Jwala Prasad vs Jwala Bank Ltd. on 6 September, 1956

Equivalent citations: AIR1957ALL143, AIR 1957 ALLAHABAD 143

JUDGMENT

Agarwala, J.

1. This is a special appeal against the judgment of the learned Company Judge dismissing in part the appeal preferred by the appellant Jwala Prasad against the rejection of his claim by the Official Liquidators.

2. The Jwala Bank was originally a private bank. It was converted into a limited concern in the year 1938. At the time of conversion an agreement was entered into between the Jwala Bank Limited and Sri Jwala Prasad appellant whereby it was agreed that Jwala Prasad shall be the C airman of the Board of Directors of the Jwala Bank Limited, for twenty years certain with a salary of Rs. 2000/- per month, a free furnished house and certain travelling allowances.

The Bank continued to function for about 10 years when on the 12th April, 1948, it stopped its business on receipt of a direction from the Go, ern-ment to do so, and on the 1st August, 1949, an application for winding up was made. The Bank was wound up by an order of the 17th February, 1950, and official liquidators were appointed to take charge of the assets of the Bank. Jwala Prasad lost no time in preferring a special appeal against this order and on the 24th February, 1950, the operation of the winding up order was stayed by the appellate Bench. The appeal was, however, dismissed on the 24th October, 1950.

The Official Liquidators took charge of the assets of the Bank on the 1st November, 1950. The next day Jwala Prasad filed his claim for a sum of Rs. 8 lacs 75 thousand, in respect of his (a) monthly salary from 1-7-1939 to 30-6-1946, from 1-6-1950 to 31-10-1950 and from 1-11-1950 to 30-6-1958, (b) compensation for free furnished house, (c) travelling expenses and (d) the price of goodwill of his private concern transferred to the limited concern.

The Official Liquidators allowed his claim for salary for the period between 1-6-1950 and 31-10-1930 and also allowed him salary for May 1950 which he nad by mistake not claimed but which was found due to him. They also allowed the claim lor tra el-ling expenses between 1-5-1950 and 31-10-1950 at the rate of Rs. 300/- per mensem. They did not allow the remaining amount for which Jwala Prasad filed an appeal under Section 183(5) of the Indian Companies Act before the learned Company Judge.

The learned Company Judge allowed the claim for travelling expenses incurred in going to places beyond Greater Bombay on account of the business of the Bank during the period beginning from the 1st June, 1950, and ending with (sic) October, 1950, with a halting allowance at the rate of Rs.

50/- per day. He rejected the rest of the claim.

3. In this appeal the appellant's grievance is with regard to three items only:

(1) Past salary from 1-7-1939 to 30-6-1946 at the rate of Rs. 2,000/- per mensem .....

..... Rs. 1,68,000/-

(2) Future salary from 1-11-1950 to 30-6-1958 at the same rate ..... Rs. 1.84000/-

(3) Price of good-will ..... Rs. 5,00000/-

4. As regards the past salary the case for the official liquidators is that Jwala Prasad had given up his claim for this amount. This plea is fully borne out from the material on the record. The learned Company Judge has pointed out that in the balance-sheets of 1946. 1947 and 1949 there are statements on behalf of the Board of Directors signed by Sri Jwala Prasad as Chairman to the effect that the salary due to Sri Jwala Prasad has been foregone by him and that the total amount comes to Rs. 1,92,000/-.

Sri Jwala Prasad admitted his signatures on these statements and the correctness thereof. Under Section 63 of the Indian Contract Act a promisee may dispense with or remit in pa"t in whole the performance of a promise made to him. The sum payable to Sri Jwala Prasad having once been foregone cannot be claimed now even though the ftct of foregoing was done without any consideration.

5. Apart from this the major portion of the claim is palpably barred by limitation. In order that the claim may be made before the official liquidator it should be witnin time at the date of the order of winding up. The date of the winding up would be treated as the 1st of August, 1949. when the application for winding up was made. The claim for the past salary from 1-7-1939 to 30-6-1943 would be barred by limitation even if the period of limitation be considered as six years under Article 116 of the Lim. Act.

The balance-sheets do not contain any acknowledgment of an existing liability and therefore cannot be treated as acknowledgments which would extend the period of limitation within the meaning of Section 19 of the Lim. Act.

6. The second item of the claim is about the future salary from the date the liquidator took charge of the assets of the Bank upto the end of the period of 20 years mentioned in the agreement above referred to. The learned Company Judge was of the opinion that this salary could not be claimed by tne appellant because the contract under which the salary was to be paid had become void with respect I am unable to agree with this view.

7. After an order of winding up of a company has been made all the property and assets belonging to the company are deemed to be in the custody of the Court, and on behalf of the Court, in tne custody

of the official liquidator, vide Section 178 of the Indian Companies Act. The result is that the company cannot transact any business through the Board of Directors. Such business as may be continued after the date oi' the order of winding up must be done by the official liquidator.

