
(1929) 01 AHC CK 0014
In the Allahabad High Court

Hansraj and Others

APPELLANT

Vs

Official Liquidators Dehra Dun Mussoorie Electric Tramway
Co. Ltd.

RESPONDENT

Date of Decision : 30-01-1929

Acts Referred:

Citation : (1929) 01 AHC CK 0014

Hon'ble Judges : Niamatullah, J;King, J;Boys, J

Bench : Full Bench

Judgement

Boys, J.—This case arises out of an order of Mukerji, J., dated 19th July 1927, made in winding up proceedings.

2. A Letters Patent appeal was filed from that order and came up for hearing before Sulaiman, J., and Weir, J. Those two learned Judges were to some extent but not wholly in agreement, and the case has been referred to the present Bench consisting of King, J., Niamatullah, J., and myself for an expression of our opinion on the question of law raised in the appeal as regards the extent of the jurisdiction vested in the Company Judge u/s 171 in the matter of granting leave to a mortgagee decree-holder.

3. This question I shall re-draft presently.

4. The case has been referred to us for our opinion under Clause 27, Letters Patent. That clause requires the Judges who have differed to "state the point upon which they differ." In the form in which it has been referred to us we have had to ascertain from the record (there were no less than 10 grounds of appeal), and from the statements of counsel and by comparing the judgment under appeal and the two judgments of the appellate Bench what exactly was the question which we were invited to answer.

5. I will briefly state the facts which in greater detail appear from the judgments of Mr. Mukerji, J. and Mr. Weir, J. After certain preliminary proceedings the

present appellants, who had previously given some indecisive indications of their intention to submit their claim to the receiver, put in a definite application on 12th April 1927 asking to be allowed to proceed to execution of a decree which they had obtained on foot of a mortgage. They also asked to be allowed to proceed with a pending suit. But as to this we have not been addressed. This action of the appellants has been understood throughout as an intimation of their intention to stand out of the winding up proceedings and not submit their claims to proof.

6. Mr. Justice Mukerji had in a previous suit *Union Indian Sugar Mills Co. Ltd. Vs. Brij Lal Jagannath*, held that he was entitled, if he suspected that the claim was not a just claim, to go behind a decree for damages and in proper circumstances to refuse to allow effect to that decree, and to call upon the creditor to establish before him that he had suffered any damage, and the extent of that damage and to disallow finally part or the whole of the claim. The decision of Mr. Mukerji, J. that he had power in the case of a decree for damages to adopt that course was incidentally and generally approved by a Division Bench in *Ram Lal v. Kashi Charan* AIR 1923 All. 380.

7. In the present case it was contended before Mr. Mukerji, J, as set out in his judgment, that

although u/s 171, Companies Act the decree could not be executed without the permission of the Court, yet the granting of the permission was mere matter of course and should be granted.

8. This position was founded on the fact that in the present case the applicants for leave were in the position of a secured creditor" who had the same rights as a secured creditor of an insolvent individual. It was contended that as a secured creditor the applicants had a right to stand out of the winding up proceedings altogether, and to proceed as if those proceedings did not exist, with this single exception that they must draw their claims to the notice of the winding up Judge in order to obtain his mechanical sanction to their proceeding. Mr. Mukerji, J. did not refer in his judgment to Section 28(6), Pro. Ins. Act, or to any suggestion that section was imported into the law regulating the winding up of companies by Section 229, Companies Act. I quote the following excerpts from the conclusion of Mr. Mukerji, J.'s judgment:

(a) Having regard to the conduct of Mr. Belti Shah (the managing director) alone I should hesitate more than once before I accepted an ex parte decree against the company as a bona fide one and above the scrutiny of the Official Liquidators.

(b) If the decree be found to be supported by good consideration the applicants may be, if they agree, put down as secured creditors with a first charge on the entire or a portion of the assets of the company, and they may thus be put in the same position in which they would be if they could execute the decree by themselves. However, that is a point which has not risen for decision.

(c) After the consideration of the decree has been enquired into it will be time to see whether the decree should be executed by representatives of Lala Raghu Mal or whether the liquidators should pay them, as a first charge-holder out of the assets of the company or out of such parts of the assets of the company as may have been validly charged by the company,

(d) I hold therefore, that leave to execute the decree should be refused.

9. I note here that Mukerji, J., did not say what course he proposed to adopt if, after the liquidators had time to consider the merits of the case in which the decree had been obtained, he (Mukerji, J.,) was of opinion that the decree or part thereof was not supported by consideration in his opinion good.

10. As the judgment stands it may be that in that event he would continue to refuse leave to proceed to execution of the decree only until the liquidators had time to file a suit to get the decree set aside. On the other hand it may be that he would hold that he was entitled to ignore the decree and himself allow only such part of the debt if any, as might find to be justly due.

11. As Mukerji, J.'s judgment has not definitely stated which of these two courses he would adopt, it was at least open to argument that the appeal from his order, on the main ground on which we are asked to set it aside, is premature.

