

1939

*Present : Wijeyewardene and Nihill JJ.**In re H. L. POPE, Liquidator.*IN THE MATTER THE WINDING UP THE TRAVANCORE
NATIONAL AND QUILON BANK, LIMITED.115—D. C. Colombo, 2,605 (*Special*).*Company law—Remuneration of liquidator—Percentage basis or salary—
Powers of District Court.*

A District Court has power to fix the remuneration of the liquidator of a company, by way of salary or on a percentage basis, after notice to the creditors. The Court has also power to make such interim payment as may be prudently made in accordance with the English practice. Any payment so made will be subject to the condition that the whole or part of such amount may have to be repaid if it is found to be irregular at a later stage on an audit of the liquidator's accounts.

The Court may, if necessary, require the liquidator to enter into a bond for securing the repayment of any sum that may ultimately be found to be an over-payment.

A PPEAL from an order of the District Judge of Colombo.

N. K. Choksy (with him *Miss Mehta*), for appellant.

Cur. adv. vult.

December 19, 1939. WIJEYEWARDENE J.—

There appellant was appointed liquidator of the Travancore National and Quilon Bank, Limited, by an order of Court made on September 12, 1938.

The Bank in question was a company incorporated in British India and had a branch office in Colombo.

The liquidator who appears to have done an appreciable amount of work applied to Court on February 23, 1939, for an order fixing a sum of Rs. 500 as his monthly salary from the date of the appointment.

Notice of that application was directed by Court to be given to the creditors of the bank by an advertisement in an issue of the Ceylon Daily News, intimating that any creditor who wished to be heard should appear in Court on March 21, 1939. Such notice was given by the liquidator but the journal of the record has no entry to show that there were any proceedings before the Court on March 21, 1939, or that the case was called on that date to ascertain whether any creditors were present in response to the notice. These facts were discovered after we reserved judgment in appeal.

The District Judge made his order on the application on May 8, 1939, refusing to fix a salary as applied for. The learned Judge indicated in his order that he would have been prepared to fix the remuneration on a percentage basis as provided for by "Rule 154 of the Companies (Winding Up) Rules, 1909," if a final scheme of distribution had been submitted to Court by the Liquidator. He has also expressed the view that he does not seem to have the power to order an interim payment to be made on account of the remuneration that would become payable ultimately to the Liquidator on a percentage basis. The present appeal has been preferred by the liquidator against that order.

The learned Counsel for the appellant, who contended that the order of the District Judge was wrong, sought to support his argument mainly by reference to a Form given at page 192 of *The Rights and Duties of Liquidators, Trustees and Receivers (12th edition)* by Ranking, Spicer & Pegler which was assumed in the course of the argument to be a Form used by liquidators in England. After we reserved judgment the book was made available to us through the courtesy of Counsel who obtained it from his client. It was then found that the Form was one used in bankruptcy proceedings. The Counsel thereupon submitted some further authorities in support of his argument. These circumstances and the fact that both my brother and I went on circuit soon after the conclusion of the argument have resulted in the somewhat unusual delay in delivering this judgment.

The Companies Ordinance, No. 51 of 1938, came into operation in November, 1938. Section 359 of that Ordinance provides that any company the winding up of which commenced before the Ordinance came into operation should be wound up in the same manner and with the same incidents as if the Ordinance had not been passed. The law that would govern the present case, therefore, would be the English law.

The Companies Act, 1929 (19 & 20 Geo. 5c. 23), section 188 (2) enacts that "where a person other than the official receiver is appointed liquidator he shall receive such salary or remuneration by way of percentage or otherwise as the Court may direct". Rule 157 (1) of the Companies (Winding Up) Rules, 1929, provides that "the remuneration

of a liquidator, unless the Court shall otherwise order, shall be fixed by the committee of inspection and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting the sums (if any) paid to secured creditors (other than debenture holders) out of the proceeds of their securities and the other part on the amount distributed in dividend". Rule 192 of these rules sets out the order of priority to be observed in making payment out of the assets of a company wound up by order of Court but this rule "does not prevent payments being made to a liquidator on account of remuneration where the assets will clearly or probably be sufficient" (*vide Palmer's Company Precedent, 14th edition (Topham), Part 2, Winding-up, p. 287*). According to the English practice, it appears that the liquidator, although he earns his remuneration from time to time as assets are realized or distributed, does not generally pay himself the remuneration as it becomes due, but fills up a certain statutory form which he forwards to the Board of Trade and obtains payment. Generally such payment is made only after some audit of accounts showing that something has been realized and that there are sufficient funds left to provide for the payments which have priority over the liquidator's claim for remuneration. The amount received by way of remuneration has to be entered in the cash book a copy of which has to be transmitted to the Board of Trade once every six months in accordance with Rule 173. The form of the summary so transmitted to the Board of Trade is given as Form 239 at page 300 of "*Palmer's Company Precedents*" cited above. This form contains on the credit side an item under the heading "Remuneration of Liquidator". These facts appear to indicate that the practice in English Courts is to make interim payments to liquidators on account of remuneration.

I think the District Judge has the necessary power to fix at this stage of the proceedings after due notice to the creditors the remuneration of the liquidator by way of salary or on a percentage basis after making such further inquiry as he may desire to make regarding the work already done and work to be done by the liquidator. In the absence of any special circumstances, he will also, no doubt, exercise his power to make such an interim payment as may prudently be made in accordance with the English practice as referred to by me. Any payment made to the liquidator on such an order will be subject to the condition that the whole or part of such amount may have to be repaid by the liquidator if it is found to be irregular at a later stage on an audit of the liquidator's accounts. The District Judge may, if he thinks it necessary, require the liquidator to enter into a bond for securing the repayment of any sum that may ultimately be found to be an over-payment.

I set aside *pro forma* the order of the District Judge and remit the case to him to enable him to take action as indicated by me.

I make no order as to the costs of this appeal.

NIHILL J.—I agree.

Set aside.

Case remitted.