

(1988) 06 KAR CK 0039

In the Karnataka High Court

Case No : Company Application No. 502 of 1987 in Company Petition No. 47 of 1986

G.T. Swamy and Another

APPELLANT

Vs

Goodluck Agencies and Another

RESPONDENT

Date of Decision : 03-06-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Companies (Court) Rules, 1959 — Rule 6, 9
Companies Act, 1956 — Section 433 (e), 443, 466, 518, 529

Citation : (1990) 69 CompCas 819 : (1988) ILR (Kar) 3147

Hon'ble Judges : P.P. Bopanna, J

Bench : Single Bench

Advocate : Udaya Holla, for the Appellant; S. Vijayashankar, for the Respondent

Judgement

P.P. Bopanna, J.—The petitioners-directors have filed this application under the provisions of rules 6 and 9 of the Companies (Court) Rules, 1959, read with section 151, Civil Procedure Code, and section 466 of the Companies Act, 1956 (in short the Act"), for the following reliefs :

"That this court may be pleased to recall the order dated February 6, 1987, passed by this Hon"ble court in Company Petition No. 47 of 1986 for winding up of the company by name Super Galaxy Drugs Pvt. Ltd. Alternatively, it is prayed that this court may be pleased to permanently stay the winding up order dated February 6, 1987, passed by this court winding up the aforesaid company in Company Petition No. 47 of 1986."

2. The petitioners are the directors of the company by name Super Galaxy Drugs Pvt. Ltd. (in liquidation). They are also the only two share-holders. This company was ordered to be wound up by this court by its order dated February 6, 1987. It is not in dispute that the official liquidator, pursuant to the order of winding up, had complied with the necessary formalities of winding up. The respondent had invoked the jurisdiction of this court for the winding till of the aforesaid company

under the provisions of section 433(e) of the Act. But, before the official liquidator could take possession of the assets of the company (in liquidation), the petitioners, claiming to be the shareholders, had filed this application for the reliefs which I have expected above. The reason for filing this application is that subsequent to the order of winding up passed by this court, the petitioners had paid a sum of Rs. 5,168.15 due to the respondent-company, i.e., the Petitioner in the company petition, and the balance was paid after the filing of this application and, therefore, the company (in liquidation) is not due in any sum to the respondent company and hence the order of winding up passed by this court in exercise of its jurisdiction u/s 433(e) of the Act would cause considerable prejudice to the petitioners. It is further submitted in the application that there are only two creditors of this company, viz., J. T. Parameshwaraiah and Sri Veerabhadraiah, who have absolutely no objection to receive the amounts due to them after the company (in liquidation) starts making profits. They, in fact, had not entered appearance before this court when this court ordered advertisement of the company petition. It is further asserted in paragraphs 9 and 10 of the application that the drugs manufactured by the company (in liquidation) are well received in the market and the company has great potential to run its business profitably; that the assets of the company are valued at Rs. 5 lakhs and about 23 persons have come forward to invest in the equity capital of the company and each one of them has come forward to invest a sum of Rs. 10,000 in the equity capital of the company.

3. In Support of these assertions, the petitioners have filed exhibits R-1, R-2, R-3 and R-4.

4. This application is not opposed by the respondent-company. It is also not opposed by the two creditors of the company (in liquidation). But the official liquidator has objected to the first relief prayed for in the petition. It would be noticed that he has not filed his objections on the other averments made by the petitioners in support of their plea that it is just and necessary that the order of winding up made by this court should be recalled or alternatively the order of winding-up proceedings before this court in Company Petition No. 47 of 1986 should be permanently stayed.

5. Mr. Udaya Holla, learned counsel appearing for the petitioners, has relied on rules 6 and 9 of the Companies (Court) Rules, 1959 (in short "the Rules"), and also on the two decisions of the Supreme Court and the decision of this court which was affirmed in appeal in O.S.A. No. 7 of 1987.