12. But it is contended for the appellants that from the statement of Mukerji, J. in an earlier portion of his judgment that he was still of the opinion that he has expressed in *Union Indian Sugar Mills Co. Ltd. Vs. Brij Lal Jagannath*, , and from the general tenor of the judgment, it was a fair inference that he had held that in the case of this decree obtained by a secured creditor he had the same powers, and meant to exercise those powers, as he had already held himself to be entitled to exercise in the case of the holder of a decree awarding damages.

13. There is something to be said for this view of the judgment under appeal put by the applicants, and it appears to have been so accepted by the Judges who referred the case to us, and I, therefore, think it desirable to deal with the question raised in the appeal. Moreover, both Judges were of opinion that an appeal did lie and therefore that question cannot perhaps be considered as being included in the matter for our consideration.

14. In order to ascertain the exact point upon which our opinion is really required I have analyzed and compared the judgments of Weir and Sulaiman, JJ.

15. Weir, J., was apparently of the opinion that the words

the same rule... as are in force for the time being under the law of insolvency

16. sufficed generally to import the provisions of Section 28 and particularly Section 28(6), Pro. Ias. Act, 5 of 1920, but in so far as the immunity given by Section 28(6) to a secured creditor from being required to obtain leave of the Court was concerned it could not be availed of in winding up proceedings in view of the specific provisions in Section 171, Companies Act. Sulaiman, J., was of the

view that the word "rules" must be interpreted in the sense of the General Clauses Act, Section 3(47), and the use of that word did not suffice to import Section 28(6), Pro. Ins. Act. It will be seen, therefore, that, though for different reasons, both the learned Judges were of opinion that Section 171 must prevail, and in this respect Section 28(6), Pro. Ins. Act, would not help the appellants.

17. Both Weir and Sulaiman, JJ., were in agreement that a winding up Judge has jurisdiction to refuse leave to a secured creditor and were equally in agreement that he has no jurisdiction to order a secured creditor to come in and justify his decree. There is no effective difference, then, in the opinions of the two learned Judges on either of these three points nor was there on certain other minor points.

18. Weir, J., further held that the winding-up Judge while he has jurisdiction to refuse leave has "jurisdiction" to refuse only temporarily to enable him to decide whether he will:

(a) direct the liquidator to pay up the decree, or; (b) allow the decree-holder to file a suit to proceed or (c) direct the liquidator to get the decree set aside; that the winding up Judge has no jurisdiction to refuse leave "absolutely" and thus himself virtually tear up the decree and the mortgage-deed on the foot of which the decree was obtained. Mr. Justice Sulaiman on the other hand has held that the winding up Judge has power to refuse leave "absolutely," and this would, of course, include the lesser powers which alone Mr. Justice Weir would allow. It is in this last point that the learned Judges have really differed, and I have, therefore, redrafted the question for our opinion as follows:

Where a person has obtained a mortgage dated 4th April 1923) on the assets, including moveable and immovable property of a company, and has obtained what was in effect an ex-parte decree (dated 12th January 1926) and winding up proceedings of the affairs of the Company have commenced (on 29th January 1926) on which date also a general stay order was passed u/s 169, Companies Act, and he has applied to the winding-up Judge for leave to proceed to the further enforcement of his security, has the winding up Judge, if on inquiry he is for any reason satisfied that the claim was not a just one, power u/s 169, Section 171 or any other section of or rule made under the Companies Act 7 of 1913 to continue the stay absolutely or to refuse absolutely to grant leave?

Or has he only power so to stay or so to refuse leave temporarily with a view to determining whether he will direct the liquidator to pay up the decree or allow the decree-holder to proceed or direct the liquidator to file a suit?

19. The phrase "refuse absolutely" may be used for the sake of brevity for that which I should prefer, "to meet with an unqualified refusal an application for leave to proceed" or "refuse leave finally and unconditionally."

20. My brothers, King and Niamatullah, JJ., agree that this is the real question for our consideration.

21. We have been referred to the following provisions of law by one or other of the counsel:

22. The Companies Act, Section 169, Section 171, Sections 228-232 and any other Act, section or Rule which may be held to be imported by Section 229, more particularly with reference to the Provincial Insolvency Act 5 of 1920, Sections 28(6) and 47, the Rules under the Companies Act, particularly Rules 45 to 50 and 104; and the practice and procedure in company matters in England so far as imported by Rule 104, Companies Act, with more particular reference to the English Companies (winding up) Rules 1909, Nos. 88 to 92, 103, 104 and 135.

23. I shall further refer to Sections 2(1)(e), 9(2), 33, 34, 44, 45, 61 and 64, Pro. Ins. Act and Rule 21, Pro. Ins. Act Rules and Section 183(4), Companies Act.

