SHANKARLAL AGGARWAL AND ORS.

1963

January, 24

v:

SHANKARLAL PODDAR AND ORS.

(S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

Company Law—Sale—Confirmed by Company Judge—Set aside by Division Bench—Administrative and judicial orders—Distinction—Discretion exercised by company Judge—Interference on ground that certain factors were not considered by him—Letters Patent Appeal against order of Company Judge—Whether maintainable—Clause 15 of Letters Patent of Calcutta High Court—Indian Companies Act, 1913 (7 of 1913), s. 202.

Luxmi Spinning and Weaving Mills Ltd. was ordered to be wound up compulsorily by an order of the High Court of Calcutta on a petition of the first respondent, Shankar Lal Poddar. Before the winding up order, the appellants instituted a mortgage suit against the said company and Joint Receivers were appointed by the High Court. Later on, Joint Liquidators were appointed in the winding up proceedings. The Joint Liquidators applied for directions regarding the sale of the assets and properties of the company and the Court sanctioned the same. The sale was held after complying with the requirements of law with regard to advertisement. etc. The highest bid of Nandlal Agarwalla was for Rs. 3,37,000/- and the bid of the appellant firm was Rs.3,35,000/-. The bid of Nandlal was accepted and he was directed to pay immediately 25% of the bid money. As he stated that he had not brought cash, he was allowed to go and bring the same. As he did not turn up inspite of waiting for him for some time. the appellant firm was asked to stand by their previous bid for Rs. 3,35,000/-but they refused to do so. The property was then put up for sale once again and the highest bid of the appellant firm of Bansidhar Shankarlal for Rs. 2,25,000/- was accepted. The sale was confirmed by the Company Judge. The first respondent filed an appeal against the order confirming the sale and his appeal was allowed by a Division Bench of the Calcutta High Court. The liquidators were ordered to re-sell the property after due advertisement. The appellants came to this Court by special leave against the decision of the Division Bench.

The questions for consideration before this Court were : (1) Whether the order of the Company Judge confirming the

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sale was merely an administrative order passed in the course of the administration of the assets of the company under liquidation, and therefore not a judicial order subject to appeal, (2) whether on a proper construction of s. 202 of the Indian CompaniesAct it was a condition fort he availability of an appeal that the order should be open to appeal under cl. 15 of the Letters Patent of the Calcutta High Court and if the above were answered in the affirmative whether independently of s. 202, the order of the Company Judge in this case amounted to Judgment within cl. 15 of the Letters Patent, and (3) whether the appellate court acted improperly in interfering with the order of the Company Judge.

Held, that the order of the Company Judge confirming the sale was not an administrative but a judicial order. It is not correct to say that every order of the Court, merely for the reason that it is passed in the course of the realisation of the assets of the Company, must always be treated merely as an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely an administrative order, for before confirming the sale the court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation.

It is not possible to formulate a definition which would satisfactorily distinguish between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a court is not decisive of the question whether the act or decision is administrative or judicial. An administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there would be two parties and a *lis* between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. Nodo ubt it

would not be possible to describe an order passed deciding a *lis* before the authority that is not a judicial order but it does not follow that the absence of a *lis* necessarily negatives the order being judicial. Even viewed from this narrow standpoint, it is possible to hold that there was a *lis* before the Company Judge which he decided by passing the order. On the one hand were the claims of the highest bidder who put forward the contention that he had satisfied the requirements laid down for the acceptance of his bid and was consequently entitled to have the sale in his favour confirmed, particularly so as he was supported in this behalf by the Official Liquidators. On the other hand, there was the first respondent and the large body of unsecured creditors whose interests, even if they were not represented by the first respondent, the court was bound to protect. If the sale of which confirmation was sought was characterised by any deviation from the conditions subject to which the sale was directed to be held or even otherwise was for a gross undervalue in the sense that very much more could reasonably be expected to be obtained if the sale were properly held, in view of the figure of Rs. 3,37.000/- which had been bid by Nandlal Agarwalla it would be the duty of the court to refuse the confirmation in the interests of the general body of creditors, and this was the submission made by the first respondent. There were thus two points of view presented to the court by two contending parties or interests and the court was called upon to decide between them, and the decision vitally affected the rights of the parties to property Under the circumstances, the order of the Company Judge was a judicial order and not administrative one, and was therefore not inherently incapable of being brought up in appeal.

Held, also, that Letters Patent Appeal was competent. The second part of s. 202 of the Indian Companies Act which refers to "the manner" and "the condition subject to which appeals may be had" merely regulates the procedure to be followed in the presentation of appeals and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which the appeal would lie and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of s. 202. The words "order or decision" occurring in the first part of s. 202, though wide, would exclude merely procedural orders or those which do not affect the rights or liabilities of parties.

