

(1963) 11 MAD CK 0032

In the Madras High Court

Case No : O.S. Appeals No. 18, 37 and 70 of 1962

C. Hariprasad

APPELLANT

Vs

Amalgamated Commercial Traders Private Ltd.

RESPONDENT

Date of Decision : 19-11-1963

Acts Referred:

Companies Act, 1956 — Section 205, 206, 207, 426, 434

Citation : AIR 1964 Mad 519 : (1964) 34 CompCas 209 : (1964) ILR (Mad) 832 : (1964) 77 LW 255

Hon'ble Judges : S. Ramachandra Iyer, C.J.; Ramakrishnan, J

Bench : Division Bench

Advocate : S.V. Subramanian, T.T. Srinivasan, A.N. Rangaswami and S. Ramachandran, for the Appellant; G. Vasanthe Pai, D. Padmanabha Pai and A. Basi Philip, for the Respondent

Judgement

S. Ramachandra Iyer, C.J.—These appeals arise from the judgment of Veeraswami J. dismissing an application filed by C. Hariprasad, the

appellant in O. S. A. No. 18 of 1962, for directing the winding up of the Amalgamated Commercial Traders (Pte.) Ltd., which will hereafter be

referred to as the "Company". The petition was based on the inability of the company to pay its debt due to him. The appellants in the other two

appeals claim also to be creditors of the company and they supported the petition for winding up of the company. All of them are share-holders in

the company.

2. The company was incorporated on 29-1-1948, with a capital of Rs. 3,00,000, consisting of ten thousand taxfree cumulative preference shares

of Rs. 10 each and two thousand equity shares of Rs. 100 each. Its object, among other things, was to take over the selling agency of Indian

Sugars and Refineries Ltd., Hospet and exploit an agreement obtained from it by Mr. A. C. K. Krishnaswami, one of the appellants in O. S. A.

No. 70 of 1962. The agency agreement turned out to be very profitable. The company maintained its accounts on the mercantile basis, the years

adopted being the calendar year. Its main source of income was the commission earned from Indian Sugars and Refineries Ltd. Since the year

1950, the company has been able to declare very substantial dividends to its share-holders.

3. For the year ending 30-12-1959 the directors of the company reported to its shareholders that the commission earned during the year had not

yet been received from the principals and concluded by saying:

You will note that the disbursement of the proposed dividends to our shareholders will depend on our being able to collect outstandings from our principals"".

At the general body meeting of the company held on 30-12-1959, the following resolution relating to the declaration and payment of dividend was

passed:

.....that a dividend of Rs. 100 per share (taxable) on the equity shares be paid to such shareholders as appear on the register of members as on

date, payments to be effected when commission due from principals are realised.

It is admitted that the commission due from the India Sugars and Refineries, after taking into account of which the dividends were declared for the

year 1959, was received by the company sometime during the second week of" May 1960.

4. In the meanwhile, certain events happened, which could be said to have largely contributed to the present" petition. During the year 1960,

misunderstandings appear to have arisen between certain groups of share-holders. Mr. A. C. K. Krishnaswami, who was the managing director of

the company till then led one such group, while Mr. Parasrampuriah was the leader of another group. In the month of March of that year, the former

filed an application to this Court Under Sections 397 and 398 of the Indian Companies Act for certain reliefs. That was followed by acrimonious

exchange of allegations and counter-allegations, in respect of the management of the company by Mr. A. C. K. Krishnaswami. But all these

received a quietus by reason of a settlement between the parties which enabled

Mr. Parasrampurua to purchase 216 shares owned by Mr.

Krishnaswami and by Factors Limited, a concern in which the latter had a controlling interest. The transfers of the shares. were completed by the third week of April 1960.

It is not very clear from the evidence placed" before. us whether Mr. Parasrampurua retained the shares so obtained for himself or assigned them to

one Mr. M. R. Banka. It is unnecessary to refer to that matter any further, as. there is no dispute between them. Mr. M. R. Banka made a demand

of company for payment of the dividends already, declared; Mr. A. C. K. Krishnaswami also claimed that he was entitled to receive the dividends

declared before the date of transfer, in respect of all the shares held by him. His claim had this merit, namely, that there had been no specific

transfer in writing to the purchaser, of dividend already declared by the company which under the law, should be regarded as a debt due by the

company to the shareholder. The transfer of the shares only entitled the transferee to obtain future dividends. Indeed, in the affidavit filed by Mr.