24. On behalf of the decree-holder appellant's counsel has contended in effect for the view taken by Weir, J. We did not challenge the position that his client must ask for leave to proceed. For the respondent, i.e. for the liquidator, counsel has contended broadly that there is no distinction in winding up matters between the position of an unsecured and a secured creditor, except possibly to this extent that in the case of a secured creditor the winding up Judge may, if he so desires, give him permission, if he is satisfied that the debt was a good and just debt, to proceed to enforce his security whether by filing a suit or by proceeding to execution of his decree if he has already obtained one.

25. We were also invited by counsel on both sides to consider the numerous cases quoted in the judgments of Mukerji, J., and Weir, J., together with a few further cases not so mentioned, I will proceed to state as briefly as possible my view.

26. On the face of them Ss 169 and 171 are wide enough to confer upon the winding up Judge power respectively to stay all proceedings by a secured creditor and to refuse leave to a secured creditor to proceed. The appellant then relies on Section 229. That section provides that in the winding up of an insolvent company (and in this case there is no doubt about the insolvency)

the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent.

27. The second portion of the section says that

all persons who in such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

28. There was much contention before us as to the meaning of the phrase the same rules... as are in force for the time being under the law of insolvency.

29. For the liquidator it was contended that the word "rules" must be restricted to the scope given to it by the General Clauses Act Section 3(47). For the appellant creditor it was contended that the phrase is wide enough to include rules contained in the sections of Provincial Insolvency Act, rules made under any power conferred by that Act and rules of practice.

30. As to the proper construction Weir, J., and Sulaiman, J., differed, and though they both agreed, though for different reasons, that the secured creditor could obtain no benefit from Section 28(6), Pro. Ins. Act, it is still necessary for us to consider which is the correct interpretation for there are provisions besides Section 28(6) to be considered in answering the main question.

31. I am of opinion that the contention of the appellant is correct. The section is copied verbatim from the English Act and prima facie it would be unjustifiable in such circumstances to restrict the word to a meaning given to it by a purely Indian Act. Again by Rule 104 Companies Act the Court is instructed to apply

the practice and procedure of the High Court of Justice in England in matters relating to Companies.

32. Again the Rule 104 just referred to begins:

In cases not provided for by these rules or by rules of procedure laid down in the Act.

33. That rule itself, therefore, definitely applies the word "rules" to provisions contained in the Act itself. Finally on the supposition that the word "rules" was to be taken in the sense of rules made under an Act counsel for the respondent was invited to say to what rules made under an Act relating to insolvency the section referred if his interpretation was accepted. There are some rules made u/s 79, Pro Ins. Act, but no rules bearing in any way on the rights of secured and unsecured creditors, and counsel was not able to point to any such and was reduced to acknowledging that if his interpretation of the section was accepted the section was without meaning. I see, therefore, no reason for restricting the word "rules" in Section 229 to the narrower sense of "rules made under an Act." I am, therefore, of opinion that the rules contained in any section of the Provincial Insolvency Act, the rules, if any, made under the Act and any appropriate established rules of practice in insolvency proceedings are imported into the Companies Act, unless there is some thing in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import.

34. Counsel for the respondent next contended that even if the wider meaning must be given to the word rules" in Section 229, the rule by which a secured creditor was given immunity in insolvency proceedings was not intended to be

imported but only the rule giving a secured creditor priority. There does not, however, appear to be any justification *prima facie* for admitting the one class of rule and not admitting the other. Moreover, it is manifest that the rule giving a secured creditor priority, if and so far as any such rule existed, is not a right given by the law of insolvency.

35. Counsel was unable to point to any provision in the insolvency Act or in any rule made under that Act by which priority was given and admitted that the right to priority, in so far as it existed, was given by "the general law." The only relevant sections in the Provincial Insolvency Act and the Companies Act of which I am aware are Section 61 in the former and Section 230 in the latter which have no bearing on priority in this connexion.

36. If, therefore, the word "rule" in Section 229 is given the wider meaning it is not apparent what rules there are in insolvency to be imported except the rules contained in Section 9(2), Section 28(6) and Section 47, Pro. Ins. Act.

37. Mukerji, J. is also apparently, though he has not discussed the point, of the view that the rules contained in appropriate sections of the Provincial Insolvency Act are imported by Section 229 for he refers to and relies on Section 34(2) of that Act at p. 455 (of 25 A.L.J.) of his judgment in *Union Indian Sugar Mills Co. Ltd. Vs. Brij Lal Jagannath*,

38. If in truth the appropriate sections of the Provincial Insolvency Act are not to be held imported by Section 229 we should look in vain for much necessary guidance e.g., where are we to find the definition of "secured creditor" except in Section 2(1)(e) of that Act?

39. I should also find it surprising if the principles contained in rules made under an Act were imported (so far as appropriate) and not the principles contained in rules made in the Act.

40. Giving therefore the wider meaning to the term "rules" in Section 229 I would hold the provisions of Section 9(2), Section 28(6) and Section 47 to be imported unless there be something in the Companies Act itself either directly substituted for those provisions or something otherwise showing that the importation of those provisions is inappropriate. I agree, therefore, with Weir J.'s interpretation of Section 229.

