There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying section 57 of the Contract Act.

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As regards the 2nd point, it is a pure question of fact which has been adequately dealt with by the learned Judge. We see no reason to differ from the conclusion at which he has arrived. We therefore dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Hiralal & Co.*
Attorneys for the respondents: Messrs. *J. R. Patel & Co.*

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1909.
September 25.

IN THE MATTER OF THE INDIAN COMPANIES ACT VI OF 1882
AND
IN THE MATTER OF THE BOMBAY COTTON MANUFACTURING COMPANY, LIMITED,
AND
IN THE MATTER OF RATILAL KARSONDAS.

Winding up petition—Petitioner a creditor for amount not immediately payable—General financial position of company—Indian Companies Act (VI of 1882), sections 128, 129, 130 and 131—Scheme of arrangement—Practice.

The definition of "debt" in section 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor". A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor.

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If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up.

If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement. . . . . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors.

ON 2nd September 1909 a petition for the winding up of the Bombay Cotton Manufacturing Company was filed by one Ratilal Karsondas, a creditor of the Company to the extent of Rs. 6,500 lent on fixed deposit account and repayable in April 1910. A provisional liquidator was appointed on 4th September. Further petitions were filed by two other creditors on the 7th and 8th September respectively; and on 9th September by an order of Macleod, J., all three petitions were consolidated.

The various allegations made by the petitioners as to the insolvent condition of the Company and the mis-management by the Directors were strenuously denied by two of the Directors on behalf of the Company, who further contended that the petitioners were not in the position of creditors entitled to present such a petition, in that their debts were not immediately payable.

Before the matter came on for hearing certain other creditors proposed a scheme of arrangement with the view of preventing liquidation and the consequent loss of credit. The terms of this scheme were subsequently modified and agreed upon at a meeting of creditors held on 23rd September. The petitioners, however, submitted that such an arrangement could not be sanctioned by the Court until a formal order for winding up had been made.

Setalwad appeared for the 1st petitioner, Ratilal Karsondas.

Jinnah appeared for the 2nd and 3rd petitioners.

Padshah appeared for other creditors.

Strangman, Advocate General, appeared for the Company.

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MACLEOD, J.:—Three petitions have been filed for winding up the Bombay Cotton Manufacturing Company. The first is by Ratilal Karsondas, a creditor for Rs. 6,500 in respect of three deposit receipts, the second by Raja Bahadur Shivlal Motilal, who is a creditor to the extent of three lakhs, one lakh of which is secured by a charge on certain liquid assets of the Company, and the third is by Raju Babaji, who alleges that he has a claim of about Rs. 50,000 in respect of monies due to him for the erection of a weaving shed for the Mill.

The chief allegation on which the prayer for winding up the Company in all these three petitions is based is, that the Company is unable to pay its debts. There are other allegations made regarding the management of the Company to the effect that the affairs of the Company have been grossly mis-managed by the Directors.

The Company oppose these petitions and a large number of creditors have also appeared who are desirous that their interests should be secured by some means or other, either by a winding up order being made, or by some directions of the Court being given. A number of share-holders have also appeared and they are anxious that their interests should be protected.

The grounds on which the Company oppose the petitions fall under two heads. In the first place they take certain technical points. It is contended that the petitioners are not creditors who are entitled to petition under section 131 of the Indian Companies Act. The ground for this contention seems to be, that a creditor must be a person to whom a debt is now due and who can demand immediate payment from the Company before he can petition. That contention seems to be based on the definition of "debt" in section 130. But the definition of "debt" is quite distinct from the meaning of the word "creditor". A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or whether his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor. Otherwise this contention would lead to this absurdity, as I have already observed on an interlocutory application in these

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petitions, that depositors who have lent their monies to the Company would have to stand by and see the assets of the Company dissipated without their being able to seek the protection of the Court. The petitioners Ratilal and Shivlal are clearly creditors entitled to petition under section 131. It may be that the position of Raju Babaji is somewhat different, as the amount of his claim if any has yet to be ascertained. But it seems unnecessary to decide whether he is in a position to file a petition, as there are two petitions, which are good, before the Court.

The next contention is that the petitioners have not proved any ground on which the Court can make a winding up order; that the only ground defined under section 128 on which the petitioners can rely is ground (*d*) "whenever the Company is unable to pay its debts." That is defined in section 129, sub-section (*c*) (the only part of that section which is relevant to these petitions) as follows:—"Whenever it is proved to the satisfaction of the Court that the Company is unable to pay its debts." The Company argue now that as "debt" is defined in section 130 as debts actually due, therefore the petitioners must prove that the Company is unable to pay debts which are due to-day, and that even if the Court is satisfied that the debts which will fall due to-morrow and any time thereafter cannot be paid, the Court cannot make a winding up order on this ground. Even if that contention, which appears to lead to an absurdity, is correct, it is immaterial, because clause (*e*) to section 128 makes it possible for the Court to order the winding up whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the Company should be wound up. And if the Court is satisfied that the Company is unable to pay the debts falling due hereafter that would be a reason of a like nature to (*d*). It is suggested that reasons under clause (*e*) must be restricted to reasons of a like nature to those mentioned in the previous clauses (*a*) to (*d*) but in the case of *In re Shah Steam Navigation Company of India*(1), Mr. Justice Davar held himself entitled to follow the English practice, and to construe the

(1) (1908) 32 Bom. 415.

