

(1970) 08 CAL CK 0009

In the Calcutta High Court

Case No : Company Application No. 126 of 1970 connected with Company
Petition No. 91 of 1970

Calcutta Safe Deposit Co. Ltd.

APPELLANT

Vs

Ranjit Mathuradas Sampat

RESPONDENT

Date of Decision : 28-08-1970

Acts Referred:

Companies Act, 1956 — Section 434, 439, 439(1)
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : AIR 1971 Cal 78 : (1971) 41 CompCas 1063

Hon'ble Judges : Ramendra Mohan Datta, J

Bench : Single Bench

Advocate : Anindya Mitter, for the Appellant; Panja, for the Respondent

Final Decision : Dismissed

Judgement

Ramendra Mohan Datta, J.—This is an application for the stay of the winding up proceedings of Calcutta Safe Deposit Co., Ltd. (hereinafter called the said company). The petitioning creditor in the winding up proceedings is one Ranjit Mathuradas Sam-pat the respondent herein. Sampat is one of the debenture holders of the debentures issued by the applicant company.

2. According to the petitioner he is the holder in due course of three debentures of the value of Rs. 1000/- each put of 250 First Mortgage Debentures issued by the company on or about June 19. 1939. Each of the said debentures carried interest at the rate of 4 1/2% per annum payable half yearly in June and in December in each year.

3. The said debentures were issued subject to and with the benefit of the conditions endorsed thereon and in an Indenture dated November 22, 1939. made between the company of the one part and Sailendra Nath Banerjee and others of the other whereby certain properties of the company were vested in trustees for securing the payment of the principal amount and interest payable in respect of the said debentures.

4. The relevant clauses of the said debentures as endorsed thereon are as follows :

"(I) The Calcutta Safe Deposit Co., Ltd. (hereinafter called the "Company") will on the 22nd day of November 1969 or on such earlier date as the principal monies hereby secured become payable in accordance with the conditions endorsed herein, pay to the bearer of this debenture or if registered to the registered holder hereof on the presentation of this debenture of Rs. 1000/-.

(2) The Company will during the continuance of this security pay interest on the said principal sum of Rs. 1000/- at the rate of 4 1/2 per annum by equal half-yearly payments on every 30th June and 31st December in accordance with the coupons annexed hereto.

(4) This Debenture is issued subject to and with the benefit of the conditions endorsed hereon, which are to be deemed part of it."

5. The conditions referred to herein above and as provided, on the reverse of the said Debenture are as follows :--

"(3) If the principal moneys hereby secured shall become payable before the 22nd day of November 1969 the person presenting this debenture for payment must surrender therewith the coupons representing subsequent interest, the company nevertheless paying the interest for the fraction, if any. of current half-year.

(4) The registered holder for the time being of this debenture when registered and the bearer thereof for the time being when not registered and the bearer of each of the interest coupons aforesaid, shall be entitled to the principal money and interest secured by such instruments, respectively free from any equities between the company and the original or any intermediate holder hereof and all persons may act accordingly, and the receipt of such registered holder or bearer, as the case may be, for such principal money and interest shall be a good discharge to the company which shall not be bound to enquire into the title of such registered holder or bearer or save as herein provided and except as ordered by some court of competent jurisdiction or as by statute required to take notice of any of equities affecting the ownership of such instruments or moneys.

(12) The principal moneys hereby secured shall immediately become payable :

(a) If the company makes default for a period of six months in the payment of any interest hereby secured and the bearer or registered holder hereof before such interest is paid by notice in writing to the company calls in such principal moneys, or

(b) If an order is made or a resolution is passed for the winding up of the company otherwise than for the purpose of reconstruction.

(13) The holders of the debentures of the above issue are and will be entitled *pari passu* to the benefit of and subject to the provisions contained in an

indenture dated 22nd day of November 1939 and made between the company of the one part, and Sailendra Nath Banerjee and others of the other part, whereby certain property of the company was vested in trustees for securing the payment of the principal moneys and interest payable in respect of the said debenture.

(15) This debenture except when registered is to be treated as negotiable.

(17) This debenture is issued subject to and in terms of the indenture referred to in Clause 13 hereof."