Held, also that the appellate court did not act improperly in interfering with the order of the Company Judge. The Company Judge did not take into consideration the fact that certain bidders had left at the time when the property was put

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up for auction once again. The Judges of the Division Bench were justified in considering that the sale to the appellants ought not to have been confirmed.

Madan Gopal Daga v. *Sachindra Nath Sen* (1927) I. L. R. 55 Cal. 262, reversed.

Bachharaj Factories Ltd. v. *The Hiraji Mills Ltd.*, I. L. R. (1955) Bom. 550 and *Western India Theatres Ltd.* v. *Ishwarbhai Somabhai Patel*, I. L. R. (1959) Bom. 295, approved.

Asrumati Debi v. *Kumar Rupendra Deb Raikot* (1953) S. C. R. 1159 and *State of Uttar Pradesh* v. *Dr. Vijay Anand Maharaj* [1963] 1 S.C.R. 1 referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 214 of 1960.

Appeal by special leave from the judgment and order dated December 11, 1958, of the Calcutta High Court in Appeal from Original Order No. 176 of 1956.

S. T. Desai, Himmatsinghka and *B. P. Maheshwari*, for the appellants.

N. C. Chatterjee, B. M. Bagaria, M. V. Goswami for *B. C. Misra*, for respondent No. 1.

1963. January 24. The Judgment of the Court was delivered by

Ayyangar, J.

AYYANGAR, J.—The principal point raised for consideration in this appeal by special leave relates to the correctness and legality of an order by a Division Bench of Calcutta High Court refusing to confirm a sale by the liquidators of the assets of a company which is being wound up. The company in question—the Luxmi Spinning & Weaving Mills Ltd.—a company incorporated under the Indian Companies Act—was carrying on business at Calcutta. On a petition of the 1st respondent—Shankarlal Poddar—made to the

High Court of Calcutta, this company was ordered to be wound up compulsorily by order dated August 22, 1955. But before this order was passed, certain matters had transpired to which it is necessary to advert. The appellants claiming that they had advanced loans to the company under two registered deeds of mortgage and alleging that there had been default on the part of the company in performing its obligations as to payment of interest etc. under the said deeds instituted a mortgage suit in the High Court of Calcutta for the usual reliefs under O. 34, Civil Procedure Code. Pending the disposal of the suit they moved the Court for the appointment of a receiver, and the second appellant and the Managing Director of the company were appointed Joint receivers and they took possession of the assets of the company.

By reason of this circumstance, when the order for winding up was passed in August, 1955 though the Official Receiver was appointed as Official Liquidator, still he was directed not to interfere with the possession of the Joint Receivers. Subsequently by a further order dated September 8, 1955 two independent persons who are respondents 2 & 3 before us were appointed as Joint Receivers in the suit and they were also directed to function as Joint Liquidators in the winding up proceedings.

The Joint Liquidators applied for directions to the Court as regards the sale of the assets and properties of the company and the Court by an order dated December 20, 1955 directed their sale by public auction after due advertisement in the manner set out in the order and notice of this sale was directed to be given to the appellants who had by that date obtained a mortgage decree in their suit. At this stage it is necessary to mention that in the winding up proceedings the validity of the appellants' claim as creditors and as secured creditors is challenged,

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and a claim by the State of West Bengal to arrears of certain taxes in regard to which priority is claimed is also pending adjudication by the Company Judge.

In pursuance of the aforesaid directions of the Court dated December 20, 1955 the liquidators held certain auctions to which it is unnecessary to refer since these proved infructuous, but ultimately the appellants and others agreed to have the sale of the assets to be held free of all charges and encumbrances and to their claims to security over the properties being transferred to the sale-proceeds when paid into Court. Consequent on this agreement the Court made an order on July 10, 1956 by which the Joint Liquidators were directed to sell the properties free of all encumbrances, the sale proceeds realised being held in Court to answer the claims of the creditors according to such priorities as might be determined by the Court.

The sale by public auction thus directed was duly advertised to be held on September 8, 1956 at 2 p.m. The conditions subject to which the properties were to be sold which were approved by the Court included, inter alia, (1) that the sale was subject to a reserve price to be determined by a valuer and surveyor which however was not to be made known to the bidders but had to be kept in a sealed cover until the bidding was over, (2) the sale was subject to confirmation by the Court, (3) that it was in the discretion of the liquidators to accept or reject any bid, (4) as far as possible the highest bid was to be accepted provided the liquidators considered that the bid was for a sufficient amount, (5) immediately on acceptance of the bid by the liquidators the bidder was required to deposit 25 per cent of the amount of the bid in cash "in default whereof the liquidators were at liberty to put up the property again for sale", (6) the purchaser was to pay the

balance of purchase moneys within two weeks from the date of confirmation by the Court.