41. As to whether it is necessary for a secured creditor to apply at all for leave to proceed, it is not necessary for me to express an opinion since both the learned Judges were, though for different reasons, of one opinion that leave must be applied for.

42. The next and main question is: what, if any, are the special rights of a secured creditor?

43. Section 229 bears on the face of it a reference to "the respective rights of secured and unsecured creditors." The phrase is in itself sufficient to show that

the legislature recognized a difference between the rights of the two classes of creditors. In view of what I have said above as to the scope of Section 229 I see no reason for excluding from importation into winding up proceedings the broad established and admitted principle of insolvency law in the case of insolvency of an individual that a secured creditor can stand outside the proceeding, as evidenced by, amongst other sections Section 9(2), Section 28(6) except so far as getting leave is concerned (as to which both the learned Judges of the Division Bench were in agreement) and Section 47 and as evidenced by the prevailing practice.

44. In this connexion I note that Rule 104, Companies Act Rules of this Court, authorizes this Court to be guided by the practice and procedure of the High Court of Justice in England in matters relating to companies so far as they are applicable and not inconsistent with these Rules and the Act. Turning to the English "Companies winding up Rules 1909" we find Rule 135 which was incidentally referred to by counsel for the appellant. That was a Rule in reference only to the matter of voting, but it contains the phrase

a secured creditor shall, unless he surrenders his security state....

45. With this may be compared

where a secured creditor relinquishes his security

in Section 47, Pro. Ins. Act, and the similar phrase in Section 9(2). It is clear, then, that the situation is in all three cases contemplated that a secured creditor may choose not to surrender his security. I should find it difficult to reconcile the two positions that a creditor may decide not to surrender his security, while at the same time a winding up Judge may throw that security aside and examine into the justice of the debt exactly as if no security had ever existed. Nor has any principle been suggested to us or suggested itself to me why a secured creditor should be allowed to stand out in the case of the insolvency of an individual and not in the insolvency of a company.

46. On the other hand I find no difficulty in reconciling the two positions, that a secured creditor can stand on his security but that he must obtain leave to proceed, when we bear in mind the purpose with which the provision in Section 171 was enacted. In reference to the similar provision in Section 87, English Act of 1862, it was pointed out by James L J. in *David Lloyd* 6 Ch. Div. 339 that the object was to enable the winding up Judge to prevent a multiplication of costs to the detriment of the estate and not to enable him to interfere with "the property" of the mortgagee.

47. Counsel for the liquidator was driven to contend that no difference is made between a secured and an unsecured creditor and he referred to Rules 47 to 53 and Rule 104 Indian Company Rules and Rule 103 English Rules. I shall refer by a general observation to these rules later, but a sufficient answer to the broad statement of counsel is that Section 229 on the face of it shows that there is a

difference in the rights of the two classes. And if indeed there be no difference between the rights of a secured and an unsecured creditor in the matter of their being liable to be called upon to prove their claims and secure entry on the schedule, what, in view of the provisions of Section 61(5), Pro. Ins. Act, and Section 183(4), Companies Act, becomes of the right to priority which at another stage of the argument for the liquidator it was admitted and contended the secured creditor had.

48. Counsel was further driven to urge that a creditor claiming to be a secured creditor is not a secured creditor" at all until he has "proved" his security. To this the definition of "secured creditor" in Section 2(1)(e), Pro. Ins. Act, is a sufficient answer. In fact even an unsecured creditor, in order to secure acceptance of his claim does not necessarily have to do more than send it in under Rule 45, which sending in would appear to be equivalent to the state which is described as "notifying" in Section 64, Pro. Ins. Act; even such a creditor need not "prove" unless called upon vide Rule 46:

49. In this connexion I note the phraseology of the second part of Section 229, "all persons who would be entitled to prove * * may come in." The word "provable" as used in the Provincial Insolvency Act, does not in my opinion mean "which must be proved." but "capable of proof" or "which may be, i.e., are allowed to-be, proved." To appreciate this meaning of "provable under this Act" in Section 28(2), Section 33(1) and (3), Section 44(2) etc., we must look at sections such as the proviso to Section 33(1), Section 34(I) and Section 45.

50. But of course the real question of importance is whether "provable under this Act" read with Section 64 means that in the case of all creditors, secured as well as unsecured, if they do not choose to come in (R. 45) and prove if called upon to do so (Rr. 46 to 49) they will lose their claims That this is not so in the case of secured creditors, in the sense that they must, if called upon to do so, satisfy the winding up Judge that their security is for a just debt, is clear from Section 47, Prol. Ins. Act, the language of which is consistent only with the idea that the secured creditor need not prove at all if he relies on realizing his security.

51. Here I may note an indication from Rules 185 and 136, English Company Rules under which, when a secured creditor himself wishes to prove for the purpose of voting, he puts his own value on his security and not the value which the liquidator may choose to allow.