6. The said Indenture dated November 22, 1939 inter alia, contained the following provisions :

"(5) The trustees shall permit the company to hold and enjoy all the mortgaged premises and to carry on thereon and therewith the business or any of the businesses mentioned in the Memorandum of Association of the company until the security hereby constituted shall become enforceable as hereinafter provided and then the trustees may in their discretion without any such request next hereinafter mentioned and shall upon the request in writing of holder or holders of the one-half of the debentures (but in either case without any further consent on the part of the company or its assigns) enter upon or take possession of the mortgaged premises or any of them and may in the like discretion and shall upon the like request sell, call in, collect and convert into money the same or any part thereof etc. etc. etc.

(6) The security hereby constituted shall subject to Clause 7 hereof become enforceable within the meaning of these presents in each and every of the events following (1) if the company shall make default in the payment of any principal moneys or interest which ought to be paid in accordance with these presents; (2) if an order shall be made or resolution passed for the winding up of the company otherwise than for the purpose of reconstruction, etc. etc. etc.

(40) The company shall pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof respectively and shall observe and perform the general conditions endorsed thereon respectively.

(41) At any time after the security hereby constituted becomes enforceable and the trustees shall have determined or become bound to enforce the same they may by notice in writing to the company declare that the debentures are payable and the principal moneys thereby secured shall thereupon become payable accordingly."

7. Mr. Anindya Mitter appearing on behalf of the company contended that it is highly suspicious as to whether the petitioner is the holder in due course in respect of the said three debentures or not. According to the learned counsel the petitioner did not collect any interest by producing his coupons since July 1, 1960 and allowed a considerable time to pass by before the claim was made by the petitioner. That creates a great suspicion so far as the company is concerned, and the company accordingly is justified in asking for particulars of the transfer

in favour of the petitioner. In spite thereof the said particulars were not answered satisfactorily. The petitioner did not produce any proof of payment of consideration. Then again a letter was received from the Hongkong and Shanghai Banking Corporation dated April 20, 1970 whereby the said company intimated that ten debentures Nos. 171 to 180 of Calcutta Safe Deposit Co., Ltd. (which included the said, three debentures) were delivered to Messrs. Amritlal Ojha & Co., Ltd. on November 21, 1960. On the basis of that it is contended that the said debentures belonged to some members of the Ojha family. Thereafter disputes were started amongst the members of the Ojha family and the said debentures were not traceable.

8. The applicant to the stay application is one Navin Chandra Ojha, in his capacity as the special officer in respect of the said company. The said applicant as such special officer made searches of the old records of the company and found that one G. G. Carapiet and/or his estate collected interest upto June 30, 1960. The said special officer also referred to a letter dated February 28, 1970 written by one Chimanlal Ojha to him intimating that the said debentures were acquired by some members of the Ojha family and due to some disputes between the members of the Ojha family the present whereabouts of the debentures were not known. The said Chimanlal requested him not to make any payment without making proper enquiry and investigation as to the bona fides of the persons who might present such debentures for payment. Accordingly, the special officer is justified in not making payment in respect of the said debentures without ascertaining as to how, when, where and from whom the petitioner acquired the said debentures and became the holder in due course. The letter was not replied to by the petitioner.

9. On behalf of the petitioner it is stated that the petitioner was not present in Calcutta at the date when the affidavit-in-opposition to the stay application was filed and as such the petitioner's father had to file the affidavit-in-opposition on behalf of the petitioner. The petitioner's father Mathura Das Sam-pat stated in his affidavit that in the year 1964 his son purchased three debentures from one Kristodhone Chattedee of J. N. Lahiri Road, Serampore at a price of Rs. 2250/-. At the request of the learned counsel appearing on behalf of the petitioner, I gave leave to the petitioner to file a supplementary affidavit to corroborate the statements made by his father. In the said supplementary affidavit affirmed on August 13, 1970 the said petitioner corroborated the aforesaid statements of his father. In this connection the correspondence should be considered to ascertain the conduct of the special officer in refusing to pay the said debentures to the petitioner.