The sale was held as advertised. There were in all 36 bids for lot No. 1 which consisted of the business and properties of the company starting with a bid for Rs. 1,50,000/- from 8 bidders including the 1st appellant who himself personally bid for Rs. 3,00,000/-. Thereafter there was keen competition between one Nandlal Agarwalla and the appellant firm of Bansidhar Shankarlal and after successive bids by these two the highest bid reached was that by Nandlal Agarwalla who bid for Rs. 3,37,000/-, the penultimate bid of the appellant-firm being Rs. 3,35,000/-. No further bids were offered and thereupon the Joint Liquidators accepted the bid of Nandlal and he was directed to pay immediately Rs. 84,250/- this being 25% of his bid-money. This bidder, however, stated that he had not brought the cash and then the Receivers offered to take instead a cheque from his solicitors, if he so desired, but this also the bidder declined and thereafter Nandlal Agarwalla left the place giving the impression on those there, including the Joint Liquidators that he had gone to bring the money. The liquidators waited for about 20 minutes but as he did not turn up they again put up the property for sale. Before doing so, however, they—the liquidators—enquired of the appellants whether they would stand by their previous bid for Rs. 3,35,000/- in which case they were informed that theirs would be treated as the highest bid. They would not agree and thereupon the liquidators put the property to auction again and the starting bid was by the appellant firm of Bansidhar Shankarlal who, as stated earlier, had, at the former bidding, offered Rs. 3,35,000/- now starting the bid with Rs. 1,50,000/- and after 8 more bids there were no further bids beyond Bansidhars' for Rs. 2,25,000/-. This bid was accepted by the official liquidators subject to

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confirmation by the Court after they ascertained by opening the sealed cover received from the valuer that this amount was not below the price for which the property could be sold. Immediately on the acceptance being intimated Bansidhar paid the amount required to be paid by the conditions of the sale.

The liquidators took out a Master's summons on September 11, 1956 stating these facts and prayed for an order from the Company Judge that the sale be confirmed or such other directions be given as the Court may deem fit and proper. The summons was opposed by the 1st respondent and the main point urged by him was that when Nandlal Agarwalla's bid was accepted by the Joint Liquidators, several others who had come to bid for the property left the auction room under the impression that that sale was going through and that the subsequent sale at which the appellant was the highest bidder was not such as could be confirmed by the Court. The summons was heard by the Company Judge—P.B. Mukharji, J.—and the learned Judge passed an order acceding to the prayer of the liquidators to confirm the sale. Thereupon the 1st respondent filed an appeal against the order confirming the sale and also applied for the stay of delivery of possession of the properties of the company to the appellant. In the application for stay the appellate court passed an order in these terms :

> "On Bansidhar Shankarlal giving an undertaking to this Court to purchase the property for Rs. 3,35,000/- should the appeal be allowed and on Bansidhar Shankarlal depositing with their Solicitors Rs. 16,000/- to be held by the Solicitors free from lien and subject to further order of this Court to abide by the result of the suit challenging the mortgage in favour of Bansidhar Shankarlal, there will be no further orders in this application and Bansidhar

Shankarlal will be entitled to possession of the factory and its assets on a sum of Rs. 16,000/- being deposited with their Solicitors."

There were a few more directions made by the Court to which however it is unnecessary to refer.

The appeal was allowed and the order confirming the sale was set aside and the liquidators were directed to resell the property after due advertisement. It is from this decision of the Division Bench that this appeal has been preferred by special leave.

Learned Counsel for the appellants urged before us the following points :

(1) The sale by auction by the Joint Liquidators effected after obtaining the sanction of the Court on December 20, 1955 under s. 179 (c) of the Indian Companies Act, 1913 was merely an act performed by them in the course of their administration of the assets of the company and the action of the Judge in confirming such sale also partook of the nature of an administrative act, and not being a judicial order no appeal lay against it.

(2) Even if the order of the Company Judge was a judicial order, still it was not a judgment within cl. 15 of the Letters Patent of the Calcutta High Court and so no appeal lay to the Division Bench.

(3) No doubt, s. 202 of the Indian Companies Act permits appeals against orders and decisions in the course of a winding up but that provision is of no avail, because for an order to be appealable under s. 202, it has, in the case of an order of a Single Judge of the High Court, to satisfy the requirements of cl. 15 of the Letters Patent.

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(4) Even if the order of Mukharji, J., was a judicial order capable of appeal, still it was a discretionary order and could not be interfered with by an appellate court merely because they considered that it was not a correct order to pass.