M. R. Banka before the. learned Judge, it is specifically stated that the price paid to Mr, A. C. K. Krishnaswami was calculated on the basis of the

valuation of the assets of the company and after taking into consideration all the future profit-making capacity of the first respondent company.

5. On 17-5-1960, Mr. A. C. K. Krishnaswami made a formal demand on the company for the payment to him of the dividend declared towards

the close of the year 1959, which amounted to Rs, 11,620 and a further sum of Rs. 6300 as payable to the Factors Limited, in respect of a similar

claim. Mr. Parasrampurua, who was the Managing Director of the company, did not repudiate the claim on any such ground as that the resolution

of the general body declaring the dividend was in any way illegal. He, however, complained by his letter dated 24-5-1960, that his pre, decessor in

office, Mr. A. C. K. Krishnaswami, had failed to produce the minutes book and certain documents belonging to the company and made a demand

for their return. On the same day he wrote another letter informing Mr. A. C. K. Krishnaswami that there was another claimant to the dividend.

There was a slight change in regard to the claim for past dividends in the letter sent sometime later where Mr. Parasrampurua claimed that the price

paid by him for the transfer of the shares included the dividends already

declared. The demand of Mr. A. C. K. Krishnaswami and Factors Ltd.

for payment to them of the dividend was not met Sometime later on 5-7-1960, Mr. Parasrampuriah wrote to the former a letter informing him that

the company was advised that the resolution declaring the dividend was invalid - this was the third case in respect to the dividends declared for the year 1959.

6. In the meanwhile Mr. Hariprasad, the appellant in O. S. A. No. 18 of 1962, had made a statutory demand on the company for payment of two

sums of money to him, by means of his notice dated 27-5-1960, - Rs. 1750 towards the dividends for the year 1959 and a further sum of Rs.

7605.62 standing to his credit in the books of the company. The company did not pay that amount. He then filed the petition, out of which this

appeal arises, for winding up of the company on the ground that it was unable to pay its debts. The petition was supported by Mr. A. C. K.

Krishnaswami and Factors Limited, for the reason that their demands dated 17-5-1960 for payment of the dividends already declared had not

been met. There was similar support from Smt. Godavari Bai, the mother of Sri Hariprasad and the appellant in O. S. A. No. 37 of 1962, who

claimed that she was entitled to get from" the company a sum of Rs. 7280 as and for dividends declared, and Rs. 34,863.73 as due on accounts.

No demand appears to have been made by Smt. Godavari Bai on the company earlier for payment of those amounts. The company denied that

any amounts were due to these three persons. They contested the validity of the resolution declaring the dividend, as also the liability of the

company to pay any sum on accounts to Mr. Hariprasad and his mother, Smt. Godavari Bai.

7. While the winding up petition was pending, and the question relating to the validity of the resolution declaring dividend was "sub judice" the

company appears to have declared afresh, at the close of the year 1960, dividend in respect of profits earned for the year 1959 as well. This is

somewhat strange, for, if the court were to hold that the resolution of the general body meeting of; the company passed on 30-12-1959 in the

matter of declaration of dividends was valid, there would be no profits available with the company for declaring another dividend for the same

year. The object of the resolution is however apparent. It will be seen that if the

second declaration were to be regarded as valid, it will completely support! the case of Mr. Parasrampuriah and Mr. M. R. Banka as, they will be enabled to get the dividend for the year 1959,. although the transfer of the shares in their favour by Mr. A. C. K. Krishnaswami took place only in the following, year. that is not perhaps all. On 27-12-1960 the Additional Collector, Bombay, issued a prohibitory order against, the company from either transferring the shares held on Mr. Hariprasad and Smt. Godavari Bai or paying dividends, in respect thereof, as such shares belong to one R. S, Morarka, against whom the Income Tax Department had a claim for unpaid tax. It has not been made clear before us as to how Mr. Morarka was entitled to the shares and in what circumstances or at whose instance the attachment order came to be issued.

