-rata with the other creditors of the bank.

The proviso to r. 97 of the Company Rules runs thus:

“Provided that where the official liquidator remains in occupation of premises demised to a company which is being wound up, nothing herein contained shall prejudice or affect the rights of the landlord of such premises to claim payment

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by the Company or the Official Liquidator of rent during the period of the company's or the Official Liquidator's occupation."

On appeal by the Official Liquidators by a certificate of the High Court:

Held, that the landlord respondent was not entitled to claim priority in respect of payment of rent because the proviso to r. 97 of the Company Rules framed by the High Court affirms the right of the landlord to claim payment of rent accruing due since the date of winding up but does not deal with the question of priority in payment thereof, and further because the building in question did not remain in the possession of the liquidators for the purpose of liquidation.

In re Oak Pits Colliery Company, 1882 Ch. D. 321, followed.

Held, further, that s. 230 of the Companies Act, 1913, which specifies categories to which priority in payment should be given, does not give priority to rent due to landlord and it is not within the competence of the High Court to give priority by its rules to a category which is not included in that section.

Under s. 193 the Court has power to order payment of the costs and expenses of winding in such priority as it thinks fit in cases where the assets are insufficient to discharge the liabilities, and s. 230(3) empowers the Court to direct the company to retain such sums as may be necessary for the costs and expenses of winding up even before discharging the debts for which priority is given by s. 230.

If a debt can reasonably be described as costs and expenses of winding up the court may direct preferential payment thereof, otherwise only pro-rata payment with the other ordinary creditors can be claimed out of the assets of the company.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 28 of 1958.

Appeal from the judgment and order dated April 17, 1956, of the Allahabad High Court, in Special Appeal No. 20 of 1954, arising out of the judgment and order dated February 10, 1954, of the said High Court (Company Jurisdiction), in Application No. 29 of 1953/Company case No. 24 of 1949.

1959. October 30. *H. N. Sanyal*, Additional Solicitor-General of India, and *N. C. Sen*, for the appellant. Rule 97 of the High Court Company Rules merely gives the landlord the right to claim payment of rent and nothing more. It does not give any priority to him. The question of priority is dealt with in s. 230 which gives no priority to the landlord.

[*Shah, J.*—Top priority is given to costs and expenses of winding up under ss. 193 and 203(3).]

We offered possession to the landlord and we never used the premises for the purpose of liquidation after the winding up order. Therefore the rent claimed by the landlord cannot be treated to have been incurred as costs and expenses of winding up.

The real question for decision is whether we used the premises for the purpose of liquidation. It has been found by the High Court that we did not do so. There is a rule under the English Companies Act which is identical to our r. 97 but none of the English cases have gone so far as to make the liquidators liable for the rent claimed by the landlord even if the premises were not used for the purpose of liquidation.

In re Silkstone and Dodworth Coal and Iron Company, 17 Ch. D. 158, *In re Oak Pits Colliery Company*, (1882) Ch. D. 21 and *In re Levy and Company*, 1919 Ch. D. 416, cited.

The *Oak Pits case* definitely holds that the landlord is not entitled to full rent accruing since the commencement of the winding up if the liquidator has done nothing except abstain from trying to get rid of the property. This principle should be applied in this case and r. 97 should not be so interpreted as to give any priority to the landlord.

A. V. Viswanatha Sastri, Mrs. E. Udayaratnam and *S. S. Shukla*, for the respondent. By a previous order Mootham, J., who was then dealing with company matters in the High Court, passed an order to the effect that the landlord was entitled to recover rent from the bank from the date of winding up to the date when the liquidators would give him possession and thus terminate the tenancy. This order was virtually passed under s. 45B of the Banking Companies Act and the respondent was entitled to payment according to the tenor of the order which is that he should be paid in full.

[*Shah, J.*—How can a decree drawn up as a result of that order be executed? The amount has to be proved.]

H. N. Sanyal, Additional Solicitor-General of India, and *N. C. Sen*, in reply. Mootham, J.'s order simply purports to declare the liability of the liquidators but does not decide the question of priority.