In the light of these submissions the questions to be considered are : (1) whether the order of the Company Judge confirming the sale was merely an administrative order passed in the course of the administration of the assets of the company under liquidation and therefore not a judicial order subject to appeal, (2) (a) whether on a proper construction of s. 202 of the Indian Companies Act it was a condition for the availability of an appeal that the order should be open to appeal under cl. 15 of the Letters Patent of the High Court, (b) If the above were answered in the affirmative, whether independently of s. 202 the order of the Company Judge in this case amounted to a judgment within cl. 15 of the Letters Patent, and (3) whether the appellate court acted improperly in interfering with the order of the learned Company Judge.

We shall deal with these points in that order. (1) First as to the scheme of the relevant provisions under the Companies Act. Section 179 of the Companies Act, 1913 specifies the powers of the official liquidator. It enacts, to quote only the words material for the present appeal :

> "179. Powers of Official liquidator. The official liquidator shall have power, with the sanction of the Court, to do the following things :—
>
> (a) .....
>
> (b) .....

(c) to sell the immovable and movable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

.....

Though s. 180 which reads :

> "180. Discretion of official liquidator.—The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court,....."

makes provision for eliminating the need for the sanction of the Court required for action by the official liquidator under s. 179, as such a power was not exercised in this case this section may be left out of account. Section 183 of the Act makes provision for the exercise of control by the Court over the liquidator and sub-s. (3) enables the official liquidator to apply to the Court for directions in relation to any particular matter arising in the winding up. Section 184 of the Act requires the Court to cause the assets of the company to be collected and applied in discharge of its liabilities.

On the basis of these provisions, we shall proceed to consider whether the confirmation of the sale was merely an order in the course of administration and not a judicial order. The sale by the liquidator was, of course, effected in the course of the realisation of the assets of the company and for the purpose of the amount realised being applied towards the discharge of the liabilities and the surplus to be distributed in the manner provided by the Act. It would also be correct to say that when a liquidator effects a sale he is not discharging any judicial function. Still it does not follow that every order

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of the Court, merely for the reason that it is passed in the course of the realisation of the assets of the company must always be treated as merely an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely a ministerial order, for before confirming the sale the Court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation.

The next question is whether such an order could be classified as an administrative order. One thing is clear, that the mere fact that the order is passed in the course of the administration of the assets of the company and for realising those assets is not by itself sufficient to make it an administrative, as distinguished from a judicial, order. For instance, the determination of amounts due to the company from its debtors which is also part of the process of the realisation of the assets of the company is a matter which arises in the course of the administration. It does not on that account follow that the determination of the particular amount due from a debtor who is brought before the Court is an administrative order.

It is perhaps not possible to formulate a definition which would satisfactorily distinguish, in this context, between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a Court is not decisive of the question whether the Act or decision is administrative or judicial. But we conceive that an administrative order would be one which is directed

to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a Court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there should be two parties and a *lis* between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt, it would not be possible to describe an order passed deciding a *lis* before the authority, that it is not a judicial order but it does not follow that the absence of a *lis* necessarily negatives the order being judicial. Even viewed from this narrow standpoint it is possible to hold that there was a *lis* before the Company Judge which he decided by passing the order. On the one hand were the claims of the highest bidder who put forward the contention that he had satisfied the requirements laid down for the acceptance of his bid and was consequently entitled to have the sale in his favour confirmed, particularly so as he was supported in this behalf by the official liquidators. On the other hand there was the 1st respondent and not to speak of him, the large body of unsecured creditors whose interests, even if they were not represented by the 1st respondent, the Court was bound to protect. If the sale of which confirmation was sought was characterised by any deviation from the conditions subject to which the sale was directed to be held or even otherwise was for a gross undervalue in the sense that very much more could reasonably be expected to be obtained if the sale were properly held, in view

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of the figure of Rs. 3,37,000/- which had been bid by Nandlal Agarwalla, it would be the duty of the Court to refuse the confirmation in the interests of the general body of creditors and this was the submission made by the 1st respondent. There were thus two points of view presented to the Court by two contending parties or interests and the Court was called upon to decide between them. And the decision vitally affected the rights of the parties to property. In this view we are clearly of the opinion that the order of the Court was, in the circumstances, a judicial order and not an administrative one and was therefore not inherently incapable of being brought up in appeal.

(2) The next point for consideration is whether even if this was a judicial order no appeal lay from it under s. 202 of the Indian Companies Act unless the order amounted to a judgment within cl. 15 of the Letters Patent of the Calcutta High Court. Section 202 runs as follows :

> "202. Appeals from orders.—Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may 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."