6. I will first consider the earlier decisions of this court on this point. In Company Application No. 2 of 1987 in Company Petition No. 17 of 1985, an application was presented by one of the directors of the company (in liquidation) for recalling the ex parte order of winding up passed against that company in that petition. A preliminary objection was taken as to the maintainability of the application in view of the fact that this court had already ordered the winding up of the company on September 25, 1986. This court relied on the decision of the Delhi

High Court in *Anil Kumar Sachdeva v. Four "A" Asbestos P. Ltd.* [1980] 50 Com Cas 122 and the provisions of rule 6 of the Rules and overruled the office objections and recalled the earlier order of winding up dated December 16, 1986. This order was taken up in appeal by the official liquidator and the same was dismissed in O.S.A. No. 7 of 1987, by an order of the Division Bench dated March 12, 1987. Subsequently, in another matter from this court which was taken to the Supreme Court by way of special leave in S.L.A. (Civil) No. 2583 of 1987, the Supreme Court made the following order :

"The petitioner stated that he is willing to pay the money and there is already a settlement between the parties. If this is the position, this will not preclude the petitioner to move the High Court for recalling the order of winding up. In view of this, he does not press this petition which is accordingly dismissed as withdrawn."

7. That S.L P. was against the order of this court winding up the company by name Mushrooms Ltd. and that order of winding up was affirmed in O.S.A. No. 9 of 1986.

8. In *Sudarsan Chits (I.) Ltd. v. G. Sukumaran Pillai* [1985] 58 Com Cas 633, the Supreme Court in para 14 of its judgment observed as follows (at page 641) :

"Now, if the winding up order was merely held in abeyance, i.e., it was not operative for the time being, but had not ceased to exist, the winding-up proceedings are in fact pending and the court which made the winding-up order would be the court which is winding up the company. It is now well-settled that a winding-up order once made can be revoked or recalled, but till it is revoked or recalled, it continues to subsist. That is the situation in this case. If the winding-up order is subsisting, the court which made that order or the court which kept it in abeyance "I have jurisdiction to give necessary directions to the provisional liquidator to take recourse to section 446(2)."

9. It is on the basis of these rulings of this court and of the Supreme Court and the provisions of rules 6 and 9 of the Rules that Mr. Holla submitted that it is within the jurisdiction of the company court to recall the order made by it earlier in the winding-up petition and the provisions of Part VII of the Companies Act which deal with the winding-up proceedings before the company court would not be a bar for exercising the power under rules 6 and 9 of the Rules.

10. Mr. S. Vijayashankar, learned counsel appearing for the official liquidator, has contended that under the scheme of the Companies Act, once the winding up order is made, what is left to the court under Part VII of the Act is to stay further proceedings pursuant to the winding-up order as provided for u/s 466 of the Act and this court has no inherent power under rules 8 and 9 to recall the order of winding up. He submitted that the power to recall the winding-up order could be resorted to by this court only if this court has made an order by mistake. but it is not so in this case. Secondly, he submitted that this power of recall should not be exercised by this court since a right of appeal is provided for under the Act and that has not been availed of. Even otherwise, the only relief

that could be granted on the facts and circumstances of the case is to stay the winding-up proceedings pursuant to the order of winding up made by this court. He relied on several decisions of High Courts in support of this plea.

11. The first submission made by Mr. Vijayashankar may be disposed of now itself since that point is covered by the decisions of the Supreme Court in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, and *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, .

12. In *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, , the Supreme Court, in its majority judgment, observed as follows (at page 532) :

"There is difference of opinion between the High Courts on this point. One view is that a court cannot issue an order of temporary Injunction if the circumstances do not fall within the provisions of Order XXXIX of the Code : *Vadapalli Varadacharlu Vs. Khandavilli Narasimha Charlu*, ; *N. Govindarajulu Nayudu Vs. Imperial Bank of India*, ; *Karuppayya Nadar through his authorised agent Ratnasami Nadar Vs. Ponnuswami Nadar and Another*, (2); *Murugesu Mudali Vs. Angamuthu Mudali*, and *Subramanian v. Seetarama* AIR 1949 Mad 104 . The other view is that a court can issue an interim injunction under circumstances which are not covered by Order XXXIX of the Code, if the court is of opinion that the interests of justice require the issue of such interim injunction : *Dhaneshwar Nath Tewari Vs. Ghanshyam Dhar Misra*, ; *Firm Bichchha Ram Babu Ram Vs. Firm Baldeo Sahai Suraj Mal*, ; *Bhagat Singh Bugga Vs. Dewan Jagbir Sawhney*, , and *Chinese Tannery Owners' Association and Others Vs. Makhan Lal and Others*, . We are of opinion that the latter view is correct and that the courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order XXXIX, Civil Procedure Code. There is no such expression in section 94 which expressly prohibited the issue of a temporary injunction in circumstances not covered by Order XXXIX or by any rules made under the Code. It is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so prescribed" is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of section 94 were not there in the Code, the court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the court's exercising that jurisdiction and the court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of section 94 of the Code have their effect and not in taking away the right of the court to exercise its inherent power."