1959. November 10. The Judgment of the Court was delivered by

SHAH J.—The U. P. Union Bank Ltd. (which will hereinafter be referred to as the Bank) was in occupation as a tenant of a building in Agra town belonging to the respondent. at a monthly rental of Rs. 325 and Rs. 10 as municipal taxes. The Bank made default in paying the rent accruing due and the respondent filed suit No. 810 of 1949 in the court of the Munsiff

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at Agra for a decree for rent for three months and obtained an order of attachment before judgment on the movable property of the Bank. The Munsiff by his decree dated December 2, 1949, decreed the suit and confirmed the order of attachment before judgment. In the meanwhile, on a petition dated September 13, 1949, the Bank was ordered to be wound up by the High Court of Judicature at Allahabad and the appellants were appointed liquidators of the Bank. The employees of the Bank had vacated the premises on September 10, 1949, but the property of the Bank which was attached was with the consent of the respondent stored by the Commissioner appointed by the Munsiff's court in the Banking hall which was sealed by that officer. A part of the premises was, it appears, occupied by some trespassers. The Official Liquidators called upon the respondent to take possession of the premises, but the latter declined to do so unless vacant possession of the entire premises was given to him. On November 30, 1950, the respondent applied to the High Court for permission to file a suit for ejection and for arrears of rent due since September 30, 1949. Mr. Justice Mootham, who heard the application declined to grant permission holding that the claim which the respondent intended to put forward against the Official Liquidators in the course of the proposed suit may be adjudicated upon in the winding up proceeding, and with the consent of parties, the learned Judge proceeded to decide that claim. By order dated August 30, 1951, Mr. Justice Mootham directed as follows :

“In the result, I hold that the petitioner is entitled to recover rent from the Bank at the rate of Rs. 325 per mensem from 1st October, 1949, upto the date on which the Official Liquidators give the petitioner (the landlord) such possession of the premises as will, in law, terminate the Bank's tenancy.”

- Against this order, the Official Liquidators preferred an appeal being special appeal No. 17 of 1952, to a Division Bench of the High Court.

On April 23, 1953, the respondent applied to the Joint Registrar of the High Court to issue a certificate of non-satisfaction and to transfer the order to the court of the Civil Judge of Allahabad for execution. The Joint Registrar issued a certificate of non-satisfaction of the order and directed that the same be transmitted to the District Judge, Allahabad, for execution. The respondent filed an application for execution in the court of the Civil Judge, Allahabad, and obtained an order for attachment of an amount of Rs. 12,000 lying to the credit of the Official Liquidators in the Allahabad Bank. The Official Liquidators thereupon applied to the High Court praying that the execution proceedings pending in the court of the Civil Judge, Allahabad, be declared void and the order of attachment of the fund in the account of the Official Liquidators passed by the Civil Judge be quashed. Mr. Justice Brij Mohan Lall, who heard the application held that the proceeding commenced against the Official Liquidators, without the sanction of the court under ss. 171 and 232, cl. 1 of the Indian Companies Act, 1913, and the attachment ordered thereunder were void and directed that the certificate of non-satisfaction be recalled. Against this order, the respondent preferred a special appeal to the High Court being appeal No. 20 of 1954. Appeals Nos. 17 of 1952 and 20 of 1954 were then heard. Appeal No. 17 of 1952 was dismissed and by an order passed on April 17, 1956, the High Court partially modified the order of Mr. Justice Brij Mohan Lall, and directed the Official Liquidators to pay to the respondent in full the amount that had fallen due to him after October 1, 1949.

The High Court was of the view that the Official Liquidators having retained the Bank's premises in their occupation, by virtue of the proviso to r. 97 framed by the High Court, the respondent was entitled to receive the rent due to him in full and was not liable to share the assets of the Bank pro rata with the other ordinary creditors. Against the order passed by the High Court, this appeal has been preferred with the certificate of the High Court.

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By his order Mr. Justice Mootham, merely declared the liability of the Bank to pay the rent accrued due since October 1, 1949: there is no direction for payment of the amount, and it is not necessary to consider the plea raised by counsel for the respondent that the order being virtually one under s. 45-B of the Banking Companies Act, the respondent was entitled to payment according to the tenor of the order. The order in terms declares the liability and does not decide any question of priority between the respondent and other creditors of the Bank.