It was submitted that assuming the order of the Company Judge was "an order or decision made or given in the matter of the winding up of a company by the Court" the last words of the section "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" restricted the right of appeal conferred by the 1st limb of the section to those which might be preferred under cl. 15 of the Letters Patent in the case of a judgment of a

Single Judge of the High Court. In support of this submission learned Counsel relied on the decision of the Calcutta High Court in *Madan Gopal Daga* v. *Sachindra Nath Sen* (1). It was there held that an order made in the winding up of a company by a Single Judge of a High Court in order to be appealable under s. 202 must satisfy the requirements of cl. 15 of the Letters Patent, viz., that it must be "a judgment" within the meaning of that clause. C. C. Ghose, J. rejected the construction that the words "same manner and subject to the same conditions" occurring in s. 202 were merely a reference to the procedure to be observed as regards the manner of filing an appeal or the forum to which the appeal lay and not the substantive right to prefer an appeal. Buckland, J. who agreed with Ghose, J. considered that though the word "manner" might refer to the procedure for filing an appeal, the word "conditions" could not be given any such limited meaning but would import a reference to the limitation on the right to appeal itself as laid down in cl. 15 of the Letters Patent where the order appealed from was that of a Judge of the High Court. It must be mentioned that in the appeal now before us the objection that no appeal lay from the order of Mukherji, J. was raised before the Bench, but the learned Judges rejected it on the ground that the order of the learned Judge was "a judgment" within cl. 15 of the Letters Patent and so appealable under that provision.

This interpretation of the scope of s. 202 of the Companies Act has not been accepted by several other High Courts. The leading case in support of the other view is *Bachharaj Factories Ltd.* v. *The Hiraji Mills Ltd.*(2). The learned Judges were dealing with an appeal against an order of the Company judge adjourning a petition for winding up in order to enable certain shareholders to file a suit for a declaration that certain debentures were not valid in law. The

(1) (1927) I.L.R. 55 Cal. 262. (2) I.L.R. (1955) Bom. 550.

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Company Judge made the order under s. 170 of the Companies Act which provides that on hearing a petition for winding up the Court may dismiss or adjourn the hearing conditionally or unconditionally or make any interim order etc. A preliminary objection was taken to the hearing of the appeal on the ground that the order from which the appeal was preferred was not a judgment within the meaning of cl. 15 of the Letters Patent and therefore no appeal lay. It was urged that under s. 202 the right of appeal conferred was subject to "the same conditions" to which appeals might be had from the decision of the Court in cases within its ordinary jurisdiction and since the said condition was not fulfilled the appeal was incompetent. Chagla, C. J. repelled this contention and pointed out that the Courts which dealt with winding up petitions and to whose orders s. 202 applied were not merely the High Courts but also the District Courts. If the construction of the section on whose correctness the preliminary objection was based were upheld it would mean that in the case of an order made by a District Court the appealability of that order would be dependent on its satisfying the conditions of appeal for "decisions" laid down under the Civil Procedure Code. Under the Code "orders or decisions" are classified into two heads—decrees and orders. Whereas an appeal lies by virtue of s. 96 of the Code against every decree which is defined in s. 2 of the Code, only certain types of orders under particular provisions of the Code which are listed in s. 104 are capable of appeal and none others. It was not in dispute that very few of the orders passed in a winding up would amount to decrees within the Code. There was no doubt either that most of the orders or decisions in winding up would not be comprehended within the class of appealable orders specified in s. 104 or O. 43. r.1. If therefore the contention of the respondent were accepted it would mean that in the case of orders passed by the District Courts appeals would lie only against what would be decrees under

the Code as well as appealable orders under s. 104 and O.43. r.1 and very few of the orders passed in the Courts of the winding up would fall within these categories. On the other hand, the expression "judgment" used in cl.15 is wider. The learned Judge pointed out that the position would therefore be that a decision rendered or an order passed by a District Court would not be appealable because the conditions laid down by the Civil Procedure Code were not satisfied, yet an exactly identical order or decision by the judge of the High Court would be appealable because it might constitute a judgment within cl.15. The learned Judge therefore rejected a construction which would have meant that the same orders passed by District Courts and by a Single Judge of a High Court would be subject to different rules as to appealability. The learned Judge observed that the right of appeal was conferred by the 1st limb of s. 202 and that the second limb merely dealt with the procedural limitations of that appeal. He further pointed out that the expression "order or decision" used in s. 202 itself indicated that the order or decision was not merely procedural in character but that which affected the rights and liabilities of parties. The learned Judge referred to the decisions in *Madan Gopal Daga* v. *Sachindra Nath Sen* (1), and the cases following it and expressed his dissent with the reasoning which found favour with the Judges of the Calcutta High Court. The decision in *Bachharaj Factories Ltd.* (2) was later followed by the same Court in *Western India Theatres Ltd.* v. *Ishwarbhai Somabhai Patel* (3). We find ourselves in agreement with the view here expressed. *Madan Gopal Daga* (1), proceeds wholly on the meaning which could be attributed to the word "conditions" in the expression "subject to the conditions" occurring in s.202 and does not take into account the context in which s. 202 was designed to operate and particularly the fact that more than one grade of Court each governed by different rules as to the nature of the decision

(1) (1927) I.L.R. 55 Cal. 262. (2) I.L.R. (1955) Bom. 550.
(3) I.L.R. (1959) Bom. 295.