13. A similar question about the powers of the court to issue a commission in the exercise of its powers u/s 151 of the Code in circumstances not covered by section 75 and Order XXVI arose in *Padam Sen and Another Vs. The State of Uttar Pradesh*, and this court held that the court can issue a commission in such circumstances. It observed (at page 887 of SCR); at (page 219 of AIR) thus :

"The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those Powers and, therefore, it must be held that the court is free to exercise them for the Purposes mentioned in section 151 of the code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature."

14. These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically, stated in section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice.

15. When this question came up for consideration again before the Supreme Court in *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, , Krishna Iyer J., speaking for the Bench, observed as follows (at page 1154) :

"Rejecting, therefore, the recommendations for solution of the problem arising here, as put forward by counsel for the appellants, We have to devise other measures. We are aware of our limitations :

"The judge, even when he is free, is still not wholly. free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuance of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life". Wide enough In all conscience is the field of discretion that remains." (Benjamin Cardozo's *The Nature of the Judicial Process*, Yale University Press (1921)).

The difficulty we face here cannot force us to abandon the inherent powers of the court to do. "The inherent power has Its roots in necessity and its breadth is coextensive with the necessity". (Theoretical Basis of Inherent Powers Doctrine. Text material prepared by Jim R. Carrigan - Publication of National College of The State Judiciary, USA.) Certainly, we cannot go against any statutory prescription. Had India had a developed system of class actions or popular organisation taking

up public interest litigation, we could have hoped for relief otherwise than by this court order. We lag in this regard, although people are poor and claims are individually trivial.

The legal aid to the poor has a processual dimension. As things stand, if each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small, a suit too prohibitive in time and money and the wrong would go without redress. If there is to be relief, we must construct it here by simple legal engineering."

16. So, the next contention of Mr. Vijayashankar is that so long as a right of appeal is available against the order of the company judge, the company court should not exercise its power under rules 6 and 9 of the Rules. No doubt the right of appeal is conferred by the Act against the order of the company judge made u/s 433(e) of the Act. But, in this case, the applicants are not aggrieved by the order of the winding up in the sense that the same is bad in law. Their prayer is that this winding-up order should not be given effect to since the petitioners have settled all the claims against the company and the company now is in a position to carry on business within the framework of the Act and if the winding-up order were to be given effect to, great prejudice would be caused to the interests of the company. Their case is supported by the fact that the respondent-company has also not opposed this application obviously because their claim is satisfied and hence they are not interested in seeing this company remaining under the constraints of winding-up proceedings and that is where the power of this court under rules 6 and 9 of the Rules comes into play. Rule 6 reads as under :

"Practice and procedure of the court and provisions of the Code to apply. - Save as provided by the Act or by these Rules, the practice and procedure of the court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the court."

17. Rule 9 reads as under :

"Inherent powers of court. - Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