8. Under Section 172(3) the order of winding up is a notice of discharge to the servants of the company except when the business of the company is continued. Under Section 87B(e) upon the winding up oraer being made, the contract of managing agency is determined though without prejudice to the managing agent's right to recover any moneys recoverable from the company on account of the premature termination oi his contract of management.

9. A winding up order has been held to operate as a wrongful dismissal of the servant or manager has been held entitled to recover any monies recoverable from the company on accou it of the premature termination of the contract of service or management (vide Halsbury's Laws of England, Simonds Edition, Vol. 6, page 654).

10. There is no express provision regarding the discharge of directors upon the company going into liquidation, but in the words of Vaughan Williams, J., the constitution of the company comes to an end when the company goes into liquidation, see Fowler v. Board's Patent Night Light Co., 893 1 Ch 724 at p. 730 (A) and therefore the directors for all practical purposes (though not for the purpose of appealing from the order of winding-up itself) cease to hold their office and cannot carry on the busines of the company, vide the South Indian Mills Co. Ltd., v. Shivalal Motilal, 36 Ind Cas 617: (AIR 1917 Mad 260 (1)) (B).

11. The principle applicable to the case of a servant or manager whose services are determined by an order of winding-up has been applied to the case of a managing director as well, vide In re, R S. Newman Ltd., (1916) 2 Ch 309 (C). In Measures Brothers Ltd. v. Measures 1910-1 Ch. 336 (D), the head note of the case clearly brings out the effect of the decision when it says that "the winding-up order operates as a wrongful dismissal of the defendant (director)". It was for this reason that in that case ft was held that the defendant director was no longer bound by the covenant which restricted him from carrying on or being engaged or concerned in the same business which the company was doing before winding-up.

12. In the present case the private banking concern, viz., the Jwala Bank was handed over to a new banking concern "The Jwala Bank Limited" conditions mentioned in the agreement entered into between the parties, and one of the conditions was that Jwala Prasad will be paid a sum of Rs. 2,000/-every month for 20 years certain. It is not equitable, therefore, that if by any reason, but not by the default Jwala Prasad himself, the company chooses to be wound-up or is compulsory wound-up (not because it has become illegal to carry on the business of the company but because the company has so acted that it has got to be wound-up) Jwala Prasad should be deprived of the benefit of the contract upon the faith of which he transferred all his assets to the company.

13. The doctrine of frustration of contracts as embodied in Section 56 of the Indian Contract Act is hot applicable to such cases. Section 56 runs as follows:--

> "An agreement to de an act impossible in itself is void.
>
> "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful....."

14. The section has been recently explained by the Supreme Court in Satyabrata Ghose v. Mugneeran Bangur and Co., AIR 1954 SC 44 (E) where their Lordships approved of the view of the Nagpur High Court in Kesri Chand v. Governor General in Council, ILR 1949 Nag 718 (F) that-

> "the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of parties".

15. The words of this section "by reason of some event which the promisor could not prevent" are significant. Section 56 cannot apply to cases of non-performance of the contract due to events happening because of the default of the contracting party himself, vide Maritime National Fish Ltd. v. Ocean Trawlers Ltd., AIR 1935 PC 128 at p. 130 (G).

16. It is not disputed that the winding-up of the Bank followed the direction of the Government of India prohibiting the Bank to stop accepting further deposits, because of the activities of the Bank jeopardising the interests of depositors. in the circumstances it cannot be said that the Bank went into liquidation by reason of an act which the Bank could not control. In fact the Bank itself was responsible for bringing about the state of affairs which compelled the court to order its winding-up.

If the appellant himself as chairman was responsible for bringing about these conditions he is not entitled to enforce the contract; otherwise, it appears to me that the mere fact of winding-up does not absolve the Bank from performing its part of the contract. If the passing of an order of winding-up is an event which in all cases attracts the doctrine of frustration I cannot see why it should have been held in the case of a manager that the winding-up order amounts to his wrongful dismissal and why he should have been given the right to claim his salary or other dues on account of the premature termination of his contract of service.

17. No doubt, the appellant cannot claim payment of the amount due to him in full. The priniciple applicable to such cases has been laid down in Yelland's case, In re, English Joint Stock Bank, 1867-4 Eq 330 (H) by Sir W. Page Wood V.C., as being "to ascertain the present value of the claim and to deduct from this amount something on account of the claimant being at liberty to ob tain a fresh appointment", (see also Halsbury's Laws of England, Simonds Edition, Vol. 6 page

654).

The appellant's debt therefore will have to be evaluated as at the date of winding-up under Section 228 of the Companies Act after making a deduction for the fact that he is now free to do any business that he likes or to seek the employment of his (Sic). In my judgment, in a case like this

justice, equity and good conscience dictate that the deduction to be made on this account should be of half the amount which is found to be the present value of the appellant's claim.. The present value of the appellant's claim on this account shall be determined by the learned Company Judge.