52. All the rules either in the Indian Companies Act, or in the English Company Rules quoted to us on behalf of the respondent relating to the necessity of proof and which it is suggested are of general application are entirely consistent with the view that they apply only to those creditors who are unsecured or where they specifically refer to secured creditors, to those secured creditors who have given up their security or who, having endeavoured to obtain satisfaction, have only succeeded in obtaining satisfaction in part and claim to prove for the remainder.

53. It is not, therefore, necessary to consider how far such rules as Nos. 88,.

etc., of the English Company Rules (or Rule 21 under the Pro. ins. Act which was not, however, mentioned for the respondent) are imported at all by the Indian Companies Rule 104 when there are Indian Companies Rules (e.g.,) Rule 45. etc.,) dealing with the same matters.

54. Similarly there is nothing in *Kashi Prasad v. Union Bank of India* [1919] 41 All. 432 quoted for the respondent to show that the decree was a mortgage decree or that any question of the rights of a secured creditor arose at all.

55. I have not considered it necessary to consider in detail the English cases to which reference has been made. It is admitted on all sides that not one of the cases whether English or Indian, suggests that the winding up Judge can compel a secured creditor to come into the winding up proceedings or in any way submit his claim to scrutiny. In cases such as *In re Van Laun, Ex-parte Chatterton* [190] 2 K.B. 23 it is clear that the secured creditor had exercised his option to come into the winding up proceedings and submit his claim to the winding up Judge. They are no authority for the proposition that the Judge has power to compel him to come in.

56. The fact that there are no cases in which it has been held that a winding up Judge can compel a secured creditor to bring in his security and that he can scrutinize that security and if he sees fit, in effect tear it up, and no cases in the opposite sense suggests that the practice in England and in this country has been uniform in one direction or the other and has been regarded as not open to question. This uniformity of practice suggests the following consideration. If the practice has been uniform in favour of the secured creditor it would be natural to find that the question of his privilege had never been raised. On the other hand if the practice had been in a sense adverse to the secured creditor it is almost certain that practice would be found to have been confirmed by some judicial decision or decisions, for it is almost certain that some secured creditor would at one time or another, on the strength of the law and practice applying to bankruptcy proceedings, have challenged the power of the winding up Judge. So far, therefore, as any conclusion can be drawn from the absence of any judicial authority either way that conclusion must be in favour of the secured creditor.

57. If it be asked why a secured creditor should ever desire to come into the winding up proceedings, it is manifest that there may be cases in which he may feel that his chances of realizing his money in good time, if he depends solely on his security, may possibly be jeopardised if he stands aloof from the winding up proceedings altogether and allows them to arrive at a termination before he has realized his security.

58. Finally I would note that it would in my view be surprising indeed if the legislature had meant by language merely requiring leave to be obtained to confer power to tear up a decree and also the security upon which it was founded.

59. In my view our answer must then be guided by the two considerations: the winding up Judge has jurisdiction to refuse leave, but his discretion to refuse

leave must be exercised

with a due regard to the rights of third persons who were not members of the company and who had not to come in and claim to share * * such as a mortgagee.: Per James L.J., in *David Lloyd & Co.* [1877] 6 Ch. D. 339.

60. To say that the discretion is thus limited is in effect to place a restriction on the exercise of his jurisdiction by the winding up Judge, but that is no more than the English Courts have found it necessary to do.

61. It is clear that in any case the orders of the winding up Judge staying proceedings u/s 169 and refusing leave u/s 171 cannot be operative any longer than the winding up proceedings continue and further it is very difficult to conceive an unqualified refusal to give leave which would not infringe on the rights of the secured creditor. Ordinarily, for a winding up Judge to say to a secured creditor that the merits of his claim are so dubious that leave to proceed is unconditionally and finally refused is going perilously near permitting him to adjudicate on the merits of the claim. It may not be in form an adjudication, but it is a judicial pronouncement and it may have a serious repercussion on the right of the secured creditor to an unprejudiced trial of his claim and also it may induce a purchaser to pay an enhanced price under what may prove to have been a false impression of security created by the action of the Judge. But there may possibly in very exceptional circumstances be a case in which unqualified refusal would be upheld and it may be that Jessel, M.R. (with whom James, JJ. and Cotton, L.J., expressed their agreement) had this possibility in mind when he held in the case to which I have just referred that those who desire to restrain a secured creditor from proceedings must offer to pay him off or show some special grounds for restraining him.

62. I would state the following propositions:

(1) That no secured creditor need, or can be forced to prove his debt, and, that, with the next following exception, such a creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or his decree if he has obtained one.

(2) That every secured creditor must obtain leave to proceed from the winding up Judge.

(3) That the winding up Judge has jurisdiction to refuse leave absolutely.

(4) That winding up Judge has not jurisdiction, under colour of refusing leave or otherwise, to annul or modify a secured creditor's security or decree.

(5) That, while there may be some exceptional case in which the winding up Judge may refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate or whether he will give leave to proceed, or whether he will direct the liquidator to

take such steps as may be open to him to get the decree set aside.