8. There can be little doubt that the winding up proceedings are the outcome of the differences between Mr... A. C. K. Krishnaswami who is reported to be still keeping, with him the minutes book and certain other documents of the company, and Mr. Parasrampuriah, who can be said to be responsible for the non-payment of the dividends for the year 1959.

9. We shall now turn to the petition filed by Mr, Hariprasad. That, as we said, was based on the inability of the company to pay two sums of money claimed to be due to him (i) a sum of Rs. 7605.62 alleged to be due on accounts and (ii) a sum of Rs. 1750 in respect of dividends declared for the year 1959. Both the claims have been disputed. The learned Judge held that so far as the first. item of claim was concerned, the company could not be said to be acting otherwise than "bona fide" in disputing it. He, therefore, left the controversy between the parties in that regard to be agitated in an appropriate suit. This view did not prevent the learned Judge from proceeding further with the petition. The petitioning creditor haft another claim which the learned Judge found to be well founded. It is true that the statutory notice issued by Mr. Hariprasad on 27-5-1960 made a demand of two sums of money one of which being disputed but the validity oft the defence not being yet decided. Even so, it will be competent for the court, to direct the winding up of the; company, if otherwise, the petition can be held to be well founded on the basis of the inability of the company to pay that sum. This precise question came up for consideration in Cardiff Preserved Coal and Coke Co. v. Norton,.

1867 2 Ch A 405, where Lord Chelmsford L. C. said -

He made, it is true, a demand upon the company for payment of more than was due, but of course the amount; due was known to the company,

and was included in the: demand, and the company neglected to pay "such sum which means not the sum demanded, but the sum due,. which they

might have paid, and so have prevented the order being made.

Veeraswami, J. held that the resolution dated 30-12-1959 relating to the dividends for that year had been validly passed and that the company

must be deemed to be unable to pay that debt. But the learned Judge, on a consideration of the other evidence, held that the company was

financially sound, in that although it failed to meet the demand of Mr. Hariprasad within the statutory period, there would be no proper ground for

directing the winding up of a really solvent company. Put in other words, the view taken by the learned Judge comes practically to this: that so long

as the company is commercially solvent, it could not be wound up at the instance of one of its creditors although he was unable to get his dues paid

in spite of demand having been made by him and such demand remained without being complied with for more than three weeks. We are, with

respect, unable to share the view expressed by the learned Judge. Under the Indian Companies Act, a company can be wound up, on the petition

of a creditor, for its inability to pay his claim after proper demand had been made by him and on the lapse of three, weeks from the date of service

of such a demand. Where, however, the company disputes the claim, the court will see whether such a dispute is a genuine one, or merely one to

cover up its unwillingness or inability to pay. in. the Patter case a winding up order should ordinarily follow.

In ""Buckley on the Companies Acts"", 13th Edn., the learn fed author has observed at page 450 :

A creditor who cannot obtain payment of his debt is entitled as between himself and the company "ex debito justitiae to an order if he brings his

case within the Act. He is not bound to give time.

Again, at page 451

A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is "bona fide disputed by the company. A petition

presented ostensibly for a winding up order but really to exercise pressure will

the dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action, if, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.

Where, in a particular case, the debt is disputed, the court hearing the winding up petition will have to decide, whether the dispute rests on any substantial ground. If it finds that there was no substantial defence, it will have to proceed with the petition; otherwise the court can leave the claim

to be proved in an ordinary civil action. In *In re, King's Cross Industrial Dwellings Co.*, 1870 11 Eq Cas 149, it was held that if a creditor's

petition to wind up a company was based on the ground that the petitioning creditor's debt was disputed, the court, instead of directing the petition

to stand over with liberty to bring an action on the debt, would have to see whether the debt was disputed on some substantial ground. As this

case is instructive on the question of the procedure to be followed in such a case, we would like to extract the following passage from the judgment

of Sir B. Matins, V. C.:

The evidence is really only one way - that the petitioners gave credit to the company. They had no other course for obtaining payment except to

bring an action and obtain judgment; and then they would have received nothing, except by taking out an execution, which would have produced

nothing. It is said that this is a bona fide Question, whether there, is or not a debt of the company; but, in my opinion the court is bound in such a

case to see that the question is a substantial one before directing an action to be brought. I entertain no doubt that this is a debt of the company,

and I should be doing the greatest possible injustice if I allowed any further litigation. I can only make the usual order to wind up, but direct it not to

be advertised for a fortnight, in order to enable the company to pay the demand.

To sum up, the position appears to be this. Where a creditor's petition for winding up is contested on the ground that no debt is due to him, the

court should ordinarily investigate that question. The court has, however, a

discretion in the matter. If it finds that the defence is a substantial one, it can direct the creditor to establish his claim in an independent action. It has an equal discretion to decide the dispute particularly in cases where the defence to the claim is unsubstantial; and once it is proved, that the debt is due to the petitioning creditor, it should proceed with the winding up petition.

10. Section 433 of the Indian Companies Act declares the circumstances in which a company may be wound up by the Court. That section

provides that a company may be wound up by the court if it is unable to pay its debts. Section 434 defines when a company must be deemed to

be unable to pay its debts. Sub-clause (a) of Section 434 states that if a creditor who is entitled to receive a sum of more than Rs. 500 from the

company, has made a demand, in the manner prescribed by the section, on the company, and the company has, for three weeks thereafter,

neglected to pay his dues, it shall be deemed to be unable to pay its debts. Sub-clause (c) to Section 434(1) says:

If it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay

its debts, the court shall take into account the contingent and prospective liabilities of the company.

It will thus be seen that clauses (a) and (c) of Section 434(1) relate to two distinct matters. The first is a neglect to pay the dues of a creditor who

has made a statutory demand; the second is a case where the company is commercially insolvent, in the case of non-payment of a creditor in spite

of the notice issued by him as prescribed by Section 434(1)(a), the position, in the words of George Rankin, C. J., in *Japan Cotton Trading*

Company Ltd. Vs. Jajodia Cotton Mills Ltd., will be :

The effect of the statutory notice is that unless the debt is paid within three weeks or some arrangement is made with the creditors, the Company

is in the position of being conclusively estopped from denying that it is unable to pay its debts.

The object of Section 434 is to create a fiction as to when a company can be deemed to be unable to pay its debts. If the case comes within the

scope of that fiction, it will not be open to the company to say that on reality it is in a position to pay its debts. It would follow that in such a case it

will really be unnecessary to enquire whether the company is in fact solvent or not. Suite recently in K.R. Srinivasa Ayyar and Others Vs. T.A.

Ramachandra Rao, , a Full Bench of this court had to consider the true scope of a statutory fiction; and it was held that within the area of its

operation such a fiction must be regarded as the reality. It will not be open to the party or the court to contradict the fiction in regard to those cases

where the statute intended it to apply. But at the same time a fiction cannot be extended to operate beyond the purpose for which it is intended.

11. It is plain, on a reading of Section 434 of the Indian Companies Act, that the intention of the legislature was to enact a fiction for the purpose of

finding out, where a company fails to meet the demand of a creditor not with standing the statutory demand made upon it whether such default

must be regarded as tantamount to an inability on the part of the company to pay its debt. As we said, sub-clause (a) of Section 434(1) is distinct

from sub-clause (c) which relates to a state of commercial insolvency. In the latter case, it will no doubt be open to the court to find out, on a

consideration of the value of existing assets and liabilities of the company, whether it is really in insolvent circumstances. But in the former case no

such investigation is called for; nor even, can it be undertaken. it will be sufficient for the purpose if there be a failure on the part of the company to

meet the demand in terms of the statute".