18. The last point that remains to be decided is about the compensation for the good-will. The appellant is clearly not entitled to anything on this account because nothing was said in the agreement which was signed between the parties as to the transfer of the good-will to the limited company. If it was transferred no compensation was agreed to be paid for it. If it was not, the appellant can use it even now. The official liquidators have no use for it and do not claim to use it any longer. The appellant is therefore entitled to nothing on this score.

19. In the result I would allow the appeal in part and would modify the order of the learned Company Judge and direct that in addition to the claim already granted by the official liquidators and by the learned Company Judge the appellant is entitled to half the amount, which will be ascertained by the learned Company Judge, of the salary due to the appellant from 1-11-1950 to 30th June 1958 provided the appellant is not found guilty of any misconduct in the affairs of the Bank which misconduct led to the winding-up of the company. The question whether the appellant is guilty or not of any misconduct in the affairs of the Bank which misconduct led to the winding-up may be determined in the miscellaneous proceedings which are pending. If not determined in the proceedings it will be determined by the learned Company Judge.

20. The parties will have costs according to their success and failure. UPADHYA, J. :

21. This is a Special Appeal against the decision of the learned Company Judge dismissing in part the appeal preferred by the appellant Sri Jwala Prasad against the rejection of his claim by the Official Liquidators.

22. Sri Jwala Prasad was the proprietor of a private back known as the Jwala Bank. After running the business for a period of nearly ten years he decided to promote a public limited company styled as the Jawala Bank Ltd. which took over the business. An agreement dated the 25th July 1938 was entered into between the Jwala Bank Ltd. & Sri Jwala Prasad whereby it was agreed that Sri Jwala Prasad should be the Chairman of the said Company for a term of 20 years from the date of the registration of the company (1938) until 'he of his own Iree will resigns' and he was not to be removed on any ground' save and except his being found guilty of fraud by a competent court of law in the management and discharge of his duties as Chairman and is found guilty of gross mismanage-

ment of his duties as Chairman by a majority of three-fourth of votes of the snareholders present at an extra-ordinary General Meeting called for the purpose.

The remuneration payable was Rs. 2,000/- per mouth from the date of the registration of the company plus free furnished house and lightings Travelling expenses and allowance was also payable in addition to this remuneration under the terms of the agreement. The Bank continued to function for about ten years. On the 12th April, 1948, it stopped its Business on receipt of a direction from the Government of India to do so, and on the 1st August, 1939 an application for winding up

was made.

The Bank was wound up by an order of this Court dated the 17th February, 1950 and Official Liquidators were appointed to take charge of the assets of the Bank. Sri Jwala Prasad preferred a Special Appeal against the order for winding up and an order staying the order of winding up was issued on the 24th February, 1950. The appeal was ultimately dismissed on the 24th of October, 1950 and the stay order was discharged.

The Official Liquidators actually took charge on the 1st November 1950 and the next day Sri Jwala Prasad filed his claim for Rs. 8,75,000/- for his monthly salary from 1-7-39 to 30-6-46, from 1-6-1950 to 31-10-1950 and from 1-11-1950 to 30-6-1958, and for compensation for free furnished house, travelling expenses and for the price of the good-will of his private concern transferred to the Limited Company.

23. The Official Liquidators allowed the claim for salary for the period from 1-5-1950 to 31-10-1950. In doing this they allowed him salary for May 1950 which he had by mistake omitted to claim, but which the Liquidators found was due to him. They also allowed the claim for travelling expenses incurred between 1-9-1950 and 31-10-1950 at the rate of Rs. 300/- per mensem. They disallowed the balance of the claim and Sri Jwala Prasad filed an appeal under Section 183(5) of the Indian Companies Act to the learned Company Judge.

The learned Company Judge allowed the claim for travelling expenses incurred by Sri Jwala Prasad in going to places outside Greater Bombay on the business of the Company during the period from 1-6-1950 and 31-10-1950 together with a daily halting allowance of Rs. 50 on such trips. The rest of the claim was disallowed.

24. In the present appeal, the appellant has pressed his claim with regard to three items :

> (1) salary from 1-7-1930 to 31-6-1946 at the rate of Rs. 2,000 per mensem--Rs. 1,68,000-0-0.
>
> (2) salary, from 1-11-1950 to 30-6-1958 (the date when the term of 20 years stipulated in the agreement expires) at the rate of Rs. 2,000/- per mensem--Rs. 1,84,000-0-0.
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> (3) price of the good-will of his private concern Rs. 5,00,000-0-0.

25. The Official Liquidators contend that Sri Jwala Prasad had given up his claim for salary from 1-7-1939 to 30-6-1946 which forms the first item of the abovernentioned claim. This contention is supported by the material on record. As pointed out by the learned Company Judge, there are statements in the balance sheet for 1946, 1947 and 1949 made on behalf of the Board of Directors signed by Sri Jwala Prasad as Chairman to the effect that the salary in question had been foregone by him.