18. A combined reading of rules 6 and 9 indicates that the inherent power of this court could be exercised in the manner provided u/s 151, Civil Procedure Code, except in cases where the Act and the Rules provide otherwise. So, the line of enquiry this court has to adopt for discerning the limits of its powers under rule 9 is to see whether there is anything in the provisions of the Act or in the Rules which takes away the power of this court to recall an order of winding up in the circumstances mentioned in the company application. Mr. Vijayashankar, relying

on the provisions of sections 444, 445, 446, 447, 466 and 529 of the Act says that the power conferred on this court under those provisions would indicate that the court's power is only limited to staying of winding up proceedings, once an order of winding up is made. This argument of Mr. Vijayashankar takes me to the scope of Part VII of the Act which deals with winding up. The winding-up proceedings under the Act comes under Part VII of the Act. Chapter I in Part VII deals with modes of winding up, Chapter II deals with the provisions of winding up by the court, Chapter III relates to the provisions of voluntary winding up, Chapter IV relates to provisions of winding up subject to supervision of court and Chapter V relates to provisions applicable to every mode of winding up. These provisions commencing from section 425 of the Act up to section 560, confer certain powers on the court to deal with the matters pertaining to winding up of companies, both registered and unregistered. But, there is no provision in Part VII which impinges on the court's inherent power that is conferred under rule 9 of the Rules. Mr. Vijayashankar relied on section 466 of the Act which confers powers on court to stay the winding-up proceedings any time after making the winding-up order. u/s 466(1), the court may, at any time after making a winding-up order, on the application either of the official liquidator or of any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

19. He has submitted that the power conferred on the company court u/s 466(1) is an indication that the court can only stay further proceedings in winding up but it has no power to recall the order of winding up. In my view, if the scheme of Part VII of the Act is taken as a whole, it is clear that the power conferred on the court in Part VII relating to winding up is a power to stay the proceedings of winding up and that power does not in any way conflict or nor is it inconsistent with the inherent power of the court under rule 9 of the Rules. The decisions of High Courts on which Mr. Vijayashankar relied do not deal with the inherent power of the company court under rule 9. Certain observations made by High Courts in India on this aspect of the case will be noticed presently. These observations were made by the High Courts before the Supreme Court made the rules in exercise of the power u/s 643 of the Act. Section 643 of the Act reads as under :

"Power of the Supreme Court to make Rules. - The Supreme Court, after consulting the High Court -

(a) shall make rules providing for all matters relating to the winding up of companies which by this Act are to be prescribed; and may make rules providing for all such matters as may be prescribed, except those reserved to the Central Government by sub-section (5) of section 503, sub-section (3) of section 650, section 552 and sub-section (3) of section 555; and

(b) may make rules consistent with the CPC (3 of 1908) ..."

20. Mr. Vijayashankar relied particularly on the decision of the Madras High Court in *Sri Shanmugar Mills Ltd. v. S. K. Dharmaraja Nadar* [1969] 39 Com Cas 297. A Division Bench of the Madras High Court, affirming the decision of the company judge of that court, observed (at page 306) :

"Sri Ramamurthi Iyer strongly urges that by sanctioning the proposals in C.M.P. Nos. 14419 and 14420 of 1967 as they stand, the rights of Jaya Jothi and Company are in no way prejudiced, and asks, for whose benefit the winding-up order is to be continued ? That is not at all the proper approach in a case of this kind. The court cannot hand over a commercially insolvent company to the shareholders and let the share-holders loose upon the market, free to raise loans. The court owes a duty to the public in such a matter. This is the principle which has been laid down in the cases decided so far. The cases have been collected in Buckley's Commentary on the Companies Acts of England, u/s 256 of the Companies Act, 1948, page 533 of the 13th edition, 1957, and in Halsbury's Laws of England, in paragraphs 1397 and 1398, volume 6, and in Palmer's Company Precedents, Part II, Chapter 12. The cases lay down that the considerations which should govern the court in an application for stay of the winding-up order are precisely the considerations which would govern the court when it is asked to stay a receiving order in bankruptcy. These principles are discussed in some cases.

Thus, in *Hester, In re* [1889] 22 QB 632, a receiving order was made in bankruptcy. The debtor originally wanted to appeal, but later gave up his intention, and, instead, applied to rescind the receiving order on the ground that the creditors consented to the rescission. Many of them had given receipts in full for their dues, but it was not pretended that payment in full had, in fact, been made to them. No meeting of the creditors had been held but the consent had been obtained by means of applications made by the debtor to each creditor individually. The Registrar refused to rescind the receiving order. His order was upheld by Cave J. and Charles J. There was a further appeal to the court of appeal, and there also the decision of the Registrar was confirmed. It is pointed out in all the judgments that the consent of the creditors alone "I not justify the court in annulling the adjudication or rescinding the receiving order. Cave J. observed that it is not right to let a man, who is unable to pay his debts in full, loose upon the public to continue his trading without the court having any right of veto. Lower down he observed that the consent of the creditors was not the only thing to be considered and added :

"The court must consider the position of the debtor, the possibility of his getting over his difficulties, and the interests of the public. It is clearly contrary to their interests that a man who is insolvent should be allowed to go on trading. In fact, it is an offence under the Act for a trader to continue trading after he knows that he is insolvent."