For the purpose of application of Section 434(1)(a), therefore, what all will be necessary to find will be whether the amount was due to the

creditor on the three dates, namely, the date of issue and service of the notice under that provision, the date of the presentation of the petition and

the date of passing of the order for winding up. If by any of the dates mentioned above, the claim had been discharged, the fiction will cease to

operate and the company cannot be regarded as one unable to pay its debts. In re, Imperial Hydropathic Hotel Co., Blackpool v. Hampson, 1882

49 L T 147, Cotton, L. J. said that where a statute requires the court to treat a company as if it were insolvent, that is, unable to pay its debts if

certain things were done, the question which the court would have to consider would be whether the event has happened on the happening of

which the Act of Parliament required the court to deem it insolvent and not whether the court would be satisfied on the evidence before it, that the

company was really insolvent. We are, therefore, unable to "sustain the judgment of the learned Judge on this ground.

12. Learned counsel appearing on behalf of the company, however, attempted to support the order passed by the learned Judge on the ground

that neither the petitioning creditor nor the supporting creditor could be regarded as creditors of the company, so as to entitle any one of them to

sustain the petition for winding up of the company. The first part of the contention under this head related to the right of the creditors to the

dividends declared on 29-12-1960. It is argued that as Mr. A. C. K. Krishnaswami had transferred his shares to Mr. Parasumpuria in April 1960,

the: latter alone would be entitled to the dividends declared for the previous year. In support of that contention reference was made to the

correspondence that ensued between the parties. As we pointed out earlier, there has been no assignment in writing by Mr. A. G. K.

Krishnaswami, in favour of the purchaser of his shares, of the dividends which prior to the date of transfer had been declared by the company.

Except the fact that a claim to such dividends had been made both by Mr. Parasrampur and Mr. M. R. Banka, there is nothing on record to

show that there was an agreement to assign such dividend or an actual transfer of it. It is however argued that as the transferee had paid as much

as Rs. 800 for a hundred rupee share, it should be assumed that what the parties intended was that the transfer should comprise not merely the

shares but also the dividends that had already accrued thereon and remained unpaid. We are unable to draw any such inference. The company, as

we stated, has been successful and since the year 1950 a dividend of not less than Rs. 50 per share had been declared. For the year 1959 the

dividend declared was equal to the value, of the share itself.

It is not surprising, therefore, that the price at which those shares were sold was eight times the nominal value of each share. Therefore any high

price paid for the shares cannot by itself indicate that the transfer included the right to the past dividends as well. At any rate, in the absence of

evidence" in that behalf, one cannot assume that what Mr. A. C. K. Krishnaswami intended to transfer was the shares plus the dividend that had

already been declared as payable; thereon. It will be interesting to recall that in the affidavit filed by Mr. Banka before the learned Judge, he

solemnly stated that he was entitled only to the future dividends. That would exclude the past dividend that had already become payable. Even

apart from that consideration the true rule is that a transfer of shares, effected after the dividend had been declared by the company, cannot, as

against the company, convey title to receive payment of the dividend to the transferee, although he expressly bought it cum-dividend. In *Chunilal*

Khushaldas Patel Vs. H.K. Adhyaru and Others, , it was held that a transfer of shares, after a dividend had been declared by the company, could

only create an equity between the buyer and seller of shares, the former being entitled to such dividends. Therefore the transfer of shares, though

expressly made cum-dividend after such dividends had been declared, could not, as against the company, carry the dividend to the buyer.

13. As regards the dividends payable to Mr. Hariprasad and Smt. Godavari Bai, the only defence to the claim is that their rights thereto have,

subsequent to the presentation of the winding up petition, been attached by the Collector for certain Income Tax arrears of one Mi". *Morarka*. An

attachment will not have the effect of transferring the debt attached. Further in the prohibitory order issued to the company it is stated that the

shares standing in the names of Mr. Hariprasad and Smt. Godavari Bai belong to Mr. *Morarka*. There has been no attempt before us to sustain

that case. u/s 206 of the Indian Companies Act, dividends can be paid by the company only to the registered share-holders. The debt due by the

company, in respect of the dividends, undoubtedly still subsists. The company has defaulted in payment of the same to the registered share-holders

as it was bound to do under the Act and the resolution of the general body. Having regard to the order which we propose to make in this case, it is

really unnecessary to pursue the question as to whether Mr. *Morarka* would be entitled to any beneficial interest in the dividends.