Sri Jwala Prasad admitted his signature on these statements and the correctness thereof. Under Section 63 of the Indian Contract Act a promisee may dispense with or remit in part or in whole the performance of a promise made to him.

Having foregone the salary in question it is not open now to Sri Jwala Prasad to make this claim.

26. It also appears, as observed by the learned Company Judge, that the claim for the salary upto 30th June, 1943 is barred by time. There are no acknowledgments of the liability within the. meaning of Section 19 of the Limitation Act which might be held to extend the period of limitation.

27. The second item consists of the salary which the appellant claims from the date that the Liquidators took charge of the company to the date when the period of twenty years mentioned in the agreement expires. The appellant contends that he was bound to work as Chairman of the Board of Directors of the Company for the above mentioned period of twenty years and the company was under a liability to pay him at the rates agreed upon for the entire period. This liability of the company could not be set at naught by the winding up order.

The learned Company Judge, however, has not accepted this contention and has taken the view that the contract entered into by the Company and Sri Jwala Prasad having become ineffectual, the parties were discharged from all obligations arising under the contract and it was not open to Sri Jwala Prasad to enforce any claim that could be said to arise under the said contract.

28. Several cases have been placed by learned counsel for the respondent in support of the Liquidator's contention. In 1893-1 Ch. 724 (A), Vaughan Williams, J. took the view that 'on the making of a winding up order the powers of the directors came to an end'. In that case the question related to the power to make calls and the learned Judge held that the 'original power of the directors to make calls ipso facto comes to an end' when the order for winding up is passed. The directors, therefore and the Chairman who was also a director could not continue to function as they did before and they are ousted and they ceased to function.

Evidently it was not, therefore, possible for Sri Jwala Prasad to perform his part of the contract under the agreement mentioned above. The question is as to whether the company continued to be under a liability to pay him the remuneration settled in spite of Sri Jwala Prasad becoming unable to perform his part of the contract.

In 1910-1 Ch. 336 (D), the defendant, R. P. Measures who was a director had entered into an agreement with the company to hold office as director for a period of seven years from June 26, 1903 at a salary of 1000 a year, and to devote so much of his time and attention to the business of the company as might be necessary. The agreement further provided that he would not at any time thereafter while he held the office of the director of the company or even seven years after ceasing to hold such office carry on or be engaged or interested in the business of the engineers or Iron-founders, nor would he in any way compete with or do anything detrimental to the business carried on by Measures Brothers Ltd.

A receiver and manager of the assets and business of the company was appointed in a debenture holder's action and "on October 13,1909 an order was made for the compulsory winding up of the company. On receipt of a notice terminating his services, the defendant commenced to carry on his own business as an engineer. The plaintiff alleged that the defendant had in his possession certain lists of names and addresses and other information relating to the customers of the company which he had obtained while he was in the service of the company and that the defendant was using the information confidentially acquired by him as director for the purpose of enabling him to carry on the business on his own account. Action was commenced by the Receiver under the direction of the Court for an injunction to restrain the defendant for a period of seven years from October 13, 1909 from carrying on the business in breach of the agreement which had been executed by him on July 14, 1903 and for an order to deliver up all lists of the names and addresses of the company's customers, copied or extracted by or at the instance of the defendant from the books of the company.

An injunction was also sought to restrain the defendant for making use of any information obtained by him from such lists or the copies. It was contended that the terms of the agreement could be enforced only so long as the defendant held the office of a director and if on the winding up order being passed, the office ceased there was no breach of the agreement which could be made the subject matter of an action. Joyce, J. held as follows:--

> "I hold that no man who is in the employment of another is entitled to use or even take a copy, for his own private purposes, of any document of his employer which comes to his hands or to which he has access in the course of his employment. Consequently I hold that the plaintiff's are entitled to relief in respect of that matter. I am of opinion that not only was a person in the position. I have mentioned not entitled to make such a list or make a copy of any document, but he should be ordered to give up any such document or any copies that he has made from it.."

Relating to the other relief claimed for injunction, the learned Judge took the view that 'when a manager is engaged by a company for a term of years, a compulsory order for w nding up is a dismissal or discharge of that manager'. The learned Judge, however, further took the view that the case before him was not 'a simple case of a manager'. He held that it was the case of 'a director who was appointed manager by a special and conditional agreement of service'.

The agreement entered into between the parties provided that he was to get a directorship for seven years at a salary of 1000 a year and there was also a further provision that at the expiration of the term of seven years of service he should be engaged upon a salary agreed upon. The learned Judge deciding the case considered the case of a director to be the same as that of a manager so far as the effect of a winding up order is concerned. He observed at p. 345 :

> "Now, whether the defendant technically ceased to be a director in name upon the making of the compulsory order to wind up or not I do not know, but he had no more work to do, and he had no more pay, and his employment ceased. It was fairly admitted and agreed by the other side. In fact it is common ground, that in truth and

> substance he ceased to be a director."