10. On or about November 22, 1969 the debentures became payable and on the very same date by his letter Sam-pat instructed his bankers for collection of the principal amount with interest upto that date in respect of the said three debentures bearing Nos. 175, 176 and 177 and to credit the amount thus realised to the savings bank account held by Sampat with the said bankers. The

bankers claimed the amount from the Special Officer who replied on November 25, 1969 to the effect that he would seek necessary directions from the High Court in that regard and in the meantime he enquired of the bankers to let him know on whose account the said debentures had been sent to the company. By their letter dated November 28, 1969 addressed to the said special officer the bankers informed that the debentures were tendered for collection by Ranjit M. Sampat of 109/2B, Hazra Road. Calcutta-26 and asked for the cheque. By his letter dated December 22, 1969 the special officer intimated that he was facing difficulty as a court officer to make payment in the absence of relative papers and documents and as such he would seek necessary directions from the Court and he assured that he would make such an application. On January 2, 1970 the petitioner wrote to his bankers and supplied a copy thereof to the said special officer, inter alia, intimating that the said debentures and the interest coupons should be returned as it was clear that the special officer had been trying to evade payment as claimed. He contended that the debentures were the bearer debentures and as such he had the right to demand payment immediately on presentation. On January 8, 1970 the special officer wrote back stating that as a court officer he was required to verify the records properly and more specially in such a case where there were disputes and suits were pending. He again emphasised that he was checking up the old records and after completing the same he would place the matter before the High Court. It was recorded therein that he asked for information as to when and how Sampat acquired those debentures and the names and addresses of the persons from whom the same were acquired as also the reasons why interest had not been collected for such a long time. Thereafter on February 6, 1970 the notice u/s 434 of the Companies Act, 1956, was sent by Sampat's Solicitor to the company claiming the sum of Rs. 4282.50. In reply thereto Messrs. T. Banerjee & Co. Solicitors for the company by their letter dated February 25, 1970, inter alia, stated that their client, the special officer did not receive any records and papers relating to the debentures in question from his predecessor-in-office and that he had been instructed to deny that Sampat acquired the debentures in question in due course, or bona fide or for valuable consideration and thus disputed the claim of Sampat. The right of Sampat to serve a notice u/s 434 of the Companies Act, 1956 was also denied and disputed by that letter. Thereafter the winding-up petition was presented on March 18, 1970.

11. On the basis of the aforesaid facts as stated in the correspondence Mr. Pania submitted that there could be no question of being suspicious about the said bearer debentures. The suspicion appears to have arisen only after the presentation of the winding-up petition. The Special Officer repeatedly stated in his letter that he would seek directions from the Court but he never did so.

12. In my opinion, in a case where the debentures are bearer debentures the same are payable upon presentation thereof and upon demand being made by the bearer. In the absence of any claim by any other party in respect of the very same debentures the special officer of the company could not have any cause to

be suspicious about the person presenting the same. It is true that as such special officer he ought to be careful to take all reasonable precautions before making payments but that does not mean that on mere suspicion he will withhold payment to the person claiming as bearer thereof on such flimsy ground as he has purported to do. In the absence of any other claimant of the said debentures and in the absence of any other substantial proof he had no further duty to ask for reasons as to why interest had not been claimed so long or to ask the bearer of the debentures to produce any proof of the payment thereof. It appears that in order to make out a ground in the stay application he wrote to the Hongkong and Shanghai Banking Corporation enquiring of them as to when the debentures were delivered to Messrs. Amritlal Ojha & Co., Ltd., and to that he got the reply from the said bank on April 20, 1970 to the effect that the same were delivered to the said Messrs. Amritlal Ojha & Co., Ltd. on November 21, 1960 according to their report. Considering the date of such delivery it does not appear to be in conflict with the petitioner's claim. In the affidavit-in-opposition to the stay application and in the supplementary affidavit of Sampat it is stated that Sampat purchased the debentures in 1964 from one Kristodhone Chatterjee of J. N. Lahiri Road, Serampore at a price of Rs. 2250/-. Accordingly the bank's letter cannot give rise to any suspicion. The said bank's record does not show what happened to the said debentures after 1960. Accordingly, that letter cannot have any bearing in respect of the purchase of the debentures by Sampat in the year 1964. Then again, the letter of Chimanlal Ojha to the effect that the said debentures belonged to some members of the Ojha family is absolutely vague and in the absence of any positive evidence from any member of the Ojha family to the effect that the said debentures belonged to him or them the special officer should not have been so suspicious as to withhold the payment for such a long time. If the motive of the special officer had been bona fide there could not have been any difficulty on his part to seek directions from this Court by making an application on the materials he had already obtained in his possession. The special officer did nothing of the kind and I have every reason to come to the conclusion that the special officer was not acting reasonably and bona fide in the matter of withholding the payment in the way he has done. Even in the stay application his attitude is such that he would not be satisfied by any explanation and it appears that he is bent upon withholding the payment under any circumstances.