By s. 647 of the Companies Act No. 1 of 1957, the winding up of the Bank having commenced before that Act was enacted, the provisions with respect to the winding up contained in the Indian Companies Act No. VII of 1913, continue to apply to the Bank in the same manner and in the same circumstances as if Act 1 of 1957 had not been passed. By s. 230 of the Indian Companies Act, 1913, provision is made for payment of specified categories of debts in the winding up in priority to all other debts; but rent due to the landlord is not one of such debts to which priority is given by s. 230. The High Court held that in as much as by r. 97 of the Company Rules, it was provided,

“When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of such periods the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding up order or resolution as if the rent or payment grew due from day to day:

Provided that where the Official Liquidator remains in occupation of premises demised to a company which is being wound up, nothing herein contained shall prejudice or affect the right of the landlord of such premises to claim payment by the company, or the Official Liquidator of rent during the period of the company's or the Official Liquidator's occupation;”

for the rent accruing due in respect of the premises which remained in the occupation of the Official

Liquidators, the respondent was entitled to preferential payment. The operative part of the rule deals with the rent or other payment in arrears till the date of winding up. By the proviso, it is declared that the right of the landlord to claim payment by the company of the rent accruing due thereafter is not to be prejudiced. The proviso merely affirms the right of the landlord to claim payment of rent accruing due since the date of winding up. It does not deal with any question of priority in payment of debts. By s. 246 of the Indian Companies Act, 1913, power is conferred upon the High Court to make rules consistent with the Act and the Code of Civil Procedure concerning the mode of proceedings to be had for winding up of the company and certain other matters. The Legislature has by s. 230 prescribed that certain specified categories of debts shall rank for priority over other debts due by the company and it is not within the competence of the High Court to prescribe by rule a category for priority in payment which is not included in that section. By s. 193 of the Act, the court has, in the event of the assets being insufficient to satisfy the liabilities, indisputably power to make an order for payment out of the assets, of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks fit, and in exercise of the power conferred by s. 230 sub-cl. 3, the court may direct the company to retain such sums as may be necessary for the costs and expenses of the winding up of the company before discharging even the debts in respect of which priority is prescribed by s. 230. If therefore, there is a debt which may reasonably fall within the description of costs and expenses of winding up of the company, the court may provide for priority in payment of that debt as it thinks just.

In the winding up of the company, it is open to the liquidators to disclaim land burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable or not readily saleable. The disclaimer operates to determine as from the date of disclaimer

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the rights, interests and liabilities of the company and the property of the company, in or in respect of the property disclaimed. By s. 230-A, cl. 4, liberty is reserved to persons interested in the property requiring the liquidator to decide whether he will or will not disclaim. It is also open to the court under sub-s. 5 of s. 230-A on the application of any person entitled to the benefit or subject to the burden of a contract made with the company to make an order rescinding the contract on such terms as to payment of damages for non-performance of contracts. It is evident that on the winding up outstanding contracts of the company do not become *ipso facto* inoperative. The contracts remain binding until disclaimed or rescinded in the manner provided by s. 230-A; but the liability incurred under these contracts is merely an ordinary debt which ranks for claim to payment pro rata along with other creditors. If the debt be regarded reasonably as falling within the description of costs and expenses of winding up of the company, it is open to the court to direct that preferential payment in respect thereof be made; otherwise the debt will be claimable out of the assets of the company pro rata with other ordinary creditors.

Distinction has been made by the courts in England where the relevant provisions of the Companies Act are substantially the same that if the liquidator continues in possession of leaseholds for the purpose of the better realization of assets, the lessor will be entitled to payment of the rent in full, as part of the expenses properly incurred by the liquidator; but as observed by Lord Justice Lindley, *In re Oak Pits Colliery Companys* (1).

“No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee.”

Evidently a distinction is made between property which remains in the occupation of the liquidator

(1) 1882 Ch. D. 321, 331.

after the winding up when the occupation is shown to be for the purpose of liquidation and property which merely remain with the liquidator, he having abstained from trying to get rid of the same and it does not appear or is not shown that the property was used for the purpose of winding up.

The High Court held on the fact that the liquidators had remained in occupation of the premises not for the purpose of winding up but "because they could not think of any suitable method of getting rid of the premises in spite of all their desire to do so." It was pointed out that the Bank had closed its business and the liquidators were not carrying on any business after the winding up and the properties were not used by the liquidators for the purpose of liquidation. This conclusion of the High Court on the evidence has not been challenged. The property not having remained with the liquidators for the purpose of liquidation, unless the court passes an order holding that the debt incurred was part of the costs and expenses of liquidation, the rent accruing due since the date of the winding cannot be claimed in priority over other ordinary debts.

We are therefore unable to agree with the High Court that under r. 97 of the Company Rules, if the premises remained in the occupation of the liquidators, not for the purpose of winding up, the landlord is entitled to priority in respect of payment of rent. On the view taken by us, the appeal will be allowed, the order passed by the High Court set aside and the order passed by Mr. Justice Brij Mohan Lall restored with costs in this Court and in the High Court.

Appeal allowed.

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