The learned Judge further held that the plaintiffs were not entitled against the defendant to specific performance of a clause of the special agreement without performing and they could not perform it, the clauses of that agreement contained in favour of the defendant. The view taken was that because of the winding up order the company became incapable of acting according to the clauses of the agreement and in that event it was only proper to hold that a director who under an agreement was bound to perform certain duties stood discharged.

29. The same view was taken by the Madras High Court. 36 Ind Cas 617 : (AIR 1917 Mad 260 (1)) (B). The learned Judges observed that 'after a winding up order was passed the directors of a Company ceased to be such'. The doctrine of law in Measure's case (D) mentioned above is the doctrine of frustration of contract which is embodied in Section 56 of the Indian Contract Act Section 56 runs as follows:--

> "An agreement to do an act impossible in itself is void.
>
> "A contract to do an act which, after the contract is made, becomes impossiole, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes. impossible or unlawful....."

This section wad recently considered by the Supreme Court in AIR 1954 SC 44 (E). Their Lordships: examined the various aspects of the doctine of frustration as understood in English Law and observed that the differences in the way of formulating legal theories 'really do not concern us' so long as we have statutory provision in the Indian Contract Act. Mukherjea, (as he then was) observed:

> "In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act. Taking the word 'impossible' in its practical and literal sense, it must be borne in mind that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intentions of the parties."

The learned Judge further observed :

> "Although various theories have been propounded by the Judges and jurists in England regarding the judicial basis of the doctrine of fustration. yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility."

30. The doctrine of frustration is, as observed by the Supreme Court in the case mentioned above, 'an aspect or part of the law of di charge of contract by reason of supervening impossibility' of the act agreed to be done.

31. The law has been succinctly stated by Lord Halsbury in his Laws of England (Hailsham Edn) page 185 as follows:--

> "The doctrine of frustration operates to excuse further performance where (i) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental (sic) or state of things will continue to exist or that some particular person will continue to be available .... and (2) before breach performance becomes impossible .... without default of either pa ty and owing to a fundamental change of circum tauces beyond the control and original contemplation of the parties."

32. It appears necessary to consider (1) whether the parties contracted on the basis that some fundamental state of things will continue (2) whether the performance has become impossible and (3) whether this has happened without default of either party and due to a fundamental change of circumstance beyond the control and original contemplation of the parties.

33. The very nature of the agreement in this case implies that the parties proceeded on the assumption that this company would continue to run. There is no term in the agreement as to what should happen if the company should cease to function as a running concern. Employment of Sri Jwala Prasad as the Chairman could be possible only if the company ran its normal course and was not wound up. It is hardly possible to hold that the parties agreed that Sri Jwala Prasad should work for the company and receive the remuneration agreed upon even if the company was wound up.

34. That the performance has become impossible is not disputed. The question is (sic) it has become impassible because of a default by any of the parties. In Constantine (Joseph) S. S. Line Ltd. v. Imperial Smelting Corporation Ltd., 1942 AC 154 (1), it was held that the defence of frustration can be defeated by proof of fault but the burden of proving the default lies on the party alleging it.

35. Sri Jwala Prasad has adduced no eviderce to prove that the company was guilty of any default. Had he made any such allegation the facts would have been examined by the learned Company Judge to see, how far the company or Sri Jwala Prasad was responsible for bringing about the liquidation. The appellant is, in my opinion, not entitled to have these matters investigated at this stage by setting up a new case.

Apart from this, it is open to doubt as to whether in the circumstances of the case, the present situation, which has rendered the performance of the contract impossibly is more directly due to the court's order directing the company to be wound up or to the more remote conduct of the company and as to whether the latter would not in law be held to be too remote a clause for the frustration. It appears to be fairly clear that the performance of the contract in this case has become impossible owing to a fundamental change of circumstances beyond the control and original contemplation of

the parties.

36. In the present case the winding up order made it impossible for the company to carry on its business; it became obviously unnecessary to have any director, manager or staff to carry on that business. In fact, when the order had the effect of stopping the normal functioning of the company and of putting it into licuidation, no question of the company needing the services of a director or manager or a Chairman could possibly arise.

After the order it was no more possible for the company to retain or utilise the services of the appellant as Chairman of the Board of Directors nor was it possible for the appellant to perform such duties any more. The agreement, there "ore, had to come to an end and the parties stood discharged from their obligations. No question could, therefore, arise of any payment of salary as claimed by the appellant.