13. In paragraph 9 of the stay application the special officer stated that he made searches of the old records of the company and he found that a series of debentures containing 10 in number and bearing numbers 171 to 180 belonged to one G. G. Carapiet and interest on the said debentures were collected on behalf of the said G. G. Carapiet and/or his estate after his demise until June 30, 1960. Thereafter the interest coupons in respect of the said debentures were not presented and out of the said series of 10 debentures 7 were redeemed long before disputes started between the members of the family. In paragraph 8 of the am-davit-in-opposition in the stay application on behalf of Sampat it was

stated that by letter dated May 11, 1970 inspection was claimed of the said purported old records to the Solicitor but inspection was not given.

14. It is surprising that even though the special officer came to know that the said debentures belonged to the said G. G. Carapiet and/or his estate upto June 1960 yet nothing was mentioned about the same in his correspondence and further that even though the names and addresses of the sellers of those debentures were stated in the affidavit-in-opposition which was filed as far back as on June 26, 1970 no enquiry was made by the special officer from the said person to verify the same. Moreover, u/s 118 of the Negotiable Instruments Act until contrary is proved, every negotiable instrument would be presumed to have been negotiated or transferred for consideration and that a holder is a holder in due course unless fraud or unlawful consideration in obtaining the same would be alleged against such holder. That being the position in law, the bearer had no obligation in the facts and circumstances of this case to explain to the company as to how he became the holder in due course in respect of the said debentures or why he did not collect the interest thereon so long and the company was bound to pay the proceeds thereof as also the arrears of interest to the holder presenting the same. It is settled law that the bearer debentures are negotiable instruments and Clause 15 of the debentures also makes them negotiable instruments and as such the provisions of Section 118 were applicable to the same.

15. Accordingly, I hold that the dispute sought to be raised by the special officer on this ground is not a bona fide dispute.

16. The second point urged on behalf of the company was that the contract in issuing the debentures was entered into by and between trustees and the company and accordingly, the bearer debenture bond holders could not have claimed directly against the company without making such claim through the trustees. Mr. Mitter has relied on the Indenture dated November 22, 1939 entered into by and between the trustees and the company and has drawn my attention to Clauses 3, 4, 6 and 41 thereof as set out hereinabove. Those clauses provide that the company's assets as mentioned therein were charged in favour of the trustees for the purpose of making payment of the debentures and how and in what manner the said security would be enforced by the trustees when the same would be enforceable.

17. In support of his contention Mr. Mitter has cited before me an English decision in the case of *In re Dunderland Iron Ore Co., Ltd.*, reported in LR (1909) 1 Ch 446 where it was held that the stockholders whose interest was in arrears were not entitled to present a winding-up petition as creditors u/s 82 of the Companies Act, 1862. That was the case of the registered stock-holders who according to Clause 1 of the trust deed, were the several persons for the time being entered in the register therein mentioned as holders of the stock. According to Clause 6 of the said trust deed the stock could be held subject to the conditions set forth in the first schedule thereto and such conditions would be

binding on the company and the stock holders and all persons claiming through them respectively. The first schedule provided the condition under which, inter alia, interests were payable by the company to the registered stock holders. Upon the presentation of the petition for winding up by some of the stock holders for non-payment of interests the same was opposed by the holders of 1,00,0001 prior lien debentures and their trustees, first on the ground that the petitioners were not the creditors within Section 82 of the Companies Act. 1862, and secondly, on the merits. In delivering his judgment Swinfen Eady J. distinguished the case of the debentures stock-holders from the case of the bearer debenture holders. The petitioners being the debentures stock holders their stock was created by the trust deed of November 29, 1904. The only parties to that deed were the company and the trustees. The learned Judge observed :