Lower down he states :

"We should not be doing our duty to the community if we were to sanction the rescission of the receiving order. To my mind, this man is hopelessly insolvent. Without any estimate, even by himself, much less by any competent persons, of his present position - his assets and liabilities - he asked us to take for granted that, if he is allowed to go on, he will be able to pay his creditors in full. I am perfectly certain that he will not. He will probably succeed in very much enlarging the area of his indebtedness, but I am pretty certain he will not diminish it."

In the Court of Appeal, Lord Esher M.R. stated (at page 639) :

"Although the consent of all the creditors has been obtained, the court will still consider whether that they have agreed to is for the benefit of the creditors as a whole. The court has gone still further, and, I think rightly so, and has said that under the present Bankruptcy Act, it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger. The court has said this before, and I adhere to it now."

Fry L.J. observed (at page 641) :

"We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country.""

21. Relying on these observations, Mr. Vijayashankar contended that by recalling the order of winding up already made by this court, this court would be exposing persons who are not parties to the application to the risk of entering into transaction with the company (in liquidation) and that will not be the object of the rule-making power conferred on the Supreme Court when they made rules 6 and 9. What he submitted was that the order of winding up involves an element of commercial morality also and binds all persons who are not parties to the winding up order and by permitting the recall of the winding up order, this court will not be achieving the object of rule 9. He also relied on a decision of Justice S. R. Das, as he then was, in *East India Cotton Mills Ltd., In re* [1949] 19 Com 61 Cas 61 (Cal). That was a case decided by the Calcutta High Court under the Indian Companies Act of 1913. One of the points that arose for consideration in that case was whether the company court should exercise the power of staying winding-up proceedings under the provisions of section 173 of the old Act. The Calcutta High Court, on the facts before it, took the view that it was not a fit case for staying further proceedings. The learned judge in para 50 of his judgment observed as follows (at page 93) :

"In this application, the petitioners also pray for the stay of the winding up proceedings u/s 173, Companies Act. This section comes into play after an order for winding up has been made. It presupposes a good and valid winding-up order.

In an application under this section, there can be no question of attacking the order. Any creditor or contributory may make an application under this section. Therefore, each of the petitioners is fully qualified to maintain this application in so far as it is one under this section. The company, however, independently of the liquidator, does not appear to me to have any locus stands in such an application. The section requires proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed. What has happened to justify a stay of proceedings ? I have already dealt with and rejected the allegations of collusion between Shiva Prosad and Manabendra and the suppression of service of the petition. Has anything happened since the order was made ? All that has happened is that the petitioning creditor has been satisfied, not by the company but by Dulichand, a creditor of the company. But is the satisfaction of the petitioning creditor's debt by itself sufficient to stay the winding up when there are other creditors ? It is said that Dulichand who, in his firm of Murarilal Dulichand, claims about Rs. 90,000, Jewraj Ram Kissen who claims also about Rs. 90,000 and is represented by Mr. M. N. Banerjee are supporting this application. On the other hand, there is the creditor, Manabendra. Manabendra claims to be a creditor in the sum of Rs. 5,24,651. It is probable that he agreed to accept Rs. 25,000. I do not propose to go into the question whether the settlement with him was on any condition or whether the condition has been broken. Admittedly, Rs. 25,000 is due to him. The petitioners, through their counsel, offer to pay Rs. 25,000 to him in full settlement which Manabendra is not prepared to accept. There is also one Khagendra Lal Saha, who appeared before Edgley J. and filed an affidavit claiming Rs. 6,444.46 and objected to any stay but who has not been served with the present summons. Lastly, there are the banks and other creditors shown in the balance-sheet as at December 31, 1944, about whose claim nothing has been said - in the petition, and the affidavits before Further, even if all the creditors consent to a stay is the court bound grant a stay ? The principles on which the court proceeds on an application of this kind have been summarised in Halsbury's Laws of England, second edition, volume 5, article 1209, at page 724, in the following terms :