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which would enable an appeal to be preferred could be vested with jurisdiction under the Act. When by the proviso to s.3 of the Indian Companies Act, 1913 the Indian Legislature enabled jurisdiction to be vested in District Courts so as to be constituted the "Court having jurisdiction under the Act", knowledge must be imparted to it that the District Courts and the High Courts functioned under different statutory provisions as regards rights of appeal from their orders and decisions. Besides, it would also be fair to presume that they intended to prescribe a uniform law as regards the substantive right of appeal conferred by s. 202. It could not therefore be that an identical order if passed by one class of "court having jurisdiction under the Act" would be final, but that if passed by another Court vested with identical powers and jurisdiction would be subject to an appeal.

There is also one another aspect from which the problem could be viewed. Taking first the provisions of the Civil Procedure Code which would govern the orders passed by District Courts; it would be seen that apart from "decrees" which are appealable by reason of s. 96 of the Code, "orders" are appealable in accordance with s. 104. That section after enumerating certain orders which are made appealable, contains a residuary clause (i) conferring a right of appeal in respect of "any order made under rules from which an appeal is expressly allowed by rules"—and the rule referred to is O. 43. r. 1. Now under s. 122 of the Code each of the High Courts is vested with power "to make rules, to annul, alter or add to all or any of the rules in the 1st Schedule". In exercise of this power High Courts have in respect of the Civil Courts subject to their appellate jurisdiction made alterations and additions in the rules including those in O.43.r.1, either extending or restricting the right of appeal conferred by the Code as originally enacted. The question that arises on this

state of circumstances is whether the legislature, when it enacted s. 202 of the Companies Act, intended that the right of appeal should vary from State to State depending on the particular rule in force in that State by reason of the exercise by the High Court of its power under s. 122, Civil Procedure Code.

The anomaly created by the construction urged by learned Counsel for the appellant does not stop here. Even taking the case of the High Courts themselves, the construction of the word 'condition' as including the appealability of the decision would lead to rather strange results. The relevant words of s. 202 are :

> "Subject to the same conditions.....to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction"—"ordinary jurisdiction" and not "ordinary original jurisdiction."

The question that would arise is as to what is meant by "ordinary jurisdiction" of the Court. Plainly the words would only exclude jurisdiction vested in the Court by special statutes as distinguished from the statutes constituting the Court. Undoubtedly; in the case of a High Court the limits of whose jurisdiction are governed by its Letters Patent, the Letters Patent would determine what the "ordinary jurisdiction" is. But that Letters Patent is not immutable and has been the subject of several alterations. Thus when the Companies Act was passed in 1913, an appeal lay from every "judgment" of a Single Judge of the High Court. But in March 1919 it was amended so as to exclude the rights of appeal from judgment passed in exercise of revisional jurisdiction and in exercise of the power of superintendence under s. 107 of the Government of India Act, 1915. There can be no doubt either that the exercise of revisional or supervisory jurisdiction is as much "ordinary jurisdiction" of the High Court as its original or appellate

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jurisdiction and it cannot be that there has been any alteration in the law as regards the appealability of decisions of a High Court under s. 202 of the Companies Act by reason of the amendment of the Letters Patent. Again, the Letters Patent were amended in January, 1928 when appeals against decisions in second appeals were made subject to the grant of leave by Judges rendering such decisions. If the decision in a second appeal were in the exercise of "ordinary jurisdiction", and there can be no controversy about it, then the construction of s. 202 of the Companies Act in relation to a High Court which is the primary Court exercising jurisdiction under the Companies Act (vide s. 3 (1) of the Act) would lead to anomalous results as judgments or decisions rendered in different types of cases, though all of them are in the exercise of "ordinary jurisdiction", are subject to different conditions as regards appealability. We thus agree with Chagla, C. J. that the second part of the section which refers to "the manner" and "the conditions subject to which appeals may be had" merely regulates the procedure to be followed in the presentation of the appeal and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which the appeal would lie and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of that section. We also agree with the learned Judges of the Bombay High Court that the words "order or decision" occurring in the 1st part of s. 202, though wide, would exclude merely procedural orders or those which do not affect the rights or liabilities of parties. Learned Counsel for the appellant did not suggest that if this test were applied the order of the learned Company Judge would be an order or decision merely of a procedural character from which no appeal lay.