14. It was then argued that, inasmuch as Mr. A. C. K. Krishnaswami had been the managing director, and Mr. Hariprasad a director of the

company at the time when the dividend was declared, they should have paid themselves out within 42 days of such declaration, in accordance with

the terms of Section 207 of the Act, and they having defaulted to do so, it would not be open to them to make a claim for the dividend and to

sustain the petition on the basis thereof. There underlies an obvious misapprehension in the argument. Declaration of dividend and the nonpayment

thereof within the time prescribed by Section 207 of the Act is respectively the act and default, of the company. There can be no estoppel, by reason of that act, either in Mr. A. C. K. Krishnaswami or Mr. Hariprasad from claiming what is due to them in their individual capacity from the company.

15. It was next contended that as the creditors in the instant case will be contributories in case the company were to be wound up, they could not

be regarded as creditors of the company so as to entitle them to file the petition. Our attention has been invited in this connection to Section 426(g)

of the Act, which declares that a sum due to any member of the company, in his character as such, by way of dividends etc., shall not be deemed

to be a debt due by the company. Support for the contention has also been sought in two decisions, namely, *In re, Leicester Club and County*

Racecourse Co., Ex parte, Cannon, (1855) 30 Ch D 629 and *In re, Consolidated Gold-fields of New Zealand Ltd.*, 1953 1 Ch 689. Both the

cases relate to proof of certain claims in the course of winding up of a company. They cannot be regarded as laying down that, even outside the

winding up proceedings, a share holder member to whom a dividend became due is not a creditor of the company, so long as company is

functioning.

As pointed by the Supreme Court in *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, , the right to participation in the profits of the

company in a share-holder even exists independently of any declaration of the dividend by the company. A declaration is necessary only for the

enjoyment of profits. It will follow that once a declaration of dividend is made and it becomes payable it will partake the nature of a debt due from

the company, to the shareholder. In *re, Severn and We and Severn Bridge Railway Co.*, - 1896 1 Ch 559, it was held that when a company

declared a dividend on its shares, the debt immediately became payable to each share-holder in respect of his dividend for which he could sue at

law, and the statute of Limitation would immediately begin to run from the date of declaration. The position of the company, which is a distinct

juristic entity, cannot, therefore, be that of a trustee but only that of a debtor. This view is supported by the observations of Eve, J. in *Re, Kidner*;

Kidner v. Kidner, 1929 2 Ch 121, where that eminent Judge states:

The declaration of the dividend.....created a debt owing by the company to the trustee as the registered share-holders. It is true that no steps could have been successfully taken to enforce payment until the due date for payment of each instalment arrived, but nonetheless the title to that dividend was in my opinion determined by the declaration, and the mere fact that the payment was postponed does not operate to deprive those who were the holders of the shares at the date of the declaration of their right to each instalment of that debt.

We are, therefore, unable to accept the contention "hat there has been no debt owing by the company to the these creditors concerned in the present petition in respect of the dividends declared for the year 1959.

16. It was then argued, that inasmuch as the dividends for the year 1959 had been declared long prior to the actual receipt by way of cash profits, such a declaration must be regarded as one out of capital and therefore invalid. The learned Judge has rejected this contention and the point is too

well settled to require any detailed examination. We may refer in this connection to the observations contained in Stringer's Case; In re, Mercantile

Trading Co., 1869 4 Ch A 475, which have been relied on by the learned Judge :

If we were to lay down as a rule that there must be actually cash in hand, or at the bankers of the company, to the full amount of the dividend

declared, we should be laying down a rule which, in my judgment, would be in consistent with what I understand and believe to be the custom of

all companies of this description, and also inconsistent with mercantile usage, and we should be laying down a rule which would open the door to

and encourage a very great amount of litigation, because there are very few dividends indeed which would not be open to more, or less question if

such a rule as that were laid downBut, I agree, it must be out of profits, although those profits were not profits in hand.