63. Where the secured creditor has not yet obtained a decree an alternative consideration may arise as to whether the winding up Judge will direct the liquidator to apply to be made a party to any proceeding that the creditor may have instituted or desire to institute but we have not been called upon to deal with that.

King, J.

64. I fully agree to the views expressed by Boys, J. and have only one comment to make.

65. The language of Section 228, Companies Act 1913, seems to me to furnish an additional argument for the view that the word "rules" in Section 229 is not to be construed as having only the narrow meaning given to that word by Section 3(47) General Clauses Act, 1897.

66. In Section 228 we find that the law of insolvency "is to be applied" in accordance with the provisions of this Act

to the winding up of insolvent companies.

67. It must be noted that the expression used is

68. law of insolvency" and not rules which are in force under the law of insolvency.

69. Now there is no provision of the Companies Act which expressly applies the "law" of insolvency to insolvent companies. Section 229 does, however, provide that "rules" which are in force, on certain subjects, under the law of insolvency shall be observed in the winding up of insolvent companies. Section 229 therefore undoubtedly appears to be the provision of the Act which is mentioned in Section 228, as applying the "law" of insolvency to insolvent companies. This leads me to conclude that the legislature did not intend to draw a distinction between the law of insolvency "(mentioned in Section 228) and" the rules in force under the law of insolvency "(mentioned in Section 229). This implies that the word "rules" in Section 229 must be liberally construed in the sense of "rules of law" including (a) provisions of the Insolvency Act, (b) rules made under that Act, and (c) rules of practice.

Niamatullah, J.

70. I agree with. Boys, J. to the answer he proposes to make on the question referred to the Pull Bench and would add a few observations in support of his conclusions and to emphasize some aspects of the case on which they rest.

71. The facts of the case so far as they are necessary to make my remarks intelligible are briefly as follows:

72. The appellants Lala Hansraj and others obtained, on 28th October 1924, an

ex parte decree for sale, passed by a learned Judge sitting on the original side of the Calcutta High Court, for a large sum of money (about Rs. 1,77,000) on foot of a mortgage deed dated 25th April 1923, executed by Dehradun Mussoorie Electric Tramway Co. Ltd., which has since gone into liquidation and is being wound up by Mukerji, J. a learned Judge of this Court. Inasmuch as no legal proceedings can be taken except by leave of the Court, i.e., the Judge exercising jurisdiction under the Companies Act (S. 171) the appellants applied for leave to take out execution of their decree. Mukerji, J held that the leave "to execute the decree should be refused." His order, which has been quoted by Boys, J. in the leading judgment has been construed to mean, and the case has been argued on the assumption, that he ruled, in effect, that after scrutinising the claim of the appellants under their mortgage-deed and the decree obtained by them, the learned Judge should decide what amount of money, if any, is due to them and what part of the company's assets should be charged therewith, or whether the decree should be allowed to be executed. On appeal from this order the learned Judges composing the Division Bench, which heard it, disagreed on a question of law. Sulaiman, J., held that the learned Company Judge had the jurisdiction to refuse leave "absolutely" and "was not bound to suspend the grant of leave for a limited period only." He added:

I express no opinion on the question whether the present case is or is not a fit case in which leave should have been refused.

73. Weir, J., the other learned Judge of the Division Bench, maintained that:

since the appellants have refused to submit their claims to the scrutiny of the liquidators, Mukerji, J. has no jurisdiction to attempt to force them to do so; though I think that he can stay the execution of the decree for a reasonable period of time in order to enable the liquidators to make up their minds whether they will or will not take other steps to attack the decree. It seems to me that the power to stay execution of a decree, such as this, in a case like the present is limited to the extent which I have indicated.

74. He ordered accordingly that the execution of the decree be stayed for six months.

75. Boys, J. has laid down after a careful analysis of the judgments of the learned Judges composing the Division Bench what question ought to be decided by this Pull Bench, and it seems to me that the difference of opinion between those learned Judges reduces itself to the question whether the jurisdiction of the Court refusing leave to a mortgagee-decree holder to execute his decree extends to the power to refuse leave altogether, and it is only a matter of his discretion to refuse for a limited time or altogether, as Sulaiman, J. thinks, or whether his jurisdiction in that behalf is limited to such time as may be reasonable to enable the liquidator to decide if he should attack the decree by instituting a regular suit, as Weir, J. would have it.