37. The third claim was of rupees five lacs as the price of the good-will. The agreement between Sri Jwala Prasad and the company has nothing to say about the good will. If the parties contemnlated that Sri Jwala Prasad should receive any amount in consideration of the good will, it will have certainly found mentioned in that agreement. If Sri Jwala Prasad ag eed to transfer the business of his private company to the Limited Liability Company as far as in 1938. it is not open to him now to put forward a claim for the price of what he alleges to have been his good will in his private concern. The company was under no liability to nay for any good-will and the Liquidators are under no liability to pay for it either.

38. In the light of the above observation I am of opinion that the appeal must fail. I would, therefore, dismiss it with costs.

BY THE COURT

39. As we differ in our opinions as to the result of the appeal, we refer the following question to be decided by a third Judge:--

> "Whether in the circumstances of the case the appellant is entitled either absolutely or subject to certain conditions to claim his salary or any part thereof from the date the liquidators took charge of the company to the date when the period of 20 years in his contract with the company will expire".

On difference of opinion between Agarwala and Upadhya JJ., in Special Appeal No. 132 of 1955, the case was referred to the third Judge, GURTU J., who delivered the following:) OPINION

40. On a difference of opinion between Agarwala, J. and Upadhaya, J. in Special appeal no, 132 of 1955, the following question has been referred to me for answer :--

> "Whether in the circumstances of the case the appellant is entitled either absolutely or subject to certain conditions to claim his salary or any part thereof from the date

> the liquidators took charge of the company to the date when the period of 20 years in his contract with the company will expire?".

41. The circumstances of the case are as follows :--

42. There was a private bank named as "The Jwala Bank". It was converted into a limited concern in the year 1938. At the time of the conversion, an agreement was entered into between the Jwala Bank Limited and Sri Jwala Prasad appellant. The terms of the agreement dated the 25th of July, 1938 with which I am concerned in this appeal run as follows: --

> "1. That Mr. Jwala Prasad, Banker, Agra is appointed the Chairman of the Company on a term of 20 years only from the date of Registration of the Company until he of his own free will resigns and his appointment as Chairman snail not at any time during the said period be liable to be revoked or cancelled nor he shall be removed from the said office on any ground or for any reason whatsoever save and except his being found guilty of fraud by a competent court of law in the management for discharge of his duties as such Chairman or he is found guilty of gross mismanagement of his duties as Chairman by a majority of three-fourth of the votes of share-holders present at an extraordinary General Meeting called for the purpose.
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> 2. The Company shall during the continuance of this agreement pay to the said Mr. Jwala Prasad, Banker, Agra. as Chairman:--
>
> (a) Remuneration of Rs. 2,000/- (Two thousand) per month from the date of the registration of the Company plus.....".

42a. The Jwala Bank Limited continued to function for about ten years but on the 12th of April. 1948, pursuant to an order of the Central Government made consequence of an inspection carried out at the instance of the Reserve Bank of India by one of its Officers, the Bank stopped its business because the order of the Central Government prohibited it from, receiving deposits. I understand that the said" order was passed under the Banking Companies (Inspection) Ordinances, 1946-48.

Then an application was made by a creditor of the Company that the Company be wound up on the ground that it was unable to pay its debts and. in consequence of that application, the Bans was wound up by an order dated the 17th of February, 1950 and an official liquidator was appointed to take charge of the assets of the Bank. A Special appeal was preferred by Sri Jwala Prasad against this order and. in consequence, the operation of the order was stayed on the 24th of February, 1950 by the appellate Bench. The ap-

peal was ultimately dismissed on the 24th of October. 1950 The official liquidator then took charge of the assets of the Bank on the 1st of November, 1950. The next day Sri Jwala Prasad filed a claim lor Rs. 8,75,000/-. The part of the claim with which I am concerned In this appeal related to monthly salary from the 1st of November, 1950 to the 30th of June, 1953.

43. The question that I have to consider is whether Sri Jwala Prasad is entitled to his salary at the contractual rate for this period either absolutely or subject to certain conditions or whether he is not so entitled?

44. Mr. Justice Agarwala was of the view that Sri Jwala Prasad was entitled to half the amount which he claimed, provided that Jwala Prasad was not found guilty of any misconduct in the affairs of the Bank which misconduct led to the winding-up of the Company. Mr. Justice Agarwala directed that the question 'whether Sri Jwala Prasad was guilty or not of any misconduct in the affairs of the Bank which misconduct led to its winding up' was to be determined in the miscellaneous proceedings which are pending.

The reference appears to be to misfeasance proceedings which are pending in this Court. Mr. Justice Agarwala further ordered that if the question of the appellant's misconduct, as above, was not determined in these proceedings, then it should be determined by the learned Company Judge.

45. The view of Mr. Justice Upadhya was that the Company was under no liability to pay the salary-money claimed.

46. The first question which arises is whether the windin-up order operates as a dismissal of Sri Jwala. Prasad. No notice of dismissal was actually served on him to this effect by the official liquidator. The position seems to have been accepted in England that an order for the compulsory winding-up of a company determines the Rowers of Directors and effects their discharge and that it also puts an end to the employment of a Managing Director : See 1893-1 Ch. D 724 at p. 730 (A) and Fowler v. Commercial Timber Co., 1930-2 KB 1 : 99 LJ KB 529 (J).