On the footing that we accepted the construction of s. 202 of the Companies Act which found

favour with the learned Judges of the Calcutta High Court in *Madan Gopal Daga* (1), that in order to be appealable the decision must satisfy the test of being "a judgment" within cl. 15 of the Letters Patent of the High Court, learned Counsel submitted to us elaborate arguments as to what was comprehended within the expression "judgment" in cl. 15 of the Letters Patent and invited us to hold that the order of Mukharji J., confirming the sale was not a judgment and that the decision of the learned Judges in the judgment now under the appeal that it was "a judgment" was erroneous. There has been very wide divergence of opinion between the several High Courts in India as to the content of the expression "judgment" occurring in cl. 15 of the Letters Patent. This conflict of opinion was referred to by this Court in *Asrumati Devi* v. *Kumar Rupendra Deb Raikot* (2), and in, *State of Uttar Pradesh* v. *Dr. Vijay Anand Maharaj* (3) where, after setting out the cleavage of views on the question by the several High Courts, the points as to the proper construction of the word was left open for future decision when the occasion required. We consider that that occasion has not arisen before us either since in view of the construction which we have adopted of s. 202 of the Indian Companies Act the scope of the expression "judgment" in the Letters Patent does not call for examination or final decision.

The next contention put forward was this. The learned Company Judge had a discretion to confirm or not to confirm the sale. In order that the discretion might be properly exercised the official liquidators had placed every meterial fact in the Master's summons which they filed and every one of those facts had been considered by the learned Judge. If, after considering those facts, the learned Judge thought that it was a fit case in which the sale could be confirmed it was not open to an appellate court to interfere with that order merely because on its

(1) (1927) I. L. R. 55 Cal. 262. (2) [1953] S.C.R. 1159.
(3) [1963] 1 S.C.R. 1.

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appreciation of the facts it would have refused confirmation and directed a fresh sale. Learned Counsel further submitted that if the Company Judge had applied his mind to the facts and every fact was before him the order passed in the exercise of his discretion could be interfered with only if any relevant facts were disregarded or if the order was arbitrary or capricious or if the appellate court considered that there has been a miscarriage of justice and his submission was that on the facts of this case no such infirmities attached to the order confirming the sale.

Before considering the objection in this form it would be proper to examine whether the liquidators were within their power in proceeding with the sale after Nandlal Agarwalla failed to turn up after an appreciable interval. The power of the liquidators in this behalf was, according to the learned Counsel for the appellant, derived from cl. 5 of the conditions of sale which reads :

> "5. Immediately on acceptance of the bid by the Joint Receivers and Liquidators subject to clause 1 hereof, such bidder shall deposit 25 percent. of the amount of such bid with the Joint Receivers and Liquidators in cash, in default whereof the Joint Receivers and Liquidators will be at liberty to put up the property again for sale."

We might add that this is the only clause under which, on a sale becoming abortive, the liquidators were empowered to continue the sale without a fresh advertisement. It would be seen that this clause requires the bidder whose bid is accepted to deposit immediately 25% of the bid amount. In the context of the facts that transpired in the present case the significance of the word 'immediately' would become clear. If on the failure of Nandlal to make the

deposit *immediately* the liquidators had proceeded to hold a fresh auction it would be apparent that all those who had come there to bid would still be there, but what happened was that the liquidators gave time to Nandlal to go home in the expectation that he would come back with the amount required to be deposited. In the circumstances it was not unnatural that the persons who had gathered there to bid were under the impression that he would bring the money and make the deposit and as a matter of fact the narration of facts by the liquidators in their Master's summons clearly shows that they themselves were under this impression. In the circumstances the continued presence of the bidders there manifestly served no purpose and several of them therefore left the place and went away. The bidding list which is Annexure 'A' to the petition of the liquidators showed that New India Transport Co. which had bid up to Rs. 2,55,000/-, Babulal Bhagwandas who bid up to Rs. 2.75,000/- and Chabildas Agarwal who went up to Rs. 2,85,000/- were not there when the second auction was held. The result therefore was that when after waiting for about 20 minutes the liquidators continued the auction several had left and the appellant was able to become the highest bidder for the price of Rs. 2,25.000/- . This feature of the case was missed by the learned Company Judge and forms the basis of the decision of the Division Bench. We would go further and add that on a proper construction of condition 5 the liquidators were not entitled to proceed with the sale in the circumstances that happened because of the interval of time they granted to Nandlal to make the deposit which gave the impression to those who gathered there that there would be no further auction on the same date at which they were entitled to bid. Learned Counsel for the appellant referred us to the fact that one S.K. Chakrabarti who in the first auction had bid up to Rs. 2,98,000/- was present at the resumed auction and that he bid then only for Rs. 2,00,000/- and that