Section 205 of the Act only prescribes that the dividend" shall be paid out of profits of the company. It does not say further how those profits have

to be ascertained. Profits of a year, under the mercantile system of accounting, only means the excess of receipts for the year over expenses and

outgoings during the same year. It is not? necessary that such excess should be in the form of cash in the till of the company. It will be open to a

company" to declare a dividend on the basis of its accounts, whether such

accounts are kept in the cash or mercantile basis. Where it is based on the estimated profits, which had not actually come in the form of cash to the company, it will be open to it to pay such dividends from out of other cash in their hands or perhaps even to borrow and pay them off. That will not amount to paying dividend out of capital. We are, therefore, in agreement with the learned Judge that the declaration of dividend in the present case, even before the actual receipt of assets, was valid.

It has been argued for the respondent that whatever might be the position in law, a declaration of dividend in this company before the receipt of profits will be unauthorized as regulation 90 of Table A in Such, I to the Act had not been adopted by the company. The contention of the learned counsel for the company is that but for the provision in Articles like the one contained in regulation 90, there could be no power in the company to declare dividends in anticipation of the actual receipt of profits. That regulation empowers a company to declare a dividend by the distribution of specific assets. We are unable to see how that regulation can have any bearing on the question before us, where what was intended at the time of declaration was only a payment in cash and not a distribution of the assets of the company.

17. The next contention was that the resolution of the company dated 30-12-1959 contravened the provisions of Section 207 of the Act in so far as it enabled payment of the declared dividends conditional on the receipt of profits, and, therefore, it should be declared invalid, as being prohibited by law. Section 207 which has been introduced for the first time: in the Companies Act, 1956 has no counterpart in England. It provides for a penalty in the event of non-payment of dividend within the period prescribed by it. The stringent provision contained in the section is evidently intended to protect the shareholders, against the arbitrary acts of the company in delaying payment of the dividends justly due. The learned Advocate General has argued that notwithstanding the provisions of that section, it would be open to the general body of the share-holders of the company to extend the period prescribed by that section for payment of dividends. In other words, the contention is that Section 207 being enacted for the benefit of the share-holders, it would be open to them to waive it. Support for the contention was sought in the well known maxim

Quailed Protest Renunciare juri prose introducto""", which means, any one may, at his pleasure, renounce the benefit of a stipulation or other right

introduced entirely in his own favour. But. this maxim has exceptions.

As has been pointed out in Broom's Legal Maxims, 10th Edn. at page 481, an individual cannot waive a matter in which the public have an

interest, nor a public body, entrusted with powers to be exercised for the benefit of the public, waive their right to exercise any of those powers.

Again, where there is an express statutory direction enjoining compliance with certain prescribed forms, it cannot be dispensed with. In the instant

case the object of Section 207 of the Act, as we stated is to protect the individual share-holders against the acts of the company. To such a case it

will be inappropriate to apply the making. Reliance was, however, placed on the decisions in Commr. of Income Tax, Bombay City v. Laxmidas

Mulraj, AIR 1948 Bom 404 and Purshotamdas Thakurdas Vs. Commissioner of Income Tax, Bombay City I, , as instances where dividends

declared payable on a future date or made contingently on the happening of an uncertain event, were accepted as valid. Those cases were

concerned with the Companies Act, 1913, where there was no provision like Section 207 of the present Act.

Secondly, the problem in those cases related to the taxability of the income in the hands of the share-holder. No question arose there as to the

validity or invalidity of the declaration of dividend. In our view, Section 207 mandatorily requires that dividends declared by a company should be

paid to the share-holders within the time specified therein. Any resolution of the company which will have the effect of contravening or evading that

provision, will be invalid inasmuch as it would be contrary to the specific terms of statute, default in that respect of it being made punishable. We

are therefore unable to agree with the contention of the learned Advocate General that the punishment imposed by the section on the delinquent

persons responsible for non-payment of dividend within the time prescribed, is merely one to enforce prompt payment of the dividend. The failure

to pay the dividend within the time specified is treated as an offence and it will not be open to the share-holders to contract out of the provisions of

the section.

18. But that does not, however, dispose of the matter. The resolution dated

30-12-1959 in form and substance, consists of two parts, separable between themselves. The first part declares the dividend; the second Dart says that payments will be effected when the commission due from the principals are realised. A contravention of the provisions of Section 207 of the Act can arise only by reason of the second part of the resolution.

The invalidity of that part cannot, obviously, render the declaration of dividend itself void. We may in this connection refer to a decision of the House of Lords in *Aramayo Francke Mines limited v. Public Trustee*, 1922-2 AC 406. In that case an English company had share-holders both in the United Kingdom as well as in Germany. After the outbreak of the First World War, the company passed a resolution at its general meeting declaring dividends subject to the condition that as regards the members of the company resident in Germany and other enemy countries, the dividend should be payable only out of the assets in those countries, but as regards the share-holders in United Kingdom out of the assets in England. But under a Parliamentary enactment, any sum due to an enemy national, by way of dividend, was to be paid to the Custodian appointed under that Act. On a claim being made by the Custodian for the dividends it was held that part of the resolution which provided for payment of dividends out of the assets in Germany, was void against the Custodian and that the company was liable, out of any assets in its hands, to pay the amount of the dividend. Dealing with the argument that the resolution declaring the dividend would not entitle the Custodian representing the alien share-holders to claim the dividend, Lord Buckmaster observed :

It is contended on behalf of the appellants that there is no right whatever in the custodian trustee to any part of either of these sums of money, because either the conditions that were attached to the resolution for payment were good and they were at liberty to permit the enemy share-holders to satisfy the debt owing by the English company out of the foreign assets, or, if they were bad, the whole declaration of dividend was bad throughout, there consequently was never any declaration of dividend, and no debt is due from the company to the custodian trustee.. I will not pause to consider what the ultimate effect might be upon the directors of the company if the latter branch of this argument found favour in your Lordships' minds, because I think it is founded upon a mistaken view of these

resolutions. In truth, the company did in plain terms declare a dividend, and it was that, and that only, that was within the competence either of the directors or of the company. The conditions which were attached, except the one as to the date of payment, are conditions which there was no power whatever to make effective, but although they have purported to make these conditions of the declaration of dividend, their addition has not affected the fact that the dividend was declared. It has merely attempted to impose upon the method by which the liability thereby created was to be discharged conditions on which it is impossible for the company to rely. It is therefore my clear opinion that all these dividends were actually declared, and it results that from their declaration at their various respective dates there were debts that arose from the company to the; various share-holders, including those who may be referred to as the enemy share-holders.

19. Applying the above principle to the present case, it would follow that, where a condition as to payment of dividend at a future date is contrary to the mandatory provisions of Section 207 of the Act, such condition being invalid, the original but separable resolution relating to the declaration of dividend being within the competence of the company to pass, should alone be regarded as the resolution actually passed. In that view, the amount of dividend would become payable forthwith on such a declaration. That amount not having been paid, there will be a valid debt on which the petition for winding up of the company could be founded.

20. It is argued on behalf of the company that except these three share-holders, the other share-holders of the company have not made demands.

But that cannot prevent winding up of the company if the amount due, continue to remain unpaid. We consider that the appropriate order to be

made in the case will be to direct the winding up of the company on the ground of its inability to pay its debt, but at the same time direct the order

to be kept in abeyance for a period of three weeks in order to enable the company to pay up the dividends to the two creditors, namely, Mr. A.

C. K. Krishnaswami and Mr. Hariprasad for the year 1959. There will be no order for payment in regard to the other claims made by the

creditors, as they being disputed will have to be established in a suit. The amount of dividend due to Mr. Hariprasad will be deposited in court and

the same will be paid over to him only after due notice to the Collector of Bombay who had issued the prohibitory order and after hearing any representation that he may make. In case the amounts are paid or deposited in court as the case may be within three weeks the winding up petition will stand dismissed. In default, there will be a winding up of the company and further proceedings will ensue. The appellants will be entitled to their costs. We make no order as to payment to Smt. Godavari Bai as she has not made the statutory demand Order accordingly.