section in the same way as the English Courts have construed the corresponding section in the English Act, although the words "for any other reason of a like nature" are omitted in that section. However, I am clearly of opinion that if the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up. The last balance sheet, which has been put before the Court, contains the last audited accounts up to the 30th June 1908. Those accounts were not audited until six months later, and, therefore, I have not got full details of the present position of the Company. But it is admitted that the Company is now a creditor of the Tricumdas Mills to the extent of nearly thirteen lakhs; and a very large amount of that must have been lent to the Tricumdas Mills since the 30th June 1908. The amounts for which acceptances have been given were on that date nearly Rs. 24,00,000 and they must have increased since that date. Now the loan to the Tricumdas Mills was an act not contemplated and not empowered by the Memorandum of Association, and although the share-holders appear in 1898 to have empowered the Directors to lend the funds of the Company to other Companies there can be no doubt that the resolution of the share-holders was *ultra vires*, and that for eleven years, not only the funds of the Company, but the money which was borrowed from the public for the working of the Company, have gone into the pockets of the Agents of the Tricumdas Mills. That amount of thirteen lakhs must now be taken as a very doubtful asset. The Company in trying to establish their solvency have estimated it at 3 lakhs, but I should consider that an over-valuation. However that may be, the remaining assets, which they entered in their affidavits with their estimated value, will not on close scrutiny bear the value which has been put upon them by the Company. They have valued the machinery, as it appears on the assets side of the balance sheet, at cost price without deducting the depreciation to the extent of nearly five lakhs which appears on the side of liabilities. Other assets are such that they are not available for the payment of the Company's debts. They are merely available

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for the working of the Mills; so that if the Company endeavoured with these assets to satisfy the debts of the creditors it would find it impossible to continue working the Mill. Now, it is no doubt the practice for Mill Companies in Bombay in order to work their Mills to borrow money for working capital, but such borrowings should not exceed what is actually required for working purposes and should not exceed to any great extent under careful management the liquid assets, such as cotton, coal, stores, etc. The Company's credit depends on this rule being observed. But it is clear that the borrowing of this Company has been quite out of proportion to what was required for the working of the Mill; and also to the paid up capital. With the small amount of Rs. 7½ lakhs paid up capital the debts of the Company have amounted to something over Rs. 25 lakhs. For the present the Company's credit has gone.

If these petitions were dismissed, it is quite clear that the Company would not be able to pay its liabilities as they became due. The only result would be that the first person who obtained a decree against the Company (and I have only recently passed a decree for Rs. 50,000 against it) would proceed in execution of his decree. It appears certain that if I dismissed these petitions there would be other petitions filed immediately afterwards.

I am quite convinced on the affidavits before me that the Company is not in a position to pay its debts, and, therefore, it is desirable that a winding up order should be made. At the same time, there is no doubt that if an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement, so that the interests of the creditors might be protected as well as the interests of the share-holders. Already it appears from the affidavits that suggestions have been made from some sources, which, if they prove effective, would keep the Company going. But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the

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minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors. Therefore I shall not sanction any proceedings in the winding up order which might in any way prejudice the chances of a settlement, and the bringing forward of any scheme for carrying on the business of the Company which may be acceptable to the creditors.

The order, then, will be: First of all that the Company be wound up. I propose, then, as I did in the case of the Tricumdas and Lukhmidas Mills to proceed to appoint a Liquidator, although I suggest that he should be provisional for a short time. What I would suggest is that until the 16th October Mr. Sethna be appointed official Liquidator in the same position as he is Liquidator of the Lukhmidas Mill. It is necessary that there should be a Liquidator for the purposes of arranging a compromise and scheme of settlement, but there will be no necessity for the Liquidator to continue after the scheme has been sanctioned by the Court, except for the purpose of giving effect to the scheme.

The official Liquidator will therefore be appointed provisionally.

I have no objection now in the interests of the share-holders to direct that nothing should be done under the order for winding up by the Liquidator beyond carrying on the working of the Mill until further application is made by the Liquidator.

Liquidator to have powers (*b*), (*d*) and (*f*) in section 144.

Under section 138 until further order proceedings to be stayed except as to the carrying on of the business of the Company by the Liquidator.

It is advisable that any proposals for settlement should be crystalized as soon as possible, so that the meeting of the creditors and contributories can be summoned.

I allow the contributories inspection of the directors' minute books and accounts relating to the loans made by and to the Company.

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Costs of the petitioner Ratilal Karsondas and the costs of the Company out of the assets: and one set of costs between the other petitioners and creditors appearing. As the other petitioners had notice of the first petition their costs must be included in the one set of costs allowed to the creditors.

Attorneys for 1st petitioner: Messrs. *Daphtary, Ferreira and Divan.*

Attorneys for the other petitioners: Messrs. *Bhaishankar, Kanga and Girdharlal.*

Attorneys for the Company: Messrs. *Payne and Co.*

Attorneys for other creditors: Messrs. *Dikshit, Dhunjisha and Sunderdas.*

K. McI. K

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910. *February* 10.

GULAM HUSSEIN ALIAS KIKABHAI TYABALLI (ORIGINAL PLAINTIFF), APPELLANT, v. MAHAMADALLI IBRAHIMJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 43 and 50—Transfer of Property Act (IV of 1882), section 90—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realized not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.

In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor.

* Second Appeal No. 493 of 1 06.