"In my opinion the true legal position is that the debenture stock-holders, although cestuis que trust, are not creditors of the company. They have not any direct contract with the company. The contract is between the company and the trustees, and in these circumstances I am of opinion that the petitioners- are not creditors entitled to present a winding-up petition. It is not a case in which there is any negotiable security or any coupons issued. The petitioners are merely the registered holders of debenture stock, and the only covenant to pay the principal and interest to the stock-holders is a covenant made between the company and the trustees."

18. The above passage would clearly show that the learned Judge made a distinction between the case of a registered debentures stock-holders with that of a bearer debenture bond which is a negotiable security. That clearly distinguishes the case reported therein from the instant case before me where the bearer debentures have been expressly declared to be treated as negotiable instruments under Clause 15 set out herein-above.

19. Mr. Panja appearing on behalf of Sampat referred me to Clause 40 of the said Indenture set out hereinabove and contended that by that clause the company agreed to make the payment of the principal and the interest directly to the bearer debenture holder. According to him Clause 41 is for the purpose of enforcing the security. Here Sampat is not seeking to enforce the security. That question could have arisen if he had filed a suit. Here the only question is whether a claim has arisen and, if so, whether the company under Clause 40 of the said Indenture and by the conditions mentioned in the debenture bond, is liable to pay to the bearer debenture holder directly.

20. The right of the bearer debenture holder under Clause 40 of the said Indenture, in my opinion, in getting payment directly from the company has been recognised and accordingly Clause 1 and condition 4 as mentioned in the debenture bond make it obligatory for the company to make the payment directly in accordance with the tenor of the said debenture bond.

21. Mr. Panja has referred to the case of Bachharaj Factories Ltd. Vs. Hirjee Mills

Ltd., . There the Division Bench of the Bombay High Court in dealing with bearer debentures distinguished the case before them from the said English decision reported in (1909) 1 Ch 446 and relied on two other English cases viz.. In re Borough of Portsmouth Tramways Co. reported in (1892) 2 Ch 362 and In re Olathe Silver Mining Co. reported in (1884) 27 Ch D 278. The said Division Bench also relied on the principle set out in a passage in Buckley on the Companies Act. The said passage appears in the 13th Edition at page 464 as follows :

"But where the obligation to debenture holders was direct by the company to pay the bearer, the bearer could present a petition."

22. The principle can best be understood if it is remembered that in making the winding up petition what is being enforced by the debenture holder is the right under the bearer debentures to make a claim on the company for the unpaid debt due to him through the machinery of winding up as provided by statute and not the right to enforce the security covered by the debentures. This is a statutory remedy which has been provided not to enforce the claim but to enable the Court to decide by using its discretion as to whether the company should be allowed to do its business as a going concern or should be wound up so that all the creditors' dues might be paid off in the manner as provided by law. In a case where this remedy is not pursued by the creditor and the suit is filed, the creditor would no doubt think of enforcing his security as well and in doing so has got to make the trustees the parties to the suit inasmuch as the indenture of trust is entered into by and between the company and the trustees and not with the debenture holders.

23. In any event, a special right has been given to the debenture holders and they would be deemed to be the creditors within the meaning of Clause (b) of Sub-section (1) of Section 439 of the Companies Act, 1956. This new definition of the word "creditors" has been introduced by the 1956 Act and accordingly the debenture holders' right to present a petition for winding up has been recognised by the statute.

24. Accordingly, in my opinion there is no substance in the contention of Mr. Mitter on this point and I reject the same.