76. That a secured creditor need not prove his debt in winding up proceedings

and can stand wholly outside such proceedings relying on his security is conceded by both learned Judges of the Division Bench. Weir, J. has quoted a number of English decisions in support of this view. Sulaiman, J. though he does not consider any of the sections of the Provincial Insolvency Act imported into the provisions of the Indian Companies Act by Section 229, of the latter Act, has nevertheless expressed himself as follows:

Although there is no express provision in the Companies Act protecting secured creditors, their safety rests on well established principles. Under the Transfer of Property Act an interest is transferred to a mortgagee. A mortgagee's estate, so to speak, is carved out of the original estate and vests in the mortgagee, when a company is in liquidation, only the property of the company comes under the control of the Court or the Official Liquidator. The interest which has previously passed to a mortgagee is separate and distinct and is not brought in. It follows that a mortgagee with his well defined interest can keep aloof and remain outside the jurisdiction of the Court. His remedy to realize his security would ordinarily be unaffected by the insolvency of his debtor. He cannot against his will be dragged into the winding up proceedings, or compelled to surrender his security and place himself on the same footing as other creditors by proving his debt. His rights are paramount and remain safe. Of course if he so chooses he may realize his security and prove for the balance, or he may surrender his security and prove for the whole debt; but he cannot be forced into doing that or to abandon his remedy. The liquidators may redeem the mortgage but cannot prevent him from selling the mortgaged property.

77. We find no provision in the Companies Act conferring jurisdiction on the Court to adjudicate, in winding up proceedings on the right of third persons whose claims come in conflict with the rights of the company. The only provisions which relate to such third persons, are contained in Sections 231 and 232, Companies Act, which run as follows:

231-Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up a fraudulent preference of its creditors, and be invalid accordingly.

(2)-For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of every individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

232(1). Where any company is being wound up by or subject to the supervision of the Court, in attachment, distress or execution to be in force without leave of the Court against the estate or effects of the company after the commencement

of the winding up shall be void.

(2) Nothing in this section applies to proceedings by the Government.

78. It will be seen at a glance that Sections 231 and 232 of the Companies Act are parallel to Sections 53 and 54 of the Insolvency Act, but it is significant that there is no provision in the Companies Act corresponding to Section 4, Provincial Insolvency Act which lays down:

(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or a Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in Sub-section (1) it has reason to believe that the debtor has a saleable interest in any property the Court may without further enquiry sell such interest in such manner and subject to such conditions as it may think fit.

79. It follows from the foregoing remarks and the provisions quoted that a winding up Court, unlike an insolvency Court, cannot take cognizance of and adjudicate on the title of third persons except to the limited extent mentioned in Sections 231 and 232, Companies Act, and if it is necessary to impeach such title, the liquidators must have recourse to regular suits cognizable by ordinary civil Courts. A mortgagee or a secured creditor qua the interest which has been transferred to him by the mortgage or hypothecation is not a mere creditor but a person in whom the right is vested, and his right can be impeached, if at all, in the same manner as in case of any other person who claims adversely to the company.

80. It has been said that a claimant, to occupy the advantageous position of a secured creditor, should establish, before the Court in winding up proceedings, the fact that he is a secured creditor. I do not think that any occasion can arise for his doing so. A person claiming to be a transferee of an interest, be he a vendee, donee or mortgagee, can establish it when he desires to enforce his claim and can defend his title if it is attacked before a competent Court. Meanwhile the liquidator is to take note of it in dealing with what he thinks to be the property of the company. The right claimed by a secured creditor may be so palpably illusory that he feels justified in ignoring it and in assuming that the

claim will not appreciably influence intending purchasers of the company's property affected by such adverse claim. In other cases the liquidator must either accept it or have the cloud on the title of the company removed by obtaining appropriate relief from a competent Court.

81. Wherever a mortgagee or other secured creditor has already obtained a decree against the company in enforcement of his claim, it affords an additional strength to his title and can be questioned by the liquidator on the usual ground, such as fraud or collusion. Sulaiman, J. is inclined to think that, as between the liquidator on the one hand and the mortgagee decree-holder on the other, the binding character of the decree is to be judged with reference to the rule of *res judicata* contained in Section 11, Civil P C., and that the former, being an officer of the Court and representing the interest of the whole body of creditors as well as those of the shareholders, is not bound by the decree. I take leave to point out that before the rule of *res judicata* can be invoked by one or the other of the parties, to determine the binding character of the decree there must be an issue in a suit or proceeding in a competent Court between the parties, and in so far as such an occasion does not arise before a Court in winding up proceedings, there is no room for the application of the rule of *res judicata*. Such an occasion will, of course, arise when the mortgage or the decree is in question in a regular suit brought by the liquidator to challenge the mortgage or the decree or in any proceedings taken by the mortgagee to realize his security. I doubt if in such a case the liquidator can get over the bar of *res judicata* by an appeal to his position as a representative of the creditors generally. *Prima facie* he will, in that contingency, occupy no higher position than the one which an attaching creditor does under similar circumstances. It is, however, unnecessary to express a decisive opinion on this question.