"In the exercise of its jurisdiction to stay, the court so far as possible, acts upon the principles applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual. The court refuses, therefore, to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. In particular, the court will have regard to the following facts : That directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement of the affairs; that there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid-up shares forming the consideration for the purchase of property by the company on its formation; that the promoter has made gifts of

fully paid-up shares to the directors, that there are other matters connected with the promotion, formation, or failure of the company or the conduct of its business or affairs, which appear to the court to require investigation. The same principles are apparently applicable whether the company has or has not invited the public to subscribe for its shares except, possibly, In the case of a private company where all the shareholders have full knowledge of what has been done."

This summary of the law is based on the observations of Buckley J. in the case of Telescriptor Syndicate Ltd., In re [1903] 2 Ch 174 : 72 LJ Ch 480 wherein reference was made to the trenchant observations of Fry L.J. in the earlier case of Hester, In re [1889] 22 QB 632, at page 641 60 LT 943. I, therefore, proceed to consider the facts in the light of these principles."

22. Rules 6 and 9 of the Rules were not on the statute book at that time and, therefore, this decision cannot be treated as an authority for the proposition that this court has no power to recall an order of winding up made by it. As noticed earlier, the inherent power of the civil court u/s 151 of the CPC is conferred on the company court under rules 6 and 9 and that power has to be exercised as noticed by the Supreme Court in the cases where this court has to do justice between the parties.

23. One factor which strongly supports the case of the petitioners is that the respondent-company has not opposed this application nor the two creditors of the company (in liquidation). So, this court has Inherent power to render justice between the parties and that is the reason the Supreme Court, in its two decisions to which I have already made a brief reference, had observed that it is open to the company court to recall the order of winding up made by it earlier. The contention of Mr. Vijayashankar is that in both the decisions of the Supreme Court, there were no arguments as to the right of the company court to recall its order of winding up either made ex parte or after notices to the parties and in the absence of any Such discussion by the Supreme Court, those two decisions do not lay down the law which comes under the mandate of article 141 of the Constitution. This argument has given rise to some anxiety in my mind.

24. The law laid down by the Supreme Court has to be ascertained from the judgment in Sudarsan Chits (I.) Ltd. [1985] 58 Com 633 Cas 633. The Supreme Court has declared the law as noticed earlier in para 7 above This declaration presupposes two things : that the question whether the High Court could recall the order of winding up was in the mind of the Supreme Court in para 14 of the judgment and perhaps this question had come up earlier before the Supreme Court and the Supreme Court would have taken the view that the High Court has the power of recalling its. order. It may,be that those earlier decisions of the Supreme Court in which they have taken that view are not reported. But it does not mean that for the first time the Supreme Court has laid down the proposition per incuriam in Sudarsan Chits (I.) Ltd. [1985] 58 Com 633 Cas 633 that the High Court has power to recall its order of winding up. This is also made clear by the Supreme Court in S.L.A. (Civil) No. 2583 of 1987 preferred against the order

of winding up which was affirmed in appeal by the Division Bench.

25. For these reasons, taking a contrary view would be to ignore the declaration of law made by the Supreme Court. It would not be proper for this court to take such a stand because these decisions of the Supreme Court do not indicate that there was a proposition by one side and opposition by the other and a decision rendered on the basis of discussion before the Supreme Court. Mr. Vijayashankar has relied on certain commentaries on the English Companies Act like Pennington and Halsbury's Laws of England. No doubt, in those authorities, we do not find any cases relating to the power of the company court in England to recall the order of winding up. In Halsbury's Laws of England, volume 7, in para 1375, it is observed as follows :