47. So far as the Indian Companies' Act is concerned, there is no express provision regarding the discharge of Directors or the dismissal of a Managing Director upon a company going into liquidation, but it is evident from the relevant sections of the Indian Companies' Act that the consequences of winding-up are that the Directors can no longer discharge their duties.

The liquidator takes into his custody, or under his control, all the property, effects and actionable claims to which the company is entitled and all such property and effects of the company are deemed to be in the custody of the court as from the date of the order for the winding-up of the company. See Section 178 of the Indian Companies Act (Act VII) of 1913 and Section 456 of Act No. 1 of 1956.

The liquidator in a winding up by the court has the power, with the sanction of the court, to carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company. (See Section 179 of the 1913 Act and Section 457 of the 1956 Act). Section 179 of the old Act and Section 457 of the present Act also indicate the powers of the liquidator which are to be exercised with the sanction of the court. It is enough to quote these provisions to show that there is very little left which the Directors or a Managing Director can do after a company has been wound up.

In these circumstances, the winding-up order virtually brings the office of the Directors and Managing Directors to an end and it may be said that they cease to hold their office once a winding up order is passed for they cannot carry on the business of the company themselves. (See 36 Ind Cas 617 : (AIR 1917 Mad 260 (1)) (B)). So far as the servants of the company are concerned under Section 172(3) of the previous 1913 Act, the order of winding up constituted a notice of discharge to the servants of the company except when the business of the company is continued.

Under Section 87B(e) of the previous Act upon a winding--up order being made any contract of management or managing agency is determined, though without prejudice to the Managing agent's right to recover any money on account of the premature contract of management.

48. In England, the principle applicable to the case of a servant or Manager whose services are determined by an order of winding up was applied to the case of a Managing Director. See 1916-2 Ch 309 (C). The view that a winding up order operates as a wrongful dismissal of a Director was expressed in 1910-1 Ch 336 (D). In that case, it was held that the defendant Director was no longer bound by a covenant which restricted him from carrying on or being engaged or interested in the same business which the company was doing before winding up.

In that case, the defendant had agreed with the plaintiff company of which he was a Director to hold office for seven years at a fixed salary and had covenanted that so long as he continued to hold such office he would not either solely or jointly with, or as Manager or agent for any other person or persons or company, directly or indirectly carry on or be engaged or interested in any business that would compete with that carried on by the company.

A receiver and manager was afterwards appointed in a debenture-holders' action and a compulsory winding-up order was made against the company. The receiver and manager having given notice to the defendant that his services would no lonfer be required and ceased to pay his salary, the defendant commenced to carry on business on his own account. In an action, inter alia, to restrain him from carryiny on a business in competition with the company in breach of his covenant, it was held that the winding-up order operated as a wrongful dismissal of the defendant and that applying the principle of General Billposting Co. v. Atkinson, 1909 AC 118 (K) he was no longer bound by the restrictive covenant.

It would thus appear that the consequences of a winding-up order is that there is, in effect, a dismissal of the Directors and Managing Directors. The winding-up order, therefore, in the present case, had the effect of dismissing sri Jwala Prasad from his office of Managing Director (In the contract he is referred to as the Chairman of the company, but it is clear that his position was that of a Managing Director in view of Articles 100 and 101 of the Articles of Association and in view of Clause 3 of the Agreement dated the 25th of July, 1938).

Now if Sri Jwala Prasad was not responsible for bringing about the state of affairs which led to the company eventually going into liquidation, then this dismissal would be wrongful dismissal and, in such a case, it woud have to be seen what compensation Sri Jwala Prasad is entitled to. It was, however, submitted that the contract between Sri Jwala Prasad and the company became void for

frustration. So far as India is concerned, the doctrine of frustration of a contract is em-

bodied in Sections 56 and 32 of the Indian Contract Act, Section 56 thereof runs as follows :--

> "An agreement to do an act impossible in itself is void. A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

It will be observed that this section clearly indicates that the act must become impossible or unlawful by reason of some event which the promisor could not prevent. This section has been recently interpreted and explained by their Lordships of the Supreme Court reported in AIR 1954 SC 44 (E). Their Lordships of the Supreme Court approved of the view of the Nagpur High Court in ILR 1949 Nag 718 (P) to the effect that 'the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties'.

The present winding-up order was made upon the petition of a creditor because the Bank was not able to pay its debt. It was, therefore, made because of a default by the Bank in paying up the petitioning creditor and not on account of any circumstance which was beyond the control of the Bank. The Bank has a separate juristic entity from that of Sri Jwala Prasad, the Chairman, or the other Directors of the company, though ultimately it may he that it was by virtue of the mismanagement by the Chairman or the Directors that the Hank was not able to pay its debts.