25. On the basis of the aforesaid point Mr. Mitter submits that in any event, this is a point of law of great substance and accordingly it raises a substantial dispute which the winding up court should not go into or decide and in support of that relied on the case of Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, . There the company declared dividend which according to law was to be paid within three months from the date of declaration. The declaration of the dividend was made on the basis of a resolution that the payment of the dividend was contingent on the receipt of the commission from other concerns. It transpired that the said commission was not received within the time of three months. Before the trial court the company's solvency was proved. The Supreme Court at page 463 observed :

"Further we are satisfied that the question whether the declaration of dividend dated December 30, 1959 is valid or not raises a substantial question as to the interpretation of Section 207 of the Companies Act. Further, whether the declaration dated December 30, 1959, is severable or not is also a substantial question. We do not propose to decide whether the declaration of dividend was valid or not or whether it was severable or not, because in these proceedings we are only concerned with the question whether the debt was bona fide disputed by the company on substantial grounds. If the debt was bona fide disputed, as we hold it was, there cannot be "neglect to pay" within Section 434(1)(a) of the Companies Act; if there is no neglect, the deeming provision does not come into play and the ground of winding up, namely, that the company is unable to pay its debts is not substantiated."

26. In the instant case before me In the correspondence no such grounds were made out. The company disputed the claim of the petitioner on different grounds as mentioned hereinabove and as such, in my opinion the deeming clause will operate and the company would be deemed to be unable to pay its debts within the meaning of the said provision. The debt, in my opinion, was disputed by the company on the ground that the petitioner was not a holder in due course in respect of the debentures. In other words, if the company would have been satisfied with the particulars about the petitioner being the holder in due course the company would have made payment to the bearer as the company had done in other cases. What has been called a substantial ground is really a ground which was sought to be made out by the company when the matter reached the hands of the lawyer in the stay application. Such ground can, of course, be decided by the winding up Court, however, difficult it might be. In my opinion, the Supreme Court has not observed anywhere in their judgment that if and as soon as any substantial point of law would be raised in the stay application the same should not be decided by the winding up Court. What it lays down is that if the debt is bona fide disputed by the company on substantial ground it would not be deemed to be unable to pay its debts and as such the deeming provision as provided u/s 434 would not come into play on the basis that there would be no neglect to pay the debt. If it is a substantial question of law which is raised by the company to express its inability to pay and if it is bona fide disputed, the winding up Court will not decide the same to find out whether the point of law is correct or not and would leave the parties to have the point decided elsewhere by suit or otherwise. Accordingly, the Supreme Court case has no application to the facts of the case before me and I reject the contention of Mr. Mitter on this point.

27. The last point which has been raised by Mr. Mitter is that a secured creditor unless his security is insufficient, has no right to present a winding up petition. Mr. Mitter contends that there is no averment that the security is insufficient. Mr. Mitter has relied on the case of Karnatak Vegetable Oils and Refineries Ltd. Vs. Madras Industrial Investment Corporation Ltd. and Another, where the Division Bench of the Madras High Court held that the winding up would not be ordered where the security was rather an ample security and there was no averment that

the security was insufficient.

28. That was a case which was decided under the provision of the Indian Companies Act, 1913. Under the Companies Act, 1956 the definition of the word "creditor" has undergone a radical change so as to include therein a secured creditor as well and such right has been provided under Sub-section (2) of Section 439 of the Companies Act, 1956 by virtue of which a secured creditor shall be deemed to be a creditor within the meaning of Clause (b) of Sub-section (1) of Section 439 of the Companies Act, 1956.

29. Mr. Mitter admits the position up to that but contends that even then the deeming provision of Section 434 will not come into play and the company will not be deemed to be unable to pay unless it is shown that the security is insufficient. The question, therefore, is whether the company should be deemed to be unable to pay its debts if the security for the debt is sufficient. In my opinion the decision of this question involves the interpretation of Clause (a) of Sub-section (1) of Section 434 of the Companies Act, 1956. The said section is set out below :

"434. (1) A company shall be deemed to be unable to pay its debts--

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; Or

(b) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) 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.

(2) The demand referred to in Clause (a) of Sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

30. It would appear that Sub-section (1) (a) provides, inter alia, that in order to attract the said provision all that the creditor would do is to deliver the demand letter to the registered office of the company requiring the company to pay the sum due to him and thereafter the company in its turn has (a) neglected to pay the same (b) or has neglected to secure the sum so due to the reasonable satisfaction of the creditor and (c) or has neglected to compound for it to the reasonable satisfaction of the creditor.