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this feature of the resumed auction was not noticed by the learned Judges in appeal. We consider that this is not a very relevant circumstance for a decision of the question either as regards the power of the liquidators to hold the fresh sale without advertisement or whether the sale at the resumed auction had been at an undervalue. It is possibly profitless to speculate how or why it happened that persons who half an hour earlier had been willing to bid for much larger figures suddenly permitted the appellant to become the purchaser for Rs. 2,25,000/- . It may be mentioned that at the resumed bidding there were only six bidders of whom three had not bid at the earlier auction at all, though apparently they were present—Shantilal Bansidhar, Power & Machinery Construction Co., and Relay Corporation. Besides these three, there were only two others—Mahabir Prasad who had earlier bid for Rs. 2,10,000/- and now contented himself with a bid for Rs. 1,90,000/- and S.K. Chakraborty who though originally thought that the property was worth having for Rs. 2,98,000/- now refused to go beyond Rs. 2,00,000/- . These facts show that if those others who had gathered there at the beginning of the auction but who left the place under the impression that Nandlal would make the required payment had continued there, the appellant's bid for Rs. 2,25,000/- would not have been the highest bid. We consider therefore the learned Judges of the Division Bench were justified in considering that the sale to the appellant ought not to have been confirmed.

There was one further point made by learned Counsel that when the learned Judges allowed the appeal of the respondent they should not have directed a resale of the property by a fresh auction but should have confirmed the sale to the appellants at the price of Rs. 3,35,000/- which was the amount of their bid at the first auction. The basis of this argument was the undertaking which

they gave at the time of the disposal of the application for interim stay pending the hearing of the appeal. We have already extracted the terms of that undertaking. It is not easy to find any legal basis for this argument. It is true that in the event of the appeal being allowed the Court might have, possibly with the consent of the 1st respondent before us, insisted upon the appellant taking the property for Rs. 3,35,000/- but that surely cannot give the appellants any legal right to insist that the property be sold to them. It was a condition for the grant of the indulgence of stay and by no stretch of language could that be read as implying that the appellants had a right to purchase the property. It is true that the appellants have made a grievance about this matter in the application for leave to this Court as well as in the statement of the case but that hardly improves the position.

This matter may also be looked at from a slightly different point of view. Immediately Nandlal failed to turn up on September 8, 1956 the liquidators enquired of the appellants whether they were willing that their penultimate bid be treated as the highest bid and they be declared purchasers. This offer was refused as apparently they were satisfied that they would be able to get the property for a much less sum. Thereafter the liquidators took out a Master's summons seeking sanction of the Court for the sale to them for Rs. 2,25,000/-. The appellants supported that application. In other words, they wanted that the Court should confirm the sale to them for Rs. 2,25,000/- and that was the order which they obtained from the learned Company Judge. It was only when the appeal was filed and an application for stay was moved before the appellate court by the 1st respondent here that the offer which is embodied in the undertaking was made. In the circumstances it is difficult to see what justification there is for the contention that the learned Judges

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should, when they allowed the appeal, have confirmed the sale to them for Rs. 3,35,000/-. We consider there is no substance in this submission.

The result is the appeal fails and is dismissed with the costs of the 1st respondent.

Appeal dismissed.

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January, 24.

STATE OF RAJASTHAN AND ANR.

v.

SRIPAL JAIN

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH and J. C. SHAH, JJ.)

State Service—Order of compulsory retirement—Power of Inspector-General of Police—Order if amounts to punishment—If must be submitted to Governor—Constitution of India, Arts. 166, 311—Rajasthan Service Rules, rr. 56, 244(2)—Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958, rr. 14, 34—Rules of Businesses, rr. 21, 31(vii)—Rajasthan General Clauses Act, 1955 (VIII of 1955), ss. 32(33), 32(75).

The respondent in the present appeal was a Circle Inspector in the Rajasthan State Service. He was compulsorily retired from service and the order was communicated to him by the Inspector-General of Police. Thereafter he filed a writ petition in the Rajasthan High Court challenging the order. The High Court allowed the writ petition on the ground that r. 31 (vii) (a) of the Rules of Business applied to a case of compulsory retirement under r. 244(2) of the Rajasthan Service Rules and as the papers had not been submitted to the Governor the order of compulsory retirement in the present case was bad. The State of Rajasthan appealed to this Court by way of special leave.