In the eye of law the default which led to the winding-up order was a default by the Bank (the promisor). Section 56 of the Indian Contract Act, in my view, cannot apply to cases of non-performance of contracts due to events happening because of default of the contracting party itself (sic) 130 (G) The other limb of the law of frustration, so far as India is concerned is to be found in Section 32 of the Indian Contract Act. The section runs as under :--

> "Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> If the event becomes impossible, such contracts become void".

There is in the contract under consideration between the Bank and Sri Jwala Prasad no express term that in the contingency of the Bank ceasing to do business or going into liquidation, the contract of service between Sri Jwala Prasad and the Bank would become void or unenforceable, but under Section 9 of the Indian Contract Act, a promise may be express or implied. I have considered whether I could imply a term in the contract between the Bank and Sri Jwala Prasad according to which the Bank would be relieved of the liability to employ Sri Jwala Prasad and to pay his salary in the event of the Bank ceasing to do business or being liquidated and I have come to the conclusion that I could not imply this term.

It would not be proper to imply a term of this nature because, in my view, neither of these two contingencies could possily have been in the minds of the parties and it would be unreasonable to suggest that at the very inception of. the new banking company, parties must have contemplated a failure of the banking business or the eventuality of a winding-up order being made. In this connection it is. I think, pertinent to refer to the case of 1930-2 KB 1 : 99 LJ KB 529 (J).

In that case, by an agreement in writing made between the plaintiff and the defendant company, the plaintiff was appointed Managing Director of that company for a term of 5 1/4 years at a fixed salary. Before the expiration of that period the company passed a resolution, which was assented to by the plaintiff, for the Voluntary winding-up of the company on the ground that by reason of its liabilities it could not continue its business.

The plaintiff thereupon brought an action claiming damages for repudiation of the agreement. It was held that a term could not be implied in the agreement that if the company should be wound up voluntarily and the plaintiff should vote for that course being adopted, his employment should cease so as to disentitle him to damages for breach of the agreement. The plaintiff was, therefore, held entitled to damages for breach of the agreement.

My conclusion is that I should not read an implied term in the contract between the Bank and Sri Jwala Prasad as is clearly indicated by the decision in the above case. It is a decision of the court of appeal in England. It is not necessary for me to elaborate upon the doctrine of frustration, but so far as India is concerned, the doctrine is embodied either in Section 56 or Section 32 of the Indian Contract Act and before a contract can be held to be void and the parties relieved thereunder, one or the other of these sections must become applicable.

My conclusion, therefore, is that the contract has not become void because of the Banking company into liquidation. I have already indicated that Sri Jwala Prasad must be deemed to have been dismissed from the office of Chairman (Managing Director) of the Bank. In these circumstances, he could enforce the contract. If, however, he is responsible for bringing about the ultimate state of affairs which led to the stoppage of the company's business and led to the company not being able to pay its just dues which caused the winding up of the company, then he would have no right to any compensation under the contract because his dismissal, in such a case, would be because of his own fault.

It is true that under the contract, it is only by a special procedure that the services of Sri Jwala Prasad can be terminated. The provision made in the contract is that he is to be found, guilty of fraud or gross mismanagement of his duties as Chairman by a majority of three-fourths of the votes of the shareholders present at an extraordinary General Meeting called for the purpose. It was not necessary or possible to terminate his services in terms of the contract because these came to an end in consequence of the winding-up order itself.

It has now only to be determined whether Sri Jwala Prasad so conducted himself that he could be found guilty of gross mismanagement of his duties. That part of the enquiry has now to be made by the court which is in custody of the entire property and on which the duty must devolve.

49. Mr. Justice Agarwala has, in his order, indicated that such an enquiry should be made in the present misfeasance proceedings or later by the learned Company Judge. A broader enquiry than a misfeasance enquiry may be necessary to determine whether Sri Jwala Prasad was also guilty of mismanagement of his duties and was ultimately responsible for bringing about this Banking company to an end.

If the result of such enquiry is that Sri Jwala Prasad is not at fault, then, in my view, he would be entitled to his salary on the basis proposed by Mr. Justice Agarwala. His view was that justice, ecuity and good conscience dictated that Sri Jwala Prasad should be paid half the amount which would be found to be the present value of the appellant's claim and that the present value of the appellant's claim should be determined by the learned Company Judge.

Apparently, Mr. Justice Agarwala meant to take the 1st of November, 1950 as the date with reference to which the present value of the appellant's claim was to be worked out. My reply, therefore, to the question formulated for answer is that: --

> "Sri Jwala Prasad is not absolutely or unconditionally entitled to claim his salary from the date the liquidators took charge of the company to the date when the period of twenty years in his contract with the company will expire, but he would only be entitled to it in terms of the order proposed by Mr. Justice Agarwala".

50. The reference is answered accordingly.

Let the papers be laid before the Bench concerned along with this judgment.