82. The next question is whether Section 171, Companies Act, which unquestionably subjects a secured creditor to a disability in enforcing his claim, as he must obtain leave of the winding up Judge to institute a suit or to execute a decree, if he has already obtained one, confers an unlimited power on the winding up Judge to refuse leave. The jurisdiction of the Court is not limited by anything contained in that section which confers the widest power to refuse leave. It does not make it obligatory on the Court to withhold leave in any given case for a limited time only. At the same time it can be confidently expected that the unlimited power to refuse leave will be exercised by a Court of law in furtherance of the ends of justice and not capriciously. No Court will so abuse it as to hold it in terrorism to induce the secured creditor to forgo part of his claim or otherwise compromise his position. If the Court is obdurate in refusing leave to a secured creditor without directing the liquidator to challenge his rights in a proper Court and abide the result, it will cause incalculable harm to the interests of the company and the creditors. It cannot, by merely withholding leave, extinguish the charge, if it otherwise exists, or deprive the decree of its operative effect. The charge will subsist though it cannot be enforced during winding up proceedings. Whoever purchases the property subject to such charge will

purchase encumbered property liable to be sold in the hands of the purchaser as, it should be noticed, leave is necessary only for a

suit or other legal proceeding...against the company.

Once it is possible to avoid proceeding against the company the secured creditor is free from the trammels of Section 171, Companies Act. A prospect of this kind, and fear of future litigation, are likely to deter purchasers from offering anything like a fair market value of the property which a secured creditor claims to be burdened with his debt. It should be observed that limitation for the secured creditor's suit or application for execution as the case may be, will remain suspended u/s 15, Lim. Act. No Court winding up the affairs of a company will, therefore, ordinarily consider it safe to withhold leave altogether and to court the disastrous consequences likely to follow its action. Cases are, however, conceivable in which the Court may safely refuse leave altogether. The claim of a secured creditor may be so manifestly baseless as not to weigh with it and with the intending purchasers who may be willing to offer full value for the property, confidently relying on their ability to defeat the claim when made. In such a case the Court may deem it desirable to withhold leave absolutely and to dispense with the necessity of the liquidator instituting a suit to vindicate the title of the company. In practice, cases of this kind will be of rare occurrence but are not beyond the range of possibility. The legislature did not consider it expedient or even possible to lay down exhaustively cases, in which and the purposes for which leave should be granted and those where it should be refused. Unlimited jurisdiction has been, therefore, conferred by Section 171, Companies Act, on the winding up Judge, to withhold leave for such time and on such terms or altogether as the circumstances of each case may warrant.

83. Where legislature has advisedly conferred jurisdiction or power on a Court without imposing any fetters thereon, it cannot be limited by enumerating cases, in which alone it can, in our present view, be exercised. It will be tantamount to adding a proviso to Section 171, Companies Act, which the legislature has not thought fit to add.

By jurisdiction is meant the authority on which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, character or commission under which the Court is constituted or may be extended or restricted by the like impositions. If no restriction or limit is imposed, the jurisdiction is said to be unlimited; a limitation may be either as to the kind and nature of the actions and matters of which a particular Court has cognizance, or as to the area over which the jurisdiction shall extend or may partake of both these characteristics: see Halsbury's Laws of England Vol. 9, p. 13, para. 10.

84. Numerous cases have arisen with reference to Section 115, Civil P.C., in which a distinction has been drawn between absence of jurisdiction and

erroneous exercise thereof. It was observed by their Lordships of the Privy Council in, *Rajah Amir Hassan Khan v. Sheo Bakhsh Singh* [1885] 11 Cal. 6

The question then is: did the Judges of the lower Courts in this case, in the exercise of their jurisdiction act illegally or with material irregularity. It appears that they had perfect jurisdiction, to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity.

85. If therefore a winding up Judge has jurisdiction to grant leave or not and he withholds it altogether he cannot be said to have acted without jurisdiction even when he erroneously disregarded the rights of a secured creditor.

86. The dictum of their Lordships of the Privy Council in *Rajwant Prasad Pande v. Ram Ratan Gir* AIR 1915 P.C. 99 I. A that:

It is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction

has a peculiar bearing on the question which is engaging our attention. If a winding up Judge refuses leave to a secured creditor without the slightest justification "his method of the exercise of the jurisdiction" may be erroneous, but his jurisdiction cannot be questioned.

87. An order passed without jurisdiction is a nullity and therefore one of the tests of an order being without jurisdiction is to find if it can be treated as not possessing a binding effect. Can the order of a winding up Judge refusing leave absolutely be regarded as a nullity? Can it be ignored after a reasonable time such as may be considered sufficient to enable the winding up Judge to decide what steps should be taken with reference to the claim of the secured creditor? I have no doubt as to the answers to these questions. If a winding up Judge has no jurisdiction to refuse leave without specifying a reasonable time, that order ought to cease to have binding effect after a reasonable time. It seems to me that there is a contradiction in terms in the proposition that a Judge has no jurisdiction to refuse leave for all time but can refuse leave for such length of time as he considers reasonable. If the length of time for which he can withhold leave rests with him, he can refuse it absolutely and altogether according to the latter part of the proposition, a power which the first part thereof professes to deny.

88. For the reasons I have stated, I answer the question referred to the Pull Bench in terms set out in the judgment of Boys, J.