"Power to stay winding up proceedings. - The court may, at any time after an order for winding up, make an order staying the either altogether or for a limited time, on such terms and conditions as it thinks fit, on the application either of the liquidator or the official receiver or of any creditor or contributory, and on proof to its satisfaction that all proceedings in relation to the winding up ought to be stayed. On any application, the court may, before making the order, require the official receiver to furnish to the court a report with respect to any facts or matters which are, in his opinion, relevant to the application. The validity of the winding up order cannot be questioned on such an application. The order to stay may reserve liberty to any dissentient creditor or the official receiver to apply within a limited time to remove the stay. If no creditor objects; the proceedings on a compulsory order made after the commencement of a voluntary winding up may be stayed so as to allow the voluntary winding up to continue. Frequently, a stay is applied for in pursuance of a scheme of arrangement sanctioned by the court."

26. But this statement of law does not deal with the inherent power of the court to make appropriate orders in terms of rules 6 and 9. Likewise, Pennington's Company Law, at page 872, has reiterated what is stated in Halsbury's which I have excerpted above. Incidentally, a reference may also be made to the decision of the Supreme Court in National Textile Workers' Union v. P. R. Ramakrishnan [1983] 53 Com Cas 184. The Supreme Court in its majority judgment has ruled as under (at page 204) :

"Considerable reliance was, however, placed on behalf of respondents Nos. 6 to 9 on the statement of the law on this point contained in the leading text books on company law. Respondents Nos. 6 to 9 drew our attention to Palmer's Company Precedents, 17th edition, volume 2, at page 77, where it is stated that any creditor or shareholder may appear to support or oppose the petition but no one else can do so even if he has an indirect interest in the continued existence of the company. So also in Buckley on the Companies Acts, 14th edition, at page 546, the law has been stated in the following terms, namely : "the only persons entitled to be heard are the company, its creditors and contributories. The court may, in its discretion, hear other persons who have an interest in order to learn

what public grounds there are in favour of, or in opposition to, the winding up, but such persons can be heard only as *amicus curiae*, and cannot appeal." Our attention was also invited to Halsbury's Laws of England, 4th edition, volume 7, where a similar statement of the law is to be found; it page 614, para 1028. Now, it is undoubtedly true that according to the statement of law contained in these three leading text books, it is only the company, the creditors and the contributories who are entitled to appear on the winding-up petition and no other persons have a right to be heard, But this statement of the law is based on the old decision, *Bradford Navigation Co., In re* ILR [1869] 80, which was carried in appeal and decided as *Bradford Navigation Co., In re* [1870] 5 Ch App 600. This decision was given by the English courts over a hundred years ago when a company was regarded merely as a legal device brought into being as a result of a contractual arrangement between the shareholders for the purpose of carrying on trade or business and the workers were looked upon as no more than employees of the company working under a master and servant relationship and the interest of the public as consumers or otherwise was a totally irrelevant consideration and it can have no validity in the present times when the entire concept of a company has changed and it has been transformed into a dynamic socioeconomic institution in which capital and labour are both equal partners, possibly with heavy weightage in favour of labour, and the interest of the public as consumers as also the general welfare and common good of the community constitute a vital consideration. We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, It will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of the changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must, therefore, constantly be on the move adapting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation. We cannot, therefore, mechanically accept as valid a legal rule which found favour with the English courts in the last century when the doctrine of *laissez faire* prevailed. It may be that even today, in England, the courts may be following the same legal rule which was laid down almost a hundred years ago, but that can be no reason why we in India should continue to do likewise. It is possible that this legal rule might still be finding a place in the English text books because no case like the present one has arisen in England in the last 30 years and the English courts might not have had any occasion to consider the acceptability of this legal rule in the present times. But, whatever be the reason as to why this legal rule continues to remain in the English text books, we cannot be persuaded to adopt it in our country, merely on the ground that it has been accepted as a valid rule in England. We have to build our own jurisprudence and though we may receive light from whatever source it comes, we cannot surrender our judgment and

accept as valid in our country whatever has been decided in England. The rule enunciated in *Bradford Navigation Co., In re* ILR [1869] 80 does not commend itself to us and though it has been followed by a single judge of the Bombay High Court in *Edward Textiles Limited, In re* [1968] 38 Com Cas 284, we do not think it represents the correct law."

