Privy Council Appeal No. 41 *of* 1940.

Dairen Kisen Kabushiki Kaisha and others – – – *Appellants*

v.

Shiang Kee (otherwise known as The China Merchants Steam Navigation Co., Ltd.) – – *Respondent*

FROM

THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20th MAY, 1941

Present at the Hearing:
LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON
[*Delivered by* LORD ROMER]

The appellants and the respondents are (or were until it ceased to exist) shareholders in a company known as the Ching Kee Steam Navigation Company, Ltd. The company was incorporated in the year 1920 under the laws of the Republic of China, having its head office at Chefoo, in the Chinese Province of Shantung. It had also several branches, one of which was situated at Hong Kong. Its main business appears to have been that of owning steamships, of which, at the outbreak of hostilities between China and Japan, it possessed 20. Of these 6 were, and still are, in the harbour of Hong Kong.

On the 21st February, 1939, the company was dissolved by decree of the District Court of Chungking, Szechuen. In the normal course of things the jurisdiction to make such a decree in the case of this company would have been vested in the District Court of Fooshan, in the Province of Shantung, of which the immediate higher court was the Shantung Provincial Court. But in February, 1939, the Japanese were in military occupation of the Province and the Chinese Courts there were not able to exercise their judicial functions. But it is provided by the Chinese Code of Civil Procedure that whenever a competent court cannot legally or physically exercise its judicial powers an immediate higher court may designate some other court to assume jurisdiction. Accordingly, on the 20th February, 1939, the Supreme Court of China made an order designating the District Court of Chungking, Szechuen, to assume jurisdiction over the case of the company.

In view of the dissolution of the company the respondents, on the 29th March, 1939, presented a petition in the Supreme Court of Hong Kong for the winding up of the company under the provisions of the Companies Ordinance, 1932. The jurisdiction to make such an order is conferred upon that Court by section 313 of the Ordinance, the material provisions of which are:—

> "313 (1) (*b*) The circumstances in which an unregistered company may be wound up are as follows:—
>
> (i) If the company is dissolved, or has ceased to carry on business, ...

(iii) If the Court is of opinion that it is just and equitable that the company should be wound up.

" 313 (2) Where a company incorporated outside the Colony which has been carrying on business in the Colony ceases to carry on business in the Colony, it may be wound up as an unregistered company under this Part of this Ordinance notwithstanding that it has been dissolved or otherwise ceased to exist as a Company under or by virtue of the laws of the country under which it was incorporated."

The petition came on for hearing before the Chief Justice of Hong Kong on the 3rd July, 1939, when a winding-up order was made. It should be mentioned that in the meantime—viz.: on the 5th May, 1939—the order dissolving the company made by the District Court of Chungking had been taken by way of appeal to the Supreme Court, Szechuen, and that the appeal had been dismissed.

The present appellants, who had opposed the making of the winding-up order by the Chief Justice appealed in due course to the Full Court of Hong Kong, who by order dated the 5th January, 1940, dismissed the appeal with costs. From this last mentioned order an appeal is now brought before His Majesty in Council.

In opposing the petition before the Chief Justice the appellants relied solely upon what they conceived to be the merits of their case. But in the Full Court they put forward in addition an altogether new contention. They asserted that by reason of the military occupation of the province of Shantung by the Japanese forces, the jurisdiction of the Chinese Courts over the company had been ousted; that the decree of the 21st February, 1939, was a nullity; and that the company had accordingly never been dissolved. The Full Court, consisting of Lindsell and Fraser JJ., had no difficulty in repelling this contention. And Mr. Vaisey, in presenting his arguments on behalf of the appellants before this Board, frankly, and quite properly, admitted that he could not challenge the correctness of the decision of the Full Court on this point. The position, therefore, is this. The company has ceased to exist by an act of the country by whose acts and under whose law it was made a juristic entity, and must accordingly be treated as non-existent by all courts administering English law (see as to this the observations of Lord Wright in *Lazard Bros. & Co.* v. *Midland Bank* [1933] A.C. 289 at p. 297). In these circumstances both the Chief Justice and the Full Court of Hong Kong held that they had power to order the company to be wound up in that colony.

They found a precedent for so holding in the case of *In re The Russian Bank for Foreign Trade* [1933] 1 Ch. 745 where Maugham J., as he then was, ordered a winding up in this country of a Russian bank which had a branch office in this country but had been dissolved by Russian legislation. But in truth no precedent was required in order to establish the power of the Supreme Court of Hong Kong to make such an order. The power was expressly conferred upon it by s. 313 (2) of the Companies Ordinance, 1932. As the company had ceased to exist it had necessarily ceased to carry on business in the colony, and in such circumstances the subsection in terms empowers the court to wind it up notwithstanding that it has been dissolved and ceased to exist by virtue of the law of the Republic of China. That the court rightly exercised the power so conferred upon it is abundantly clear. There are valuable assets formerly belonging to the company that are still in Hong Kong, and it is essential in the interests both of the former shareholders and of such creditors of the company as there may be that these assets should be protected and distributed amongst those who may be found to be entitled to them. This can only be done by means of a winding-up order.

For these reasons their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of the appeal.

(12538) Wt. 8194—7 80 6/41 D.L. G. 338

In the Privy Council

DAIREN KISEN KABUSHIKI KAISHA AND OTHERS

v

SHIANG KEE (OTHERWISE KNOWN AS THE CHINA MERCHANTS STEAM NAVIGATION CO., LTD.)

DELIVERED BY LORD ROMER

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1941