31. Mr. Mitter argued that if the sum so due is already secured does this sub-section require further security within the period of the said three weeks? He contends that it cannot be the intention of the legislature to get a further security from the company if the creditor is already secured. If Mr. Hitter's contentions are accepted as correct it would amount to this that the secured creditor has no right to present a winding up petition. If that was the intention of the legislature then how could the new Sub-section (2) be enacted under the Act of 1956 so as to recognise the right of the secured creditor and also of the debenture holders including debenture stock-holders to present a winding up petition as creditors for non-payment of the dues by the company? In my opinion, if a secured creditor would serve a notice u/s 434 then within the period of the said three weeks the company must take action in the matter and satisfy the creditor that his claim would either be paid or that his security is intact. He must in such a case, come to some arrangement with such creditor so that the creditor would be satisfied that there would not be any difficulty in his obtaining payment at some point of time as would be agreed upon by and between the creditor and the company.

32. In the case before me the bearer debentures having become payable on maturity in terms of the debenture bonds and a notice of demand u/s 434 of the Companies Act, 1956 having been received by the company, the company became liable to pay the sum covered by the debenture bonds within the statutory period. If in spite thereof the company would choose not to come to some arrangement with the secured creditor then the same would amount to neglect to pay or to secure or to compound for it to the reasonable satisfaction of the creditor. In other words, the company got the opportunity but did not avail of it.

33. Under such circumstances, he can pursue the remedy as provided by the Companies Act, 1956 and ask the winding up Court to exercise its discretion and, if thought fit, to wind up the company. The remedy provided by the said statute is not to recover the petitioning creditor's dues alone but if an order for winding up is made such creditor would be ranked *pari passu* with all other creditors of his class and all such creditors would be paid to the extent of the assets available to the winding up court. Accordingly, such remedy is quite different from his right to recover his dues which he pursues by way of a suit under the general law of the land against the company as a going concern. All that the Companies Act under such circumstances, provides for them is that the creditor gets a right to present the winding up petition. Such right accrues to the creditor because of neglect of the company to pay or to secure or to compound within the meaning of Section 434 of the Companies Act, 1956. Here the right to present the petition accrues because of the company's failure to perform the statutory obligation as stated above. This right is different from the right to enforce the security.

34. In this case far from paying or securing the claim of the petitioner within the statutory period the company by the Solicitor's letter, as stated above, disputed

the claim of the petitioner. The company denies that the petitioner is the rightful claimant. According to my finding as stated herein above, that contention of the company has no force behind it and the petitioner had the right to make the claim against the company in respect of the said bearer debentures.

35. Accordingly, the contention that the claim of the petitioner was already secured and that if the claim was to be further secured after the statutory notice the same would amount to double security, is illusory. The question of double security could only arise if the existing security was admitted. It follows that for the purpose of the winding up petition there is no security so far as the claim of Sampat is concerned. That being the position, there is neglect on the part of the company to secure the claim of the petitioner within the meaning of Section 434 of the Companies Act, 1956 and the deeming provision would be attracted after the expiry of three weeks mentioned therein.

36. In a winding up petition presented by the secured creditor the company can be said to have raised a subsentential and bona fide dispute in the stay application, if the company would admit the transactions with such secured creditor and would reasonably satisfy the secured creditor that his security is intact and that the company is in a position to pay either in the correspondence prior to the statutory notice or within the statutory period as provided u/s 434 of the Companies Act, 1956. In such a case and under such circumstances, the right of the secured creditor to present the winding up petition would also be lost inasmuch as that would amount to an abuse of the process of the court and the remedy provided under the Companies Act, 1956 would not be available to the secured creditor. Under such circumstances he has to pursue his remedy through the ordinary process of law.

37. To my mind, that is the correct interpretation and the only meaning of the expression "to secure or compound for it to the reasonable satisfaction of the creditor" in relation to the secured creditor.

38. The result is that Mr. Mitter's contentions on this point fails and the same are rejected.

39. The overall result is that none of the grounds raised by Mr. Mitter can amount to a bona fide or substantial dispute in respect of the claim put forward by the petitioner in his winding up petition and accordingly this application must be and is hereby dismissed with costs.