27. I have no doubt in my mind that regard being had to the provisions of rules 6 and 9 of the Rules framed by the Supreme Court in exercise of the powers u/s 643 of the Act, the power of the company court to recall the winding up order is recognised by the Supreme Court in the aforesaid two decisions. But the exertion of that power is dependent on the facts and circumstances of each case. Perhaps, considerations which are relevant in regard to an order of winding up u/s 433(e) may not be relevant for an order of winding up under the "just and equitable" clause. Further, the power of the company court, u/s 443 of the Act, on hearing a winding-up petition, may be noticed. Section 443 reads as under :

"(1) On hearing a winding up petition, the court may -

- (a) dismiss it, with or without costs; or
- (b) adjourn the hearing conditionally or unconditionally; or
- (c) make any interim order that it thinks fit; or
- (d) make an order for winding up the company with or without costs, or any other order that it thinks fit:

Provided that the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the petition is presented on the ground of default in delivering the statutory report to the Registrar, or in holding the statutory meeting, the court may -

- (a) instead of making a winding-up order. direct that the statutory report shall be delivered or that a meeting shall be held; and
- (b) order the costs to be paid by any persons who, in the opinion of the court, are responsible for the default."

28. There is nothing in, these provisions express or implied which is inconsistent with the power of the court under rule 9 of the Rules. In this context, the observations of Lord Scarman in the House of Lords which were referred to by me in *A. Aziz Vs. Managing Director, KSRTC*, in a different context, may be

noticed. Lord Scarman observed :

"In our society, the judges have in some aspects of their work a discretionary power to do justice so wide that they may be regarded as law makers. The common law and equity, both of them in essence systems of private law, are fields where, subject to the increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law. The judges, even in this, their very own field of creative endeavour, have accepted, in the interests of certainty, the self-denying ordinance of stare decisis the doctrine of binding Precedent; and no doubt this judicially imposed limitation on judicial law making has helped to maintain confidence in the certainty and even-handedness of the law.

But in the field of statute law, the judge must be obedient to the will of Parliament as expressed in its enactments. In this field, Parliament makes and unmakes the law and the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where different constructions are possible. But our law requires the judges to choose the construction which, in his judgment, best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires. Further, in our system the stare decisis rule applies as firmly to statute law as it does to the formulation of common law and equitable principles. And the keystone of "stare decisis" is loyalty throughout the system to the decisions of the Court of Appeal and this House. The Court of Appeal may not overrule a House of Lords decision; and only in the exceptional circumstances set out in the practice statement of July 26, 1966 (Practice Statement (Judicial Precedent) [1966] 1 WLR 1234), will this House refuse to follow its own previous decisions."

29. For these reasons, I am unable to agree with the contentions of Mr. Vijayashankar that the only relief that the applicants could obtain in this case is an order staying the winding up proceedings before this court and not an order of recall. He further submitted that even if this court were to grant the relief of recall, the company petition stands restored to file and the petitioners must advertise the petition once again in the newspaper. This rule regarding the advertisement of the petition is found in rule 24 of the Rules. This rule comes into play only when the petition comes up for the first time for making an order of winding up. Now that the winding up order is recalled, the company (in liquidation) is taken out of winding up. This is the effect of the order of recall. Recall does not mean in this case that the company petition is revived for disposal on merits. I do not find that rule 24 mandates that the petitioners

should take out fresh advertise merit in the newspaper. So, instead of advertisement of the petition afresh, the appropriate order to make is to direct tile petitioner to file the certified copy of the order of recall with the Registrar of Companies. These are no opposing creditors and if there are any other creditors who feel aggrieved by the order of recall, they could approach this court for appropriate reliefs and it is open to this court to consider the after notice to all the parties concerned.

30. Mr. Vijayashankar relied on the decision rendered by Justice M. P. Chandrakantaraj Urs in [1982] 1 Kar LJ 414. The learned judge was concerned in that decision with sections 466 and 518 of the Act and not with the inherent powers of this court under rules 6 and 9 and, therefore, that decision does not support the stand of the official liquidator.

31. For the reasons, this application is allowed and the order of winding up is recalled.

32. Post the